

### **Abstract**

*Variations in customary laws between different communities and ethnic groups require careful consideration especially when it comes to disputes over family land which requires legal expertise and strong understanding of customary law. This research work found that family land can be created by inheritance, communal allocation and purchase among several other means. In addition, usufructuary rights were discussed in the paper. The doctrinal method of research methodology is used by using journals, law textbooks, consulting relevant statutes and decided cases on the topic. The research work concludes by noting that family land cannot be divided or alienated without the consent of all family members.*

**Keywords:** Customary Law, Custom, Land, Family, Inheritance, Intestate, Community, Will.

### **1. Introduction**

The ownership of land by such units as families, kindred, villages and similar bodies under the customary land tenure system has always been taken to be a fundamental element of land tenure system under the customary law. This is because even though ownership of land under the customary law had always been known to originate or arise from individual ownership, yet the fact that the ownership eventually results in communal or collegiate ownership which is predominantly rooted in family makes it imperative that it be given a close attention to establish its true nature. This occupies a prime position in customary land tenure system. The existence of family property and the use to which it is committed by the family members as well as the nature of their rights therein have such significance that the Nigerian law of real property cannot be fully discussed without prime attention being paid to family property<sup>1</sup>. It is therefore imperative to examine the family ownership of land in line with the unique character of customary law as a flexible legal framework.

### **2. Meaning of Family Land**

Family land, under Nigerian customary law, refers to land collectively owned, managed, and enjoyed by members of a family, usually passed down through generations. It serves as a significant source of identity, history, community bond and wealth. Individual members have the right to utilize and benefit from the land, but ownership resides with the family as a unit.

### **3. Statutory and Common Law Definition of Land**

Land refers to the physical natural element which includes the ground (earth) and things on it, the resources under the ground such as mineral deposits and to an extent above the ground which includes air space rights. The Black's Law Dictionary defines land as that three (3) dimensional part of the earth, which includes the earth's surface, the air space and the portion of the earth below.<sup>2</sup> The erstwhile legal jurist Niki Tobi JSC (as he then was and now of blessed memory) defined land to be not only the surface of the earth but includes the subsoil and appurtenances fixed upon the land<sup>3</sup>. The Property and Conveyancing Law 1959<sup>4</sup> of the old Midwestern and Western Nigeria (now applicable to all states which once made up the old Western Region, including Edo, Ogun, Ondo, Osun, Oyo, Ekiti and Delta) defines land as any building, tenure or part of a building (no matter the division of the land). Land also includes other incorporeal hereditaments or corporeal hereditaments.<sup>5</sup>

### **4. Creation of Family Land**

Family land refers to the ground (earth) inclusive of the subsoil appurtenances and airspace belonging to a family. The family could be in a nuclear form (Father, Mother and Children) and it could also be in an extended form consisting of the Father, Mother, Children Aunties, Uncles, Cousins Etc. Family land has always been the practice of the people of Southern Nigeria. It was not until the colonial era that the concept of individual land came into legal existence<sup>6</sup>. Family land could be created in various ways such as creation by the will of the owner.<sup>7</sup> Additionally, family land could be created also by gift or allotment, by devolution via intestate death and by conveyance.<sup>8</sup> Where the land (family land) is

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<sup>1</sup> *Amodu Tijani v The Secretary Southern Nigeria* [1921] 2 AC 399, [1921] UKPC 80, also known as the Apapa land case. See also [1921] NGSC 1.

<sup>2</sup> B A Garner, *Black's Law Dictionary* 'Land' (10 Edn Thomson Reuters 2014)

<sup>3</sup> N. Tobi, *Cases & Materials on Nigerian Land Law* (Reprint 1997 Mabrochi Books)

<sup>4</sup> Cap 100 Laws of Western Nigeria

<sup>5</sup> See n5

<sup>6</sup> T. O. Elias, *Nigerian Land Law* (4<sup>th</sup> Edn Sweet & Maxwell 1971) p 72

<sup>7</sup> See n5

<sup>8</sup> *Gaji v Paye* (2003) LLJR-SC, (2003) FWLR (PT. 163).

purchased with money contributed or belonging to the family, that too becomes family land or lands as the case may be. Furthermore, some other forms of creation of family land exist, such as the creation of family land by first settlement.<sup>9</sup> Another way of creation could be by the creation of family land vide a transfer of the totality of the interest & rights of the land.<sup>10</sup> Family land can also be created by conquest<sup>11</sup>. The Supreme Court in *Olodo v Josiah*<sup>12</sup> stated that family land belongs to the family and never loses its common ownership even when the family land is allotted to a family member, thus this means that the family land cannot without the consent of the family be alienated.

