

**REGISTRATION OF IRREVOCABLE POWER OF ATTORNEY: THE SUPREME COURT DECISION IN *IBRAHIM V OBAFE* (2019) 3 NWLR (PT 1660) 339 AS A WELCOME DEVELOPMENT\***

**Abstract**

*The question whether an irrevocable power of attorney qualifies as registrable instrument has continued to surface from time to time. This study examined the legislation and the leading judicial authorities on the registration of land instruments as it concerns irrevocable power of attorney affecting land. This paper aimed at carrying out a critical analysis of the definition of registrable instrument in relation to irrevocable power of attorney affecting land side by side with judicial interpretations. The objectives were to expose the pitfalls in the definition of land instrument and some judicial authorities interpreting it. This work used doctrinal method of data gathering, that is primary sources and in this case the land instrument registration law as well as case laws, in this case, some relevant judgments of the Supreme Court of Nigeria. This study found that there existed a controversy from some recent judgments of the Supreme Court on whether an irrevocable power of attorney qualifies as a registrable instrument. The study also found that some judgments of the Supreme Court have undesirably denied irrevocable power of attorney the status of a registrable instrument. It was recommended that the courts should adopt a liberal position that allows for a case by case examination of each irrevocable power attorney, looking rather at its actual contents and powers given under it rather than the label. It was also recommended that the respective land instruments legislations of various states should be amended to clearly incorporate irrevocable power of attorney as a registrable instrument.*

**Keywords:** Registrable Instrument, Irrevocable Power of Attorney, Land, Land Registration.

**1. Introduction**

In order to regulate the registration of land instruments and achieve an organised way of documenting such instruments as well as the transmission of such of interest in land from one person to another, the Land Registration Act No 36 of 1924<sup>1</sup> was enacted to be applicable throughout Nigeria. The Land Registration Act 1924 was later adopted and re-enacted by the various states in Nigeria under various headings.<sup>2</sup> As at today, it is only Lagos State that has departed from the old template of the Land Registration Act 1924 with the enactment of the Land Registration Law 2015<sup>3</sup> which has introduced several innovative and progressive provisions. The Lagos State Land Registration Law 2015 has also made very clear provisions on the status of power of attorney which has eliminated any controversy on whether an irrevocable power of attorney qualifies as a registrable instrument or document in Lagos State.

One underlying issue with the registration of land instruments is the extent of the definition of registrable instrument, that is, the documents that qualify for registration. This is very important because of the implication of the failure to register a registrable instrument especially regarding the admissibility of such document in proof of title to land and the need of accepting such documents as documents capable of transferring interests in land. It is in the light of the foregoing that the status of an irrevocable

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\*By **Ikechukwu Okwudili ODIONU, LLB, BL, LLM Candidate**, Department of Commercial and Property Law, Nnamdi Azikiwe University, Awka, Anambra State. E-mail: ikeodionu@yahoo.com. Phone number: +2343037064597; and

\* **Ikenga K.E. ORAEBUNAM, PhD (Law), PhD (Phil), PhD (Rel. & Soc.), MEd, MA, BTh, BA, BPhil, BL**, Associate Professor of Law and Applied Jurisprudence, Nnamdi Azikiwe University, Awka, Anambra State. E-mail: ikengaken@gmail.com; ik.oraebunam@unizik.edu.ng; Phone number: +2348034711211

<sup>1</sup> Land Registration Act Cap 515 Laws of the Federation of Nigeria 2004.

