# A CRITICAL ANALYSIS OF THE CONCEPT OF TRUST UNDER THE NIGERIAN JURISPRUDENCE

**BY**

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## ABSTRACT

Until recently, individual title of land holding was very rare because it is a practice that was hardly known to customary law and it was usually held as repugnant to the natural phenomena as we have it among us in Nigeria. But all that had changed and we now have the concept of trust in real property administration. Since the main element of trust is that a particular property is vested in a trustee for the benefit of the beneficiary, the trustee being the legal owner who manage and safeguard the trust property in a productive manner. This essay will explore and examine the concept of trust as it affects the administration of real property. This essay will also look into the massive growth of commerce and industry, complex business transactions arising from the growth, the problems inherent in these evolving commercial relationships, with emphasis on the practicality of the trust concept in these commercial relationships. Similarly, the legal assertion that, constructive trust is a vital legal mechanism through which the conscience of equity finds expression will be examined. Situation arises when real property is acquired in such circumstances that the legal title holder may not in good conscience keep the beneficial interest, equity will make him a trustee of the property. Hence, this work assessed the degree to which constructive trust as equitable remedy is applicable under the Nigeria legal system. Information were gathered and collected through secondary data collection method. It was found in the course of this work that the concept of trust had brought about a positive revolution into the Nigerian jurisprudence. Yet, more still need to be done to consolidate on the benefits derived from the trust concept.

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# CHAPTER ONE

## INTRODUCTION

The origin of the legal concept of trust in Nigeria cannot be fully discussed except with an extensive inquiry into the evolution of its history. The exact origin of trust cannot be ascertained and there are controversies surrounding the subject. However, it is certain that the Chancery Court entertained trust cases at a point in time. One school of thought believed that trust was transplanted into England from the Roman Legal System. Another school of thought however disproved that English law of trust has no any connection with Roman laws. Notwithstanding this controversy, the law of trusts as we now have in England was greatly influenced by the Chancellors in the Chancery Courts which administered equity, in their enforcement of 'uses'.

The origin of the modern concept of trust has been credited to the concept of *uses* during the medieval period, which was a means of conveying land to someone for the use of one or more persons. The concept then was that a person called the 'feofor' conveyed land to another person called the 'feofee' for the benefit of one person or more called the beneficiaries'. The Common law of England recognizes only the feofee as the one who holds the legal title to the property so conveyed, without taken any cognizance of the interest of the beneficiary. Hence, it is common for the feofee to put to use such property for his sole benefit instead of that of the beneficiary. Similarly, the feofee usually treats the property in an unconscionable way to the detriment of the beneficiary and in some extreme cases the feofee may retain such property for himself and the beneficiary will not be able to get relief or remedy from the Common Law Courts.

Having been shut out of the Common Law Courts for relief or remedy, the Chancery Court came to the rescue of the beneficiaries of the uses. The Chancery Court established by Chancellor Ellesmere usually passed judgement on the defendants (i.e. feofee), compelling them to oversee the property so conveyed to the benefits of the beneficiaries whom at that time was known and called *cestui que use*. To enforce the Chancery Court judgement, punishment was usually administered on the feofee for failure to do as the Court ordered, committing them to prison for contempt.

The ability of the Chancery Court to make provision for relief which ordinarily cannot be sought for at the Common Law Courts brought about the popularity of Chancery Court, since the beneficiaries of the property of trust now has solace in them. The preference of the Chancery Court over the Common Law Court brought up a profound conflict between Lord Ellesmere Chancellor of the Chancery Court, and the Chief Justice of the Common Pleas Sir Edward Coke. The conflict was to be later resolved in favour of the Chancery Court over the later. Hence it was then established that whenever there is conflict between the doctrine of equity and the rules of Common law, equity must prevail. This was the position until the Chancery Court was abolished by the Judicature Act of 1873. The implication was that the doctrines of equity and rules of Common law then became fused and henceforth administered in the same Court.

The concept of *trust* was first introduced into the Nigeria Jurisprudence by the Statute of General Application of 1st January 1900, which made it mandatory that all Laws in operation in England be applicable in Nigeria and all other British Colonies. The subsequent Legislations and Ordinances in force during the Colonial era, also had its fair share of influence on the Concept of trust in Nigeria. It is of utmost importance

to note however that, several case laws, local laws, customs and traditions also contributed immensely to the concept of trust in Nigeria.

It has to be noted here that, the concept of family ownership of land in Nigeria served a purpose similar to that of trust, where the concept of individual ownership is a foreign one, rather, land belongs to the family and the head of family holds the family land for the use of the family members. The head of family to some extent assumes the position of a trustee and all members of the family have equal right to the property. See *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 1A.C. 399 at p. 404[1] per Lord Haldane. The concept of trust under customary law is however different from that under the English law because while the trustee is regarded as the owner of the trust property, the head of family is not regarded as the owner of the family property, but rather as the caretaker.

The Land Use Act also embodied the concept of trust by vesting the control and management of land in each State of the Federation in the governors to be held in trust and administered for the use and common benefit of all Nigerians. See the Supreme Court decision in *Abioye v. Yakubu* [1991] 5 NWLR (Pt. 190) p. 130[2]. Although the concept of trust under the Land Use Act is not the same as in the law of trusts for the mere fact that, the trustee under the Act, which is the Governor cannot be compelled to render account as trustee under English law. But a special kind of trust is created under the Act, known and regarded as a bare trust. See *Abioye v. Yakubu* (supra).

Also, it must be noted that, despite the imperativeness to which trust could be put into, trusts are less frequently use in Nigeria unlike England where the concept was

[1] [1921] 1A.C. 399 at p. 404
[2] [1991] 5 NWLR (Pt. 190) p. 130

received into Nigeria because of the cultural and social differences in the lives of the people.