### **Creation by Operation of the Law**

#### ***Intestacy***

If a landowner who is subject to customary law dies without a Will, his acquired property devolves on his children as family property in accordance with the applicable customary law rules. This is the way family property is commonly created. In other words, where a land owner dies intestate, the land is naturally inherited by his children under native law and custom, and thereby becomes family property.<sup>13</sup> It is immaterial whether the land owner dies leaving only one issue, the land will still be constituted as family property<sup>14</sup>. The conditions for creation of family property by intestacy are: (1) That the land owner died intestate and (2) That his estate is governed by native law and custom, once those conditions are met the property devolves on his children as family property<sup>15</sup>.

#### ***Will***

Family property may also arise from a declaration under a Will as where a testator devised a property to his heirs jointly to hold as family property. *Sogbesan v Adebisi*. A testator may create family property by specifically stating in his will that he wishes to create a family property; this is by declaring in his will that his property be held on his death jointly by his children as family property. In the case of *Frank Coker v George Coker & ors*<sup>16</sup>, one Edward Foster in his Will made the following bequest of his dwelling house which was situated in Lagos – ‘I leave and bequeath my present dwelling house to the whole of my family or blood relation and their children’s children throughout and cannot be sold for any debt or debts that may be contracted by any of them, but at present the house should be occupied by my grandson Nath and my son Edward subject to the approval of my executors or otherwise...’ In this case, the property in question had been eventually sold by order of court and the suit was to determine who is entitled to share in the proceeds of the sale. The court held that the intention of the testator was to make his dwelling house a family house, following the Yoruba custom and so that consequently those entitled to share in the proceeds of its sale were those of his descendants entitled under the custom to reside in the premises at the time of sale.

### **Creation by Acts of the Parties**

Historically, the law recognizes that Parties may by their own acts create family property, by any of the following ways:

#### ***First Settlement***

Family property may arise where a family, through their own ancestors were the first to settle on a virgin land and by so doing, exercised acts of ownership over sufficient length of time, numerous and positive enough to warrant inference of exclusive ownership. In *Ajala v Awodele & Ors*, the supreme court held that settlement is one of the traditional modes of acquisition and that where the plaintiff’s case is that the land was acquired by settlement, it should not be open to question as to who made the grant. In the case of *Idundun v Okumagba*<sup>17</sup>, the Supreme Court accepted the finding of the lower court that the family that was able to prove that their ancestor first settled on land created family property and the family are the owners thereof.

#### ***Conquest***

Where a family conquers a people, it may appropriate the land of the conquered. In times past, it was legitimate for a family to base its ownership of land on an act of conquest. Where there is only one particular progenitor, mainly hunters and warriors, in time past, who had fought and conquered the original settlers and chased them from the land, upon his death, his children will inherit under native law and custom, and from this means a family property is created<sup>18</sup>. However, it is no longer acceptable to use conquest as it can no longer be a mode of acquiring land in this modern time.

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<sup>9</sup> *Ekpo v Ita* 11 N.L.R. P. 68, see also *Idudun v Okumagba* (1976) NMLR P.200

<sup>10</sup> *Jegede v Eyinogun & ors* (1959) 4 FSC p. 270

<sup>11</sup> *Mora v Nwalusi & ors* (1962) 1 All NLR 681.

<sup>12</sup> (2011) All FWLR pt 573, p. 1897 at 1926; (2010) LLJR-SC

<sup>13</sup> *Lewis v Bankole* (1908) 1N.L.R 89

<sup>14</sup> *Abeje v Ogundairo* (1967) LLR 9.

<sup>15</sup> *Ibid* n13

<sup>16</sup> (1938) 14 N.L.R 83

<sup>17</sup> (1976) 10 SC 227

<sup>18</sup> *Kuma v Kuma* (1934) 2 W.A.C.A 178

### **Purchase**

Where family money is used to purchase land, family property is created. Family property may be created by conveyance *Inter vivos*. Where land is purchased with money belonging to the family, a family property is thereby created. In the case of *Nelson v Nelson*<sup>19</sup>, the family decided to use money paid by government as compensation for acquisition of family property to purchase and acquire another parcel of land. The conveyance was done in favour of the family head in English form. The family head thereafter sold the land to a third party. In an action to set aside the sale, the court held that the land is a family property notwithstanding the form in which it was conveyed.<sup>20</sup>

### **Gift**

In the event that a family is a donee of unconditional gift of land, family property is created.<sup>21</sup>

### **Declaration**

Where the land owner during his lifetime decides to designate his land as family property for the benefit and enjoyment of members of his family only; family property is thereby created<sup>22</sup>.

### **Conveyance:**

In a scenario where the landlord/ land owner, confers title to his property on specific or some named members of his family by Deed with a declaration of his intention to create a family property in the named members, a family property is thereby created. In the case of *Olowosago v Alhaji Adebajo & others*<sup>23</sup>, where the family conveyed by Deed of grant a parcel of land to eight people who were children and grand-children of the land owner, the land was subsequently sold to the plaintiff; the respondents relied on the Deed of grant. It was held that the Deed created family property. The court also explained that to qualify as family land, it will be necessary to identify not only the origin of the land but also its status.