<sup>2</sup> See Land Instrument Registration Law Cap 56 Laws of Western Nigeria 1959 which was severally adopted as Cap 70 Laws of Oyo State of Nigeria 2000, Cap 64 Laws of Osun State of Nigeria 2002, Cap 74 Laws of Ondo State of Nigeria 2006, Cap L54 Laws of Ogun State of Nigeria 2006; Land Instrument Registration Law Cap 72 Laws of Eastern Nigeria 1963 which was adopted for example as Cap 75 Laws of Anambra State of Nigeria 1991 as well as for other states in the defunct Eastern Region of Nigeria; Land Registration Law Cap 58 Laws of Northern Nigeria 1963 severally adopted as Cap 83 Laws of Kwara of Nigeria 2007, Cap 75 Laws of Taraba State 1997, Cap 82 Laws of Jigawa State 1998, Cap 77 Laws of Borno State 1994, Cap 85 Laws of Kaduna 1991, Cap 74 Laws of Katsina State 1991, Cap 67 Laws of Niger State 1992, Cap 77 Laws of Kano State 1991, and as Cap L.58 Laws of Lagos State of Nigeria 2003 (now repealed).

<sup>3</sup> Lands Instrument Law No. 1 of 2015 Laws of Lagos State of Nigeria

power of attorney as a registrable or non-registrable instrument comes into play. Again irrevocable power of attorney has assumed a crucial role in land transactions in Nigeria as many legal practitioners in Nigeria resort to its use in land transactions because of the ease and low cost of its registration in states where it is registrable like Anambra State. Whereas some judicial authorities have given a blanket categorization of irrevocable power of attorney as not qualifying as a registrable instrument,<sup>4</sup> a notable recent judgment of the Supreme Court has demonstrated a very different approach, preferring rather a case by case approach with emphasis on the actual contents of the particular irrevocable power of attorney in question and the extent of the powers donated therein rather than the heading or label.<sup>5</sup> The tendency of the courts and in this case the Supreme Court on some occasions in generally disqualifying irrevocable power of attorney as a registrable instrument constitutes a major inhibition to a judicial advancement in the definition of a registrable instrument which as well impedes the growing utility of irrevocable power of attorney in land transactions. What are the pitfalls in the definitions of a registrable instrument? What are those decisions of the Supreme Court that generally disqualify a power of attorney as a registrable instrument? On what grounds can those judgments be faulted? What are the negative implications of those judgments? In what ways can those pitfalls in the definition of instruments in the land instrument registration laws be addressed?

The aim of this study is to conduct a critical analysis of the definition of registrable instrument in relation to irrevocable power of attorney vis a vis the judicial interpretations on the issue. The objectives of this study are to highlight the pitfalls in the definition of land instruments; to criticize the judgments of the Supreme Court that have in a blanket manner disqualified irrevocable powers of attorney as registrable instruments; to state the grounds on which such judgments can be faulted; to point out the implications of such judgments and to make recommendations on how the pitfalls in the definition of instruments concerning irrevocable power of attorney can be addressed. This paper adopts a doctrinal method of data collection through the primary sources of law, in this case the land instrument registration laws as well as case law, notably the judgments of the Supreme Court of Nigeria. The scope of this law is restricted to the statutory definition of land instrument in relation to irrevocable power of attorney as well as judicial interpretations of the same. The study is immensely significant as it will highlight the shortfall in the definition of registrable instrument which has given room to contradictory decisions of the Supreme Court on whether a irrevocable power of attorney qualifies as a registrable instrument. By highlighting this, a legislative process for the review and amendment of the various land registration laws of the various states can be commenced. Until that happens, the grounds as highlighted for faulting the judgments of the Supreme Court may be brought up at the Supreme Court in relevant subsequent cases with the hope of overruling the previous *ratio decidendi* that may have fallen short of what the law should be so as to make way for consistent progressive interpretations on irrevocable power of attorney.