## 1.1 BACKGROUND OF STUDY

One may be forced to argue that the reception of the English law of trust in Nigeria is to complement the existing trust rules in Nigeria. It is of importance to note that, prior to the partition of Africa and the subsequent imposition of the British legal regime on Nigeria, the idea of trust was inherent in our culture, customs and traditions. One may even be tempted to argue that the British benefited from the Nigerian concept of trust. For example, individual ownership of land was alien to our native ideas. Land was usually believed to be a Communal or Family property and as such not an individual property. It was generally accepted that the totality of the Community or family as the case may be, have equal right and access to a particular Communal or Family land. The Chief or head of the Community, Village or Family are those that have charge over such lands. They may be loosely referred to as the land owners, but in reality they only hold the title as a trustee for the benefits of individual component of the Community, Village or Family. Although, as the head of the Community or Family, he can validly alienate land to any person or group on behalf of other members, but such alienation is subject to the approval of the members of such community or family. The Chief or Head is only recognized as an agent through whom any transaction as regards the alienation of communal and or family land are usually carried out, he is to deal in such transaction with the sole aim of benefiting the members and not in any manner that will jeopardize such interest.

Such was the decision of the Supreme Court of Nigeria in the case of *Akin Adejumo &Ors v Ajani Yusuf Ayantegbe* [1986] Sc 204[3], where the sale of land by the head of the family and some members of one arm of the family was set aside. Also in *Yesufu Esan &Ors v Bakare Faro &Anor* [1947] WACA 135[4], an unauthorized sale by the family head was also set aside. See also, *Adeleke Mogaji & ors v G.Nuga [1960]5 F.S.C.107, Alhaji A.W.Elias v Olayemi Disu [1962]1All N.L.R 214, Aganran v Oluchi 1 N.L.R.66, Ekpendu V Erika 4 F.S.C.79.*

## 1.2 STATEMENT OF PROBLEM

There is a tremendous need for the overview of the application of the concept of trust under the Nigeria Jurisprudence. Until recently, the application of the trust concept in the Nigeria legal system was to a minimal extent. There were only very few cases where it was applied.

It is of note that trust, if embraced and applied effectively will go a long way in solving issues arising from land and other intangible properties, as well as, commercial relationship. To achieve the above, there is need to educate the greater populace of Nigeria the inherent benefits of the trust concept.

## 1.3 OBJECTIVE OF STUDY

Trust is a foreign concept of law, and like other received English laws has failed to yield much result in Nigeria due to the fact that those laws are built on English ideals which are not compatible with our own ideals, culture, customs and traditions. In the view of the above, this project work is aim at elucidating more on the concept of *trust* in the Nigerian context. It will also look into the duties and power of trustees and how

[3] [1986] Sc 204
[4] [1947] WACA 135

these responsibilities can be undertaken without prejudicing the interest of the beneficiaries of a trust. There is no gain saying otherwise, research has shown that some of the trustees usually violate the terms of trust by acting outside the limits of their trusteeship, thereby failing to carry out their essential *duty of care* which by extension leads to the breach of the trust. Suggestions on how to mitigate the above scenario will be provided for in this work.

Furthermore, it was discovered in the course of research on this essay that, trusteeship can be a herculean task, despite the statutory provisions and various laws relating to the exercise of their powers. Trustees most times encounter series of limitations and challenges in the course of carrying out their duty as a trustee. The reasons for such limitation and challenges are not far-fetched. In a heterogeneous society like Nigeria, customs, traditions, religious beliefs and to some extent disagreement between the beneficiaries of a trust are some of the causes of the problems associated with trusteeship and trust in general. This work is aimed at analyzing the extent at which the statutory provisions relating to the powers of a trustee had gone in addressing the above problems.

## 1.4 RESEARCH QUESTIONS

This essay seeks to provide answers as to:

1. What is the relationship between trust and customary land tenure system in Nigeria?
2. How successful was the application of customary law and received trust law in Nigeria?

3. How effective is the application of the concept of trust in commercial relationships compared to family relationship which trust were primarily used for?
4. Is constructive trust a vital legal mechanism through which the conscience of equity finds expression?

## 1.5 SCOPE OF STUDY

This research work will preview the concept of trust, inquiring into the idea of trust, its evolution, its introduction and application in Nigeria legal system. The administration of the trust estate as the primary responsibility of a trustee will be examined.

## 1.6 SIGNIFICANCE OF THE STUDY

The findings of this essay will go a long way to elucidate the concept of trust as it relates to communal and family land holding system in Nigeria and the advantages of the trust concept in mitigating the inherent problems of communal and family holding. This study will also analyze the practicability and the feasibility of application of trust concept in complex business transactions, other than family and private relationship. It will further explain the growth and cogency for the imposition of constructive trust as probably a safer means by which the legal and equitable interest in relevant parties may be protected in real and personal property.

## 1.7 METHODOLOGY

The use of secondary data is the primary method of approach employed in this essay, this include but not limited to textbooks written by renowned authors and scholars whom had been certified as expert and authority in the field of law and any other legal related field. In a similar vein, the various judicial decisions of Nigerian

courts on issues of trust and local statutes will be put to use and explore to get a grasp of the Nigeria's content of trust.

## 1.8 SYNOPSIS

Trust is a foreign legal concept which form part of Nigeria's received laws and like in most jurisdictions, the concept is usually governed by statutes and case law. Its introduction into Nigeria had helped tremendously by improving on our legal system.