From the foregoing, it is evident that family property could be successfully and legally created either by an operation of the law or the acts of the parties involved, i.e. the family members.

## **5. Character of Family Land**

Ownership of family land accordingly vests in the legal abstraction known as the family and not in its members for the time being. Each member of the family is nothing more than a member of the community to which the land belongs just as if he were a shareholder entity, as such ownership in the family is vested in the living, the dead and the unborn. However, sale of the family land without the consent of the head of the family is void and this was established in *Adejumo v Ayantegbe*<sup>24</sup> per Karibi-Whyte JSC. The basic characteristics of family property may thus be outlined as follows:

1. The property belongs to the family as a distinct perpetual legal entity, but not to the individual members. It is a collegiate property owned jointly by them; the title of which vests in the legal abstraction known as the family but which is made up of the aggregation of the members.
2. The members for the time being do not possess any separate disposition, attachable or inheritable interests in the family property as individuals but as joint inheritors, possessors and owners thereof. Thus, a member of the family who is in use of family land cannot claim exclusive ownership of same against the family no matter how long he is in possession thereof *Olaleye v Akano*<sup>25</sup>.
3. The fact that the property is vested in a body corporate implies that no transaction affecting the interests therein is valid unless done by, or with the consent of the family itself acting through its alter ego, which for some purposes is the family head and for others, is the family council comprising the head of the family and the principal members of the family.
4. Several individual members of the family may be in possession of various parcels of family land whether for farming, residential or other purpose but the ownership thereof continues to reside in the family as a unit while the members in possession continue to exercise usufructuary right over the parcels possessed by them subject to the superior title of the family as a unit.
5. A typical family land is capable of changing its character of ownership from family ownership to individual ownership and again back to family ownership depending on the nature and constitution of the family to whose ownership it is subject. Thus, cessation or termination of family ownership of land does not prevent the land from subsequently crystallizing into family ownership again. Its nature is not always necessarily static.
6. Family property is not capable of being validly alienated otherwise than by the collective will of the members of the family expressed either through the Head of family along or jointly with the principal members of the family or just the Head of the family.

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<sup>19</sup> (1913) 13 N.L.R. 248.

<sup>20</sup> See also *Dosumu v Adodo* (1961) LLR 149.

<sup>21</sup> *Ashafa v Awawu* 11 N.L.R. 39, (1959) 4 F.S.C. 270.

<sup>22</sup> *Nelson v Nelson* (1951) 13 WACA 243

<sup>23</sup> (1988) 4 N.W.L.R (pt 88) 275

<sup>24</sup> (1989) 6 SC pt 176 @ 100, (1989) 3 NWLR (Pt. 110) 417

<sup>25</sup> (2008) 25 WRN 121

7. Acquisition of temporary possessory rights over family property by individual member of the family could be authorized by the family head alone but acquisition of permanent rights over family property by individual members of the family is by the collective decision of the members thereof. This will be by way of partitioning or outright grants.
8. An action for declaration of title is not maintainable against a member of a family in respect of family land since all the members of the family are recognized as co-owners of the family land. *Yoye v Olubode*<sup>26</sup>.
9. An allotment by the head of the family to various members of the family of portions of family land for farming purposes does not in any way vest ownership of such land in the allottee (s) as to entitle them under native law and custom to a declaration of title individually, *Lengbe v Imale*.<sup>27</sup>
10. Family land remains family land irrespective of allotment and as such, an allottee of family land cannot competently alienate it without the consent of the family head and the principal members of the family and also improvements made to family land belongs to the family as held by the Supreme Court in the case of *Shelle v Asajon*<sup>28</sup>, wherein the Supreme court equally emphasized that any member of the a family in possession of family land or occupying family house(s) owes it as an obligation to keep such property in good state.

## **6. Conclusion**

Family land is a unique creation by our forefathers in the Nigerian and African setting. Presently, greed and individualistic tendencies of men are fast eroding the concept of family land which was meant to preserve the unity of the family or clan in perpetuity. Family land is created by the father figure of the family. It could also be created via conquest, intestate succession sale to another family, allotment etc. the burden of preserving family land rests first on the family head and subsequently on the principal members or family as a whole<sup>29</sup>. Family land just like every creation of man has a beginning and also has an end. It ends when the family land is partitioned or sold. Where the family head is trustworthy, family land would be preserved and would not be a subject of endless litigation.

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<sup>26</sup> (1974) 10 SC 209, (1974) LCN/1877 (SC)

<sup>27</sup> (1959) WRNLR 325

<sup>28</sup> (1957) 2 FSC 65

<sup>29</sup> Elias T. O., *Nigerian Land Law* (4<sup>th</sup> Edn Sweet & Maxwell 1971)