## 2. Meaning of Instrument

An instrument is defined as follows:

a document affecting land whereby one party, called the grantor confers, transfers, limits, charges or extinguishes in favour of another party, called the grantee, any right or title to, or interest in land includes a Certificate of Purchase, a Power of Attorney under which any instrument may be executed, but does not include a Will<sup>6</sup>

The above definition of instrument is the same for the rest of the other states in the defunct Eastern and Northern Regions of Nigeria as well as the old law applicable in Lagos State.<sup>7</sup> However, in the states in the old Western and Mid-Western Regions of Nigeria, the definition of instrument is extended to include *estate contract and a deed of appointment or discharge of trustees containing expressly or impliedly a*

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<sup>4</sup> See *Ude v Nwara* (1993) NWLR (Pt. 278) 638 and the recent Supreme Court judgment in *Malami v Ohikhuare* (2019) 7 NWLR (Pt. 1670)132

<sup>5</sup> See *Ibrahim v Obaje* (2019) 3 NWLR (Pt 1660) 389; (2018) 11 WRN 1

<sup>6</sup> See Land Instruments (Preparation and Registration) Law Cap 75 Laws of Anambra State of Nigeria 1991, section 2 and corresponding provisions of the law of the other states.

<sup>7</sup> See Land Instrument Registration Law Cap L58 Laws of Lagos State 2003 (now repealed), section 3; see also Cap 58 Laws of Northern Nigeria 1963 and Cap 72 Laws of Eastern Nigeria 1963

vesting declaration affecting land.<sup>8</sup> The new Lagos State Land Registration Law 2015 has replaced the word 'Instrument' with the 'Document' which it has defined thus: 'Document' includes any deed, judgment, decree, order or other document in writing requiring or capable of registration under this Law and includes *certificate of occupancy*.<sup>9</sup>

In *Oredola Okoya Trading Co. Nig Ltd v AG Kwara State*,<sup>10</sup> the Supreme Court outlined the test or conditions that must be applied or fulfilled in determining whether a document qualifies as instrument or not as follows:

- i. the import of the document rather than the label placed on it,
- ii. It must be an instrument of grant,
- iii. It must convey to the grantee the grantor's entire interest in the land, or residue or part thereof.
- iv. It must purport to confer, or pass on a person an interest or right in or over the land.

Similarly, in *Ogbimi v Nigeria Construction Ltd*,<sup>11</sup> the Supreme Court in construing whether a particular document (Exhibit B) qualifies as an instrument or not states as follows:

Does Exhibit B qualify as instrument... A cursory look at Exhibit B clearly shows that it purports to transfer and/or confer an interest in the piece of land described therein on or to the appellant ... I hold the further view that what is material in interpreting exhibit 'B' for the purpose of the applicable law is not the form the document was written but its content<sup>12</sup>

It is in the light of the foregoing that it will now be considered whether and to what extent an irrevocable power of attorney can fall within the definition of instrument.

### **3. The Status of Irrevocable Power of Attorney Vis-a-Vis the Definition of Instrument**

As can be seen, there is a category of a power of attorney that has been defined as a registrable instrument and this is a power of attorney *under which any instrument may be executed*.<sup>13</sup> A power of attorney under which an instrument may be executed may be such power of attorney that gives an attorney or agent the power to sell land on behalf of the donor or principal and this by definition is a registrable instrument. This is however not the thrust of this study. Conversely a power of attorney that gives someone the power to manage building or land does not qualify as a registrable instrument because it is not an instrument of grant.<sup>14</sup> Again this work is not concerned with this type of power of attorney.

The thrust of this study is irrevocable power of attorney backed by consideration of the donee and which has irrevocably granted the donee all the rights to exercise acts of ownership over the land. The leading judicial authority that established the old order in the categorization of such irrevocable power of attorney is the case of *Ude v Nwara*.<sup>15</sup> In that case, the Supreme Court stated as follows:

A Power of Attorney warrants and authorizes the donee to do certain acts in the stead of the donor and so is not an instrument which confers, transfers, charges, limits, 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 a donor to a third party. So even if it authorizes the donee to do any of these acts to any person including himself, the mere issuance of such power is not per alienation or parting in the possession. So far, it is categorized as

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<sup>8</sup> See Land Instrument Registration Law Cap 56 Laws of Western Nigeria 1963