For example, prior to the reception of the concept of trust in Nigeria, the position of the communal head or family in respect to communal land or family land was ambiguous. They were known to be the absolute owners, controllers and managers of the communal or family land and they can dispose of such in manner they so wish. But the concept of trust had turned the table around and they now stand as trustee who hold communal or family land in trust for the b3enefit of members of community or family.

In a similar vein, the concept of trust had now made it possible to form a trust in commercial relationship, other than its traditional use in family relation. A typical example is the Nigeria Pension Scheme, where pension funds are vested in a trusted for the benefit of an employee. The doctrine of constructive trust has also help in tackling cases of unjust enrichment. Example is, where a person breaches his duty, thought without an actual fraudulent intent or advantage to himself, the doctrine of constructive trust will apply here to remedy the breach of duty.

# CHAPTER TWO

## LITERATURE REVIEW

The origins of the modern trust are deeply rooted in feudal land law which existed in the Middle Ages. The trust, formerly known as a use, was employed to counter the problems of freedom of alienation and payment of taxes in the system of feudalism[5]. The system of tenure operated in a way in which no person, apart from the Crown, was the absolute owner of land. Instead ownership of land was fragmented vertically so that the King granted land to powerful Lords who could in return grant further segments of land to tenants. A tenant, of course, could grant certain land vested in him to other tenants. If he did this, he had a dual role to play in connection with the land, for he would not only be an overlord to his tenant, but he himself would also be a tenant accountable to an overlord higher up in the feudal ladder.

Within this feudal system of tenure, the death of a tenant entitled the heir of the tenant to take possession of the land, but not without first paying feudal dues to the overlord. The employment of the use allowed land to be transferred to trustees[6] during the lifetime of the tenant upon use of the tenant and after his death to members of his family, which could include the heir. The advantage of this arrangement lay in the fact that on the death of the tenant, the trustees would simply hold the land for the persons entitled after the tenant.

Attempts to form a definite definition for trust had proved to be a herculean task just like other legal terms. Trust as a legal term has been variously defined by many authorities in the field of law and other related fields. Lewis on his part defined trust as the duty or aggregate accumulation of obligation that rests upon a person described as

[5] Barton, J. L. (1965). The Medieval Use. LQR562

[6] Thorne (1938). Livery of Seisin. 52LQR at 345

trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision, written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence, the administration will be in such a manner that consequential benefits and advantages accrue, not to the trustee, but to the persons called *cestui que* or beneficiaries, if there be any and if not, for some purpose which the law will recognize and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest. This definition is self-explanatory in the sense that it tells the state of affairs where a trust falls short of the requirement, and those likely to benefit from such trust.

The Black Law Dictionary defined trust as a fiduciary relationship regarding property and subjecting the person with title to the property to equitable duties to deal with it for another`s benefit; the confidence placed in a trustee, together with the trustee`s obligations toward the property and the beneficiary[7].

Professor Keeton in his book, The Law of Trusts (8th Ed), defines trust as that relationship which arises whenever a person called a trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of someone (of whom he may be one and who are usually refers to as the cestuique trust) or for some object permitted by law, in such a way that the real benefit of the property accrues not to the trustee, but to the beneficiaries or other objects of the trust[8]. This definition is widely accepted because it deals with the core issues of trust

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[7] Black's Law Dictionary Free Online Dictionary (2nd Ed.), http://dictionary.org. accessed on 12/09/2018.

[8] Keeton, G. W. (1935). The Law of Trusts (8th Ed.). *HLR*, 48(3), pp. 535-537.

among other things. First, it seeks to explain circumstances where trust can be created either willingly or by operation of law, example is the constructive trust. It also explains what trust can be created on, and those that can be beneficiary of such trust.

What can be deduced from the above definition is that the basic idea behind the trust lies in the fact that the management and enjoyment functions of ownership are split between different persons. The role of management is usually vested in a person called a trustee, and that of enjoyment subject of trust vested in persons called beneficiaries. There is fragmentation of management and enjoyment which can only be made possible where the legal title to property of trust is vested in trustees. However, because the trustee had agreed to hold and manage the legal title to the advantage of the beneficiaries, their conscience bind them in equity, hence giving the beneficiaries an equitable interest in the property subject to the trust. The overall effect of fragmenting the management and enjoyment is that there is a consequential fragmentation of title. The trustee holds the legal title, which is a nominal title in the sense that the trustee has no beneficial interest in the property he is holding and, therefore not entitle to the enjoyment of the property. The beneficiary on the other hand holds the equitable title full of beneficial rewards from the property.

A typical example of trust is where, A who is a land owner, transfers land upon use to trustees X, Y, Z, for the benefits of A and his three sons B, C, D. By transferring the legal title to X, Y and Z, enforcement of obligations on the trust property in the court of equity lies on A along with B, C and D, to compel the trustees to recognize their interest in the land. And should A die, the land would still belong to A's sons in equity, but they could compel the trustee to transfer the trust property to them. In this way, A could achieve what he could not have achieved at common law, that is, to leave the property to his son after his death. From the above illustration, it is very evident that

there are several key features of trust namely, the Settlor, the trustee(s), the beneficiary, the trust property, the trust instrument, the legal and equitable interest.

One can better understand the concept of trust taking into account some basic principles of property law. In property law, ownership is the greatest right an individual has in relation to a thing. This ownership consists of a number of incident. The standard incidents of ownership consist of both benefits and burdens, or right and duties, which are vested in the person who has ownership. The common incidents of ownership include the right to possession, the right to manage, the right to capital and the right to income. Fragmentation of ownership, simply involve the splitting up of the incidents of ownership and vesting them in more than one person. The idea of splitting ownership and vesting the constituent elements of it in different persons has been a particularly notable features in English law and other jurisdictions founded on the common law tradition. Unlike the Roman law idea of *dominium*, meaning that the owner has all the incidents of ownership, and as such, he alone could exercise the incident of enjoyment and management. In English law, the development of the trust contributed to a large extent in allowing management and enjoyment functions of ownership to be distributed amongst different persons for different social and economic objectives.

In the case of *Westdeutsche L.G. v Islington B.C.* [1996] UKHL 12, AC669, some core principles of trust were explained thus;

> *"Equity operates on the conscience of the owner of the legal interest. But in the case of trust, the conscience of the legal owner requires him to carry out the purpose for which the property was vested on him*

*(express or implied trust) or which the law imposes on him by reason of his unconscionable conduct"*[9].

*"Equitable jurisdiction to enforce trusts depends on the conscience of the holder of the legal interest being affected and hence, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience. This mean that, until he is aware that he is intended to hold the property for the benefits of others in the case of express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience"*[10].

*"In order to establish a trust, there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property"*[11].

Similarly, once a trust is established, as from the date of its establishment the beneficiary has in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property other than a purchaser for value of the legal interest without notice.

An effective understanding of the trust concept requires an appreciation of some basic principles of property law. In property law, ownership is the greatest right that

[9] [1996] UKHL 12, AC669
[10] *Westdeutsche L.G. v Islington B.C.* [1996] UKHL 12, AC669
[11] Ibid 10.

an individual has in relation to a thing. Furthermore, ownership consists of a number of incidents.

The standard incidents of ownership consist of both benefits and burdens, or rights and duties, which are vested in the person who has ownership. The common incidents of ownership include the right to possession, the right to manage, the right to capital and the right to income. Fragmentation of ownership, as the words imply, entails the splitting up of the incidents of ownership and vesting them in more than one person. The idea of splitting ownership and vesting the constituent elements of it in different persons has been a particularly notable feature in English law and other jurisdictions founded on the common law tradition. There are a number of reasons for this. Unlike Roman law, English law has not treated ownership as an absolute relationship between the owner and a thing. The Roman law idea of dominium revolved around the fact that the owner was vested with the all the incidents of ownership, so that he alone could exercise the incidents of enjoyment and management. In English law, the development of the trust contributed to a large extent in allowing management and enjoyment functions of owner- ship to be distributed amongst different persons for different social and economic objectives. The trust occupies a central position in the law of fragmentation of ownership.

Another factor which has facilitated fragmentation of ownership is the nature of certain types of resources. The nature of land has allowed it to be put to different yet compatible uses at the same time by different users. Land is virtually indestructible and it can be enjoyed for a variety of purposes. An owner of land can carve smaller segments out of his full ownership and vest them in different users. Unlike land, however, goods and other personal property did not, from a historical point of view, feature significantly in matters of fragmentation. Goods are generally less permanent than land and more

movable so as to make them susceptible to simultaneous property interests. This is a factor that goes a long way in explaining the relatively fewer property interests that exist in personal property than compared to land. However, things have long changed and ownership in personal property can in many ways be fragmented in the same way as it can in land. Indeed, in the modern law of property, fragmentation of ownership of personal property is much more common and often more important than in the case of land. The relative economic significance of land has been displaced by large trust funds. The modern law of trusts generally recognizes the fact that the trust operates predominantly in a commercial setting rather than land and family. The idea that management and enjoyment functions can be split is very common in trusts such as pensions funds and other large investments where trustees manage assets for beneficiaries.

D. J Bakinbinga (1989)[12] described trust in his book as a relationship which is recognized by equity. It arises where property is vested in a person or persons known as trustees and these trustees are under a duty to hold for the benefit of other persons known as cestuique-trust (pronounced setikii trust) or beneficiaries. He opined that, mere appointment of trustee does not, of itself vest property in him. To constitute a valid trust, the appointment must also provide for the vesting of the trust property in the trustee as a matter of necessity. The interest of the beneficiaries were normally described in the instrument creating the trust. However, this may be implied or impose by law. It is also worthy of note to mention that the beneficiary's interest is proprietary in the sense that it can be bought or sold, given away or disposed by will.

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[12] Bakinbinga, D. J. (1989). *Law of Trust I Nigeria* (1st Ed.).

Similarly, it ceases to exist where the legal estate passes to a bona fide purchaser for value of the legal estate without notice of the trust. It is important to note that the subject of the trust must be some form of property. Normally, this takes the form of legal ownership of land or of invested funds. However, it may be any sort of property such as land, money, chattels, equitable interests or choses in action.

Jegede M.I (1981)[13] in his book, explained that trust is an institution received into Nigeria legal system and like other equitable institutions and remedies, any claim arising from trust must be shown to have an ancestry founded in the history and in the practice and precedents of the courts administering equity jurisdiction. He expressed further that, one of the distinctive features of a trust is that it provides for situation in which property is manage by one for the benefit of another. He stated that even though other institutions provide for such property management relationships, notwithstanding that fact, when they are seen and examined in the context of the essential requirement of a trust, the difference becomes clear and the uniqueness of a trustee is important to the smooth administration of a trust. The trust property must be vested in the trustee who will hold such property in accordance with the terms of the trust.

Muiz Banire in his book The Nigerian Law of Trust (2002:25)[14], analyse the definition of trust as given by Lewin who in turn adopted a definition put forward by Mayo J.[15] It was explained that trust refers to the duties or aggregate accumulation of obligation that rest upon a person described as the trustee. The responsibilities are in relation to property held by him, or under his control. He will be compelled by a court in its equitable jurisdiction to administer that property in the manner lawfully prescribed

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[13] Jegede, M. I. (1981). *Principle of Equity*. Ethiope Pub. Cor.: Benin City.
[14] Banire, M. (2002). *The Nigeria Law of Trusts*. Excel Pub. Nig. p. 25.
[15] Mayo, J. in Re Scott

in the trust instrument or where there are no specific provisions written or oral, or to the extent that such provision is lacking or invalid, in accordance with the equitable principle.