<sup>9</sup> Op cit No 1 of 2015 Laws of Lagos State of Nigeria, section 1

<sup>10</sup> (1992) 7 NWLR (Pt 254) 412

<sup>11</sup> (2006) NSCQR 407@421, paras C - H

<sup>12</sup> See also *Pastor J. Akinololu Akinduro v Alhaji Idris Alaya* (2002) 30 NSCQR 601@C-E; *Etajata v Ologbo* (2007) 30 NSCQR 966@996

<sup>13</sup> See Note 6

<sup>14</sup> *Johnson v Banjo* (1993) NNLR 187

<sup>15</sup> (1993)NWLR (Pt. 278) 638@664 – 665

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.

Similarly, in *Ezeigwe v Awudu*,<sup>16</sup> the Supreme Court stated as follows:

...Exhibit A is simply an Irrevocable Power of Attorney donated by the respondent to the appellant. It is not a document of title conferring any title to the property in issue or the appellant. Even if Exhibit A could be relied upon, it does not deprive the respondent of her title to the property, the document being nothing other than an Irrevocable Power of Attorney not a conveyance. In fact exhibit 'A' being an Irrevocable Power of Attorney allegedly donated by the respondent to the appellant is a clear evidence or confirmation of the fact that the title to the land in dispute resides in the respondent, the donor of that power<sup>17</sup>

In the light of the above pronouncements by the apex court, one question that begs for answers is: the donor, having donated all his ownership rights over land to a donee for a consideration and such being irrevocable forever even upon the death of the donor, whether there is anything left for the donor or his successors-in-title to assert over the land? The position of the law is that it is only where a power of attorney is expressed to be irrevocable and the donee has offered some consideration and thus has an interest to protect in the subject-matter of the power of attorney that it will operate and be binding even upon the death of the donor but not otherwise.<sup>18</sup> In *Chime & Ors v Chime & Ors*,<sup>19</sup> the Supreme Court further elucidated on the nature of Irrevocable Power of Attorney as follows:

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 interest or the obligation remains undischarged<sup>20</sup>

From the above it is unsustainable to dismiss an irrevocable power of attorney with an attribute of irrevocability even upon the death of the donor as not being a document of grant or at least a document that *limits* or *extinguishes* the donor's interest over the land. It is therefore submitted that such an irrevocable power of attorney by its nature having effectively limited or extinguished the interest of the donor over the subject-matter qualifies as a registrable instrument within the meaning of instrument. On this ground, it is further submitted that the decision of the Supreme Court in the leading case of *Ude v Nwara* denying an irrevocable power of attorney the status of a registrable instrument was arrived at upon a faulty pedestal as it failed to consider irrevocable power of attorney in the light of the definition of instrument to determine actually if it actually conferred, transferred, limited, charged or extinguished in favour of the donee any right or title to or interest in the subject-matter. It is therefore submitted that the pronouncement of the Supreme Court in *Ude v Nwara* that an irrevocably power of attorney does not confer, transfer, charge, limit, or alienate any title cannot therefore be completely sustainable because an irrevocable power of attorney depending on its contents can extinguish or limit the interest of the donor over the subject-matter. It can also constitute a charge on the subject-matter depending on the contents of the particular power of attorney.

The above cases also totally ignored the tests established by the Supreme Court in *Oredola Okoye Trading Co. Nig Ltd v AG Kwara State* and *Ogbimi v Nigeria Construction Ltd* cases discussed earlier which emphasized on the need to look at the contents of the respective documents rather than the label in it in order to determine whether any document in question qualifies as a registrable instrument.