As a consequence, the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee but to the person called cestuique trust, or beneficiaries, if there be any, if not for some purpose which the law will recognize and enforce. A trustee may be a beneficiary, in which case the advantages will accrue in his favour to the extent of his beneficial interest.

Olayide Adigun (1987)[16] in his work, he argued that in conventional English legal treatise, a trust is an equitable obligation binding a person (called trustee) to with property over which he has control (i.e. trust property) for the benefit of persons (known as beneficiaries or cestuique trust), of whom he may himself be one. The beneficiaries may be may be charity, human or a definite non charitable purpose. This apparent definition of trust does not tell much about the device called "trust" which Maitland[17] described as the greatest and most distinctive achievement performed by English men in the field of jurisprudence- an institute of great elasticity and generally as elastic as general contract.

The trust system is a very flexible device. This is because, it gives room for multiplicity of trustee and functions. The trustees could be successive or concurrent. For example, in a single trust instrument, there can be human beneficiaries and benefits for other purposes which are charitable. Similarly, properties of all types such as; money, choses in action, shares and real property can be the subject matter of a trust.

[16] Adigun, O. (1987). *Cases and Texts on Equity Trust and Administration of Estate* (1st Ed.). Ayo Sodimu Pub. Ltd: Abeokuta. P.246.
[17] Maitland, F. W. (1936). *Equity: A course of lectures*. J. Brunyate (Ed). p.23.

The trust splits ownership of property between the trustee and the beneficiary. The trustee holds the legal interest while the beneficiary holds the equitable interest.

The nature of the trustee's interest is a right in rem, that is, the rights of an owner of property. The trustee can validly confer title over trust property to a third party. However, the third party must be a bona fide purchaser for value without notice. On the other hand, the interest of the beneficiary is described as an interest in personam. The beneficiary of a trust has a right of personal action against the person of the trustee who has breached his trust. In the event of a transfer in breach of trust to a bona fide purchaser, the purchaser's interest in the trust property supersedes that of the beneficiary. But any other transfer in breach of trust gives the beneficiary a right to trace trust property into the hands of the volunteers and creditors of the trustee in his personal capacity.

In his own contribution to the concept of trust in Nigeria, J.O Fabunmi (1986)[18] assert that many authors have attempted to explain what a trust is with a little success. He however, agreed with the definition put forward by Professor George W. Keeton (1935)[19]. He defined trust as a relationship which arises where a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed cestuique trust) or for some objects permitted by law, in such a way that the real benefits of the property accrues not to the trustee but to the beneficiaries or other objects of the trust. There are certain important points arising from this definition. Firstly, it shows that there can be a trust of equitable interest. For example, a trust is created when A's right in a trust property is given to B1 and B2 to hold on

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[18] Fabunmi, J. O. (1986). *Equity and Trust in Nigeria.*
[19] Keeton, G. W. (1935). *The law of trust.* Published by HLRA. p.535-537.

trust for D. Secondly, it is possible for both the legal and equitable titles to be vested in one person as when he, as a trustee holds a legal interest in trust for himself. Similarly, some trust may be valid even if they are for the benefit of purposes. Also, a trust is not necessarily created whenever legal and equitable interest are separated. Fabunmi[20] stressed that if a new trustee is appointed by deed which contains a declaration by the appointor to the effect that the trust property vests in the person who by virtue of the deed became and are trustees for performing the trust, that declaration without any separate conveyance or assignment operates to vest in those persons the trust property.

Although the relationship between the parties to trust has not been elaborately highlighted, attempt has been made to explore more about the intricacy surrounding trust in Nigeria jurisprudence as well as the key features of trust and how they interrelate.

Trust consists of vast and interrelated parts, and the issues involved may sometimes be intricate. In most cases, trust issues often brought before the courts for adjudication are whether the trust is question is a legal one or has been validly created, questions of lawful management of the trust property, whether the trust is a private or public one, requests on a trustee to render account, requests for specific performance, recover of trust assets, breach of trust and construction of trust terms, etc.

Despite the various and the imperativeness to which trust could be put into, however, trusts are less frequently used in Nigeria as in England where the concept was received into Nigeria because of the cultural and social differences in the lives of the people.

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[20] Fabunmi, op.cit.

However, Roger Leroy Miller and Gaylord A. Gentz[21] saw trust as any arrangement through which property is transferred from one person to a trustee to be administered for the transferor's or another party's benefit.

From the above definitions, it is imperative to assert that a trust relationship creates some-sort of a fiduciary relationship among all the parties to the trust. A person known as the 'settlor' gives his property which may tangible or intangible to another known as the 'trustee' for the benefit of the settlor or other persons named by the settlor as 'beneficiaries'. Confidence is reposed on the trustee to deal with those properties righteously. In the case of *Maguire v Makaronis* [1997] HCA 23[22] it was held that equity intervenes not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary to and vindicate the high duty owed to the plaintiff. It went further to state that those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties, labour under a heavy duty to show the righteousness of the transactions. In addition, a trust relationship is imposed when the legal owner of the property has behaved unconscionably in some ways or it will be unconscionable to deny the beneficial rights of another.

This unique creation of equity cuts across various spheres of life without one noticing. Its ingredients can be found in banking, pension schemes, capital market, companies etc. Under banking operations, the owner of an account in a bank is the settlor and beneficiary while the bank stands as a trustee keeping the monies or securities of the owner of the account for his benefit. On account of death of the actual owner of the account, the next of kin stands as the beneficiary while the bank retains

[21] Roger, L. M.
[22] [1997] HCA 23

the position as the trustee. Notably, there exist trust relationships in oil and gas practice especially under charitable trust.

It has to be noted that the concept of family ownership of land in Nigeria served a purpose similar to that of trust, where the concept of individual ownership is a foreign one, rather, land belongs to the family and the head of family holds the family land for the use of the family members. The head of family to some extent assumes the position of a trustee and all members of the family have equal right to the property. See *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 1A.C. 399 at p. 404[23] per Lord Haldane. The concept of trust under customary law is however different from that under the English law because while the trustee is regarded as the owner of the trust property, the head of family is not regarded as the owner of the family property, but rather as the caretaker.

The Land Use Act also embodied the concept of trust by vesting the control and management of land in each State of the federation in the Governors to be held in trust and administered for the use and common benefit of all Nigerians. Such was the decision of The Supreme Court in *Abioye v. Yakubu* [1991] 5 NWLR (Pt. 190) p. 130[24].

The concept of trust under the Land Use Act is however not the same as in the law of trusts because the trustee under the Act, which is the Governor cannot be compelled to render account as trustee under English law. Thus, the kind of trust created under the Act has been regarded as a bare trust[25]. See *Abioye v. Yakubu* (supra). Also, while the head of family under customary law can be held to account, the Governor under the Act cannot be held to account.

[23] [1921] 1A.C. 399 at p. 404
[24] [1991] 5 NWLR (Pt. 190) p. 130
[25] Op. cit.

# CHAPTER THREE

## THE CONCEPT OF TRUST UNDER THE NIGERIA LEGAL SYSTEM

## 3.1 INTRODUCTION

In Nigeria as in most jurisdictions, the law of trust is governed by statutes and case law. The trustee is charged with the management of trust property and holding the same according to the instructions of the settlor in the trust instrument. The concept of trusteeship is well founded in the system of ownership under customary law. For example, ownership of family property under trust lies in the head of the family.

## 3.2 TRUST AND NIGERIAN CUSTOMARY LAND TENURE

Under Customary law, title or ownership to land ranges from individual, Communal, to family ownership. The term ownership is a multi-referential word, which does not lend itself to an apt or precise definition. The issue becomes more complex when the word is to be defined in the context of customary land law. The ordinary meaning of ownership is defined as collection of rights to use and enjoy property, including right to transmit it to others. It is the complete dominion, title to proprietary right in a thing or claim[26]. It means the entirety of the powers of use and disposal allowed by law. It is the right of one or more persons to possess and use a thing to the exclusion of others. It is the right by which a thing belongs to someone in particular, to the exclusion of all other persons.

It means the exclusive right of possession, enjoyment, and disposal involving as an essential attribute the right to control, handle and disposal[27]. Black's Law Dictionary defines ownership to mean the collection of rights allowing one to use and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Nwabueze explained

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[26] Nwabueze, B. O. (1973). *Nigeria land law*. Nwamife Publishers: Enugu. p.7.
[27] *See* Black's Law Dictionary (5th ed.). St. Paul Mim. West Publishing Co. p.997.

the concept of ownership "as the most comprehensive and complete relation that can exist in respect of anything. It implies the fullest amplitude of rights of enjoyment, management and disposal over property. Put differently, it implies that the owner's title to these rights is superior and paramount over any other rights that may exist in the land in favour of other persons"[28].

The next issue for determination is that of ownership of land under customary law. In other word, who owns land under customary law? This has been succinctly stated in the celebrated case of *Amodu Tijani v Secretary of Southern Nigeria* [1921] C399 at 404[29]. In this case, the appellant was one of the Idejo white cap chiefs of Lagos. He was the head Chief of the Oluwa family or community and one of the Idejos or land owing white cap Chiefs of Lagos and the land in question was situated at Apapa and was occupied by persons some of whom paid rent or tribute to him. By a notice dated November 12, 1913 certain lands situated at Apapa were acquired by the Government of the Colony under the Public Lands Ordinance (No. 5 of 1903) for public purposes.

The appellant as Head Chief of the Oluwa Family claimed compensation on the basis of ownership of the lands, Speed, C.J. held that the appellant was entitled to compensation on the basis of his having merely a right of control and management not on the basis of absolute ownership. That decision was affirmed by the full court. On appeal to the Judicial Committee of the Privy Council it was held that the radical title to land by the White Cap Chiefs of Lagos is in the Crown, but a full and actual title vests in a Chief on behalf of the community of which he is the head. Concerning the land held by White Cap Chiefs being acquired for public purposes under the Public Lands Ordinance, 1903, it was held that compensation was payable on the footing that

[28] Nwabueze, B. O. op.cit.
[29] [1921] C399 at 404

the Chief was transferring the land in full ownership (except so far as it was unoccupied), the compensation was to be distributed among the members of the community of which he was Chief according to the procedure provided by the Ordinance.

Also in *Lewis v Bankole* [1980] 1 N.L.R 82[30] where a certain Lagos chief called Mabinuori died in 1874 leaving twelve children and three separate plots of land. On one, the family compound, he lived with his wives and some of his children and domestics; on another he built houses for his eldest daughter and two of his sons; whilst the third was dedicated to the worship of the family fetish. About thirty years after his death, certain of his grandchildren, including the issue of the children for whom separate house were built, brought this action, claiming that the family compound which had since remained in the occupation of some of the children and grandchildren was the common property of the entire family. Speed Ag. C.J. held that by tacit mutual arrangement and acquiescence of all parties extending over a number of years, the various properties left by the deceased chief had been separated and come to be considered as separately owned.