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<sup>16</sup> (2008)11 NWLR (pt 1097)158

<sup>17</sup> See also *Chime v Chime* (2001) 3 NWLR (Pt. 701)527; *Onyeani & Anor v J.C. Avaja* (2011) LPELR – 3835 (CA)

<sup>18</sup> See also *Lawani & Anor v Grillo & Ors* (2018) LPELR – 44914 (CA)

<sup>19</sup> (2001)LPELR – 24858 (CA)

<sup>20</sup> See also *Ajuwon v Adeoti* (1990) 2 NWLR ( Pt. 132) 271 @292 – 294; *Nwachukwu v Awka MFB Ltd* (2016) LPELR – 41053 (CA)

#### 4. The Case of *Ibrahim v Obaje*<sup>21</sup>

In *Ibrahim v Obaje*, the Supreme Court in a very innovative manner effectively distinguished the case of *Ude v Nwara* and ushered in a new progressive era regarding whether and when an irrevocable power of attorney should be treated as a registrable instrument. In this case, the issue arose on whether in law a power of attorney can transfer interest in land. The Supreme Court agreed that the particular document in question (Exhibit A) which was a power of attorney had transferred interest in the land in question. The Supreme Court per Ogunbiyi J.S.C. while distinguishing *Ude v Nwara* quoted with approval the pronouncement of the lower court per Peter Odili J.C.A. (as she then was) as follows: ‘I am of the clear view that depending 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’.<sup>22</sup> The Supreme Court in the above case distinguished *Ude v Nwara* case on the ground that the 2<sup>nd</sup> Respondent in *Ude v Nwara* issued a Power of Attorney to the 1<sup>st</sup> Respondent while statutory lease period of the appellant had not been properly terminated as required by the Eastern Nigerian law.

Indeed the Supreme Court in *Ibrahim v Obaje* case hit the core of the matter which as rightly pointed out at the lower court per Peter Odili JCA (as she then was) is the examination of the contents and intendment of the power of attorney in question. This is clearly in line with the tests enunciated by the Supreme Court in *Oredola Okoya Trading Co. Nig Ltd v AG Kwara State* and *Ogbimi v Nigeria Construction Ltd* cases earlier discussed. Regardless of this advancement made in *Ibrahim v Obaje*, the Supreme Court appeared to have pressed the reverse gear again when in the recent case of *Malami v Ohikhuare*<sup>23</sup> it apparently restored the old other established in *Ude v Nwara*. The Supreme Court, per Aka’ahs JSC who delivered the lead judgment in *Malami v Ohikhuare* stated 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 meaning and nature of a power of attorney was explained by Nnemeke Agu JSC in *Ude v Nwara*...<sup>24</sup>

The Supreme Court however did state in that case that it was settled that an irrevocable power of attorney given for valuable consideration robbed the donor of power to exercise any of the powers conferred on the donee.<sup>25</sup> This again brings up the question begging for answer: if the donor has lost his right to exercise any act of ownership over the land by virtue of the irrevocable power of attorney given for a valuable consideration, why will the donee not now be ascribed as the new owner since all the incidents of ownership have reached a point of no return in his favour? Regardless of the fact that *Ibrahim v Obaje* was decided just a little over one year before *Malami v Ohikhuare*, *Ibrahim v Obaje* was not mentioned or considered in the earlier case. *Ibrahim v Obaje* was decided on the 15<sup>th</sup> December 2017 while *Malami v Ohikhuare* was decided on the 1<sup>st</sup> February 2019. Apart from the fact that this anomaly poses a serious danger to the doctrine of *stare decisis*, it is submitted that the *Malami v Ohikhuare* is manifestly untenable in the light of the definition of instrument under the Land Instrument Registration Laws of the various states and the applicable tests established by the Supreme Court in determining whether a document qualifies as an instrument or not discussed earlier.<sup>26</sup>

It is important to state at this juncture that the decision in *Ude v Nwara* and the line of cases following it cannot stand the test of time considering the growing utility of irrevocable power of attorney in land transactions and the ease and relative low cost of its registration in the states that accept it for registration as a registrable instrument like Anambra and Lagos States. Even in the Land Instruments Registration

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<sup>21</sup> (2019)3 NWLR (Pt. 1660) 389; (2018) 11 WRN 1