The essential character of customary land law is that land belongs to the community, the village or the family. Individual ownership of land is a foreign concept. Under customary law, all members of the community, village or family have an equal right to the land. Title to land is vested in the corporate unit. Individuals cannot lay claim to any portion of it as the owner. Individual rights are limited to the use and

[30] [1980] 1 N.L.R 82

enjoyment of the land. The community head is a caretaker performing administrative functions in a representative capacity and does not have sole rights in the land[31].

The Chief or administrator of the village of head of family has charge of the land and is only loosely called the owner. He is in essence a trustee and as such holds the land in trust for the use of the community or family. Every member who wants to use it is entitled to be allocated an adequate piece for cultivation to satisfy his/her needs but cannot dispose of such land without the consent of the elders of the community[32]. This legal status of land is in no way affected by the super-imposed statutory regime of the colonial administration through the Crowns Land Act. The only meaning of such super-imposition was to vest the root title to land in the Crown but only notionally as actual ownership was retained by the community and the individuals who worked the land. In effect the individual once allocated land enjoys all attributes of "owner" and in case of eminent domain, compensation paid goes to him/her.

The concept of trusteeship is well founded in the system of ownership under customary law e.g. ownership of family property under customary law is vested in the family as a unit but the power of management and control of such property is vested in the head of the family and he is strictly enjoined to exercise the power for the benefit of himself as well as other members of the family[33]. He enjoys a wide discretion in the exercise of his power as long as he discharges his duties in accordance with rules of customary law. Due to the managerial duties of the family head, he is often referred to as the owner of family property but in the real sense of it, he acts somewhat as a trustee, holding family property on behalf of the family members who would be regarded as the

[31] *See* Amodu Tijani v Secretary Southern Province [1921] 3 NLR 24.
[32] Ibid.
[33] *See* Amodu Tijani v. Secretary Southern Province (*supra).*

beneficiaries. However, the concept of family property under customary law maintain a strict distinction between management and the beneficial enjoyment of family property. Thus the burden of management lies with the family head while beneficial enjoyment of the property vests in members of the family[34]. This is the basis of trusteeship ideas in the customary law system of property ownership, it is also the premise upon which fiduciary principle relating to management and control of family property are formulated.

The legal proposition that the head of the family holds family possession in trust for himself and other members of the family is not derived from the received English law of trust. It is rather, a composite designation of a traditional system of property holding which by itself creates a unique species of trust[35].

There is only one recognized ownership of family property under customary law and that ownership is vested in all the members of the family as a group and not in individual. Such ownership can only be validly transferred by the head of the family with the consent of the principal members of the family[36]. This limited powers of head of family under customary law to dispose of family property indicates a significant difference the powers of head of family as a trustee of family property and those of a trustee under received English law of trust in relation to his trust[37]. Although strictly constrained by the instrument creating his trust, the power of an English trustee to confer good title on the purchaser has never been in doubt, even if the exercise of this power amount to breach of trust.

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[34] Yakubu, M. G. (1981). *Nigerian land law*. Macmillian.
[35] Asante (1975). *Property law and social goals in Ghana*. p.88.
[36] Adedire v. Ife Divisional Council [1963] 1 AIIDCR 30.
[37] Yakubu, M. G. (1981). *Nigerian land law*. Macmillian.

Under the English legal system, there is a distinction between law and equity in that, the effect in the creation of two separate titles in one property such that legal title is vested in the trustee while the equitable interest is vested in the beneficiary. On the contrary, the customary law system of ownership of property does not recognize duality of ownership. Notwithstanding the extensive and flexible powers of the head of a family in relation to family property, the head's duty to consult principal members of the family to obtain their consent before entering into any major transaction affecting family property remains prime importance.

Furthermore, the duty of an English trustee to account provides a distinguishable feature between the concept of trusteeship under English law and trusteeship under customary law. It is a well-established principle that the trustee under the received English law is liable to account to the beneficiaries of his trust, this was not same of the trustee under customary law. The non-liability of the head of the family from accounting to other members is a privilege attaching to his office. This exemption of the head of the family from accounting has been a feature of the tenure from the very early times and it is then a settled incident of family property until recently. In *Ajiboye Akande v Bamgboye Akanbi* [1987] 2 NWLR (pt 55) 158 at 171, it was held that the head of family, like a trustee under the English law is accountable to the members of the family. In the words of Somolu J. he stated thus; "*I can see no harm in making accountability of trustees of property held under customary law as strict as that of other types of trustees known to our law*"[38]. Thus, accountability of the family head, though foreign to the customary law practice, has been adapted and hence the accountability practice of the English trustee applies to the family head acting on behalf of the family.

[38] [1987] 2 NWLR (pt 55) 158 at 171

It is well known that the concept of trust was introduced into Nigeria by the English received laws and before that time, the entire concept was foreign to the system of administration within our country. However, in an attempt to reconcile the method of administration of the English with that of the colonies, trust was introduced. Since its introduction, it has been a focal point in courts of law, being that there has been no distinction between courts of common law and courts of equity in the Nigerian jurisprudence as it was in the English setting. But its administration still remains alien to the customary law system; ranging from the duality of interest in a trusteeship i.e. the equitable interest held by the beneficiary, as well as the legal interest held by the trustee, which the customary law does not recognize and the accountability of the family head as a trustee and so on.

## 3.2 THE APPLICATION OF CUSTOMARY LAW AND RECEIVED TRUST LAW IN NIGERIA

There are three (3) types of land title under native law and custom, namely, communal title, family title, and individual title.