<sup>22</sup> Ibid @409, para G – H

<sup>23</sup> (2019) 7 NWLR (Pt. 1670) 132

<sup>24</sup> Ibid @ P. 156, para H

<sup>25</sup> Ibid @ P. 157, para E

<sup>26</sup> See *Oredola Okoya Trading Co. Nig Ltd v AG Kwara State* (1992)7 NWLR (PT 254) 412; *Ogbimi v Nigeria Construction Ltd* (2006) NSCQR 407@421, para C-H

Law of Anambra State<sup>27</sup> which still operates under the old template of Land Registration Act No. 36 of 1924, the ground for registration of irrevocable power of attorney can be found in section 8(2) that provides that ‘the land registry shall be the proper office for the registration of all instruments *including power of attorney affecting land in Anambra State.*’ Lagos State has gone a step forward by making very clear provisions on the status of a power of attorney. Accordingly, section 56(2) of the Lagos State Lands registration Law 2015 provides that ‘where a power of attorney contains authority to deal with any land, sub-lease or mortgage, the donor or donee shall file the power of attorney in the land registry.’ In the case of Irrevocable Power of Attorney, section 57 of the Lagos State Law provides that it is registrable but only with the Governor’s consent.<sup>28</sup>

## 5. Conclusion and Recommendation

This study discussed the definition of instrument in the Land Instrument Registration Laws of various states of the federation which are basically re-enactments of the Land Registration Act No. 36 of 1924. The test for determination of whether any document is a registrable instrument within the definition of instrument as propounded in the *Oredola Okoya Trading Co. Nig Ltd v AG Kwara State* and *Ogbimi v Nigeria Construction Ltd* cases was also discussed. The test as established in the two cases principally is that the courts should look at the contents of the document rather than its label or form. Further in this study, the decision of the Supreme Court in leading case of *Ude v Nwara* which was recently followed in *Malami v Ohikhuere* placing a blanket categorization on irrevocable power of attorney as not being a registrable instrument was criticized. In the light of the above, this study welcomed the recent decision of Supreme Court in *Ibrahim v Obaje* as signalling a positive trend on what should be the proper approach towards the classification or categorization of irrevocable power of attorney by courts. The Supreme Court decision in *Ibrahim v Obaje* is in line with the principles established in *Oredola Okoya Trading Co. Nig Ltd v AG Kwara State* and *Ogbimi v Nigeria Construction Ltd* cases on the need to determine the actual contents of an instrument in order to qualify it rather than the label, heading or form.

This study found that *Ude v Nwara* which introduced a stiff position disqualifying irrevocable power of attorney as a registrable instrument can no longer stand the test of time considering the expanding utility of irrevocable power of attorney in land transaction. The case also failed to properly appraise the basic elements of statutory definition of instrument. The study further observed that regardless of the decision in *Ude v Nwara*, some states in Nigeria, notably Anambra State and Lagos States, treat an irrevocable power of attorney as a registrable instrument or document respectively. It was found further that in case of Anambra State, quite apart from adopting a liberal approach towards a power of attorney, the practice of registering a power of attorney possibly has a basis under section 8(2) of the Anambra State Land Instruments Registration Law that enjoins the registry to register all instruments including powers of attorney affecting land in Anambra State. In the case of Lagos State, it was also found that the new Lagos State Land Registration Law 2018 has made provisions for the registration of irrevocable powers of attorney. It is therefore recommended that the Supreme Court should, if and when an occasion presents itself, consistently follow and firmly re-establish its pronouncement in *Ibrahim v Obaje* that an irrevocable power of attorney depending on its contents is capable of transferring interest in land. It is further recommended that the other states of the federation should takes steps to review and amend their extant Land Instrument Registration Laws in line with the Lagos State Lands Instrument Registration Law 2015 to make very clear provisions stipulating that irrevocable power of attorney qualifies as a registrable instrument.

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<sup>27</sup>Op cit Cap 75

<sup>28</sup> Lagos State Lands Registration Law 2015, sections 56(2) and 57