### Individual Title

It was very rare in the past to hear of Individual title or land holding it is a practice that was hardly known to customary law. This was looked upon as being repugnant to natural phenomena among Nigerians[39]. The only systems of land-holding known to the people there communal and family holding. This indeed, was the gradual development of Individual land holding[40]. This process was accelerated when other reasons which favoured individual ownership of land increased or multiplied[41]. The

[39] Yakubu, M. G. (1981). *Nigerian land law*. Macmillan.
[40] *Ibid.*
[41] *Ibid.*

main reasons for the fragmentation of the family system of land holding to an individual system were the social and economic development, the growth of education and health services, the introduction of a money economy and the modernization living standards[42].

Individual tenure is a feature of land holding that is now known throughout Nigeria. Thus it would seem that the basis of concept of family property is the recognition of individual ownership, for when founder of a family who acquired land dies, his- self acquired property devolves on his children as family property as there was no notion of sale or device of land[43]. In *Otugbolu v. Okeluwa ors* [1981] 6.7 S.C. 115-116, the Supreme Court confirmed individual ownership of land under customary law. In the words Obaseki. J.S.C.

> *The knowledge of customary land tenure of each locality is within the knowledge of members of the community. Each member of the community generally within his economic capacity does acquire as he desires, a piece of parcel of communal land which he can transmit to his offspring and which he is entitled to protect by action a claim to his right against any other member who trespasses. To that extent, the interest of the community in the land is displaced or postponed[44].*

Even in what appears to be the strict communal nature of the Benin land tenure system, individual ownership was conceded. In *Arase v Arase* [1981] SC. P. 33 at 58 the Supreme Court observed that:

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[42] Yakubu, M. G. op.cit.
[43] Niki Tobi (1992). *Cases and materials on land law.*
[44] [1981] 6.7 S.C. 115-116

*"it is now settled by decided cases that basically all land in Benin is owned by the community for whom the Oba of Benin holds the same in trust, and it is the Oba of Benin who can transfer to any individual the ownership of such land"*[45].

It could be seen from the above judgement of the Supreme Court that the concept of individual ownership is a settled issue at customary law. A more recent decision of the Supreme Court in *Chukwueke v Nwanko* [1985] 2 WLR p.195[46] represents the climax of land at customary law. In this case the plaintiffs/respondents had sought a declaration of title to a piece of land. The plaintiff/respondent based their claim on the fact that their ancestor had settled on the land from time immemorial.

On the other hand, the defendants, while admitting that Uda was a remote ancestor of themselves and other respondents denied that the land was ever occupied by him. They contended that their direct ancestor had cleared, cultivated and occupied the land. Since then they had exclusive possession of the land, and planted crops on it. Evidence before the court showed however, that the land in dispute was surrounded by individual land and members of Amuda families. After a review of the evidence and the address of counsel, the trial judge dismissed the plaintiff/respondent's claim. Dissatisfied by the judgement, they appealed to the court of appeal and succeeded.

In doing so, it was the opinion of the court that the land in dispute was communal land and held that the mere use of it by any member of the community, did not convert the land into individual lands. The defendants/appellants were not satisfied with judgement of the court of appeal and hence appealed against same to the Supreme

[45] [1981] SC. P. 33 at 58
[46] [1985] 2 WLR p.195

Court. Their counsel submitted that despite the overwhelming evidence that individual ownership is permissible under native law and custom of the Amuda clan, the court applied the general principle of inconvertibility of communal land ownership. Allowing the appeal, the Supreme Court held that the court of appeal was in error by applying the principle of inconvertibility of communal land tenure to individual tenure. Sowemimo CJN, who delivered the lead judgment (disapproving of the action of the Court of Appeal) held that:

> *The court of appeal appears to overlook the decision of this court (supreme court) in Otogbolu v Okeluwa (1981) 6 - 7 Sc 99 at 137 to the effect that the general principle of communal ownership as pronounced in Amodu Jijjani v. Secretary Southern Nigeria (1921) AC 404 would not apply where it is established by evidence that native law and custom in any particular area differs from the general principle.*

From the foregoing, it is abundantly clear that authorities have firmly established the existence of individual tenure as a feature of customary land law and the individual acts as a trustee for the beneficiaries in respect of the land. This is so because as soon as he dies the interest in the land reverts to the family as the land for re-allotment to other members of the family. This is how the trust law comes into play under customary land law.

**Communal Title**

The word "communal" means a group of people. This group of people may be a tribe, a town, a village or an extended family. The group may speak the same language, share the same culture, and form a distinct social and political entity. It may

also be a single autonomous unit or a parent village with a number of off- shoots[47]. Another kind of a community is that which is free from all kinship factors and based solely on geographical contiguity, common residence on the same soil serving to bind its heterogeneous elements into a single society in which every individual has an equal claim to a share of the common land for cultivation, building and graving[48]. In a community, land is held by an individual and is expressed to be vested in the head. The rights are exercised through headmen of villages and ward- heads who may be hereditary or appointive offices who distribute land to those who need it, control the common pastures and supervise the admission of non-member-strangers[49]. The concept of communal land means that individual members of a political or social group have certain claims, powers, privileges and immunities in or over the land vis-à-vis the political authorities or other members of the group.

In this sense the land belongs to the community and the word is use as a description of a group which considers itself, and is regarded in law or by the society, as a corporate entity. Communal land holding is largely practiced throughout Nigeria. The whole of the village land belongs to the village community at large. The principle involved is that every member of the community is entitled to the use and enjoyment of the land. The village or the community chief and his councillors manage and control the land for the common benefit of the people. Every member of the community has an inalienable right of access to the community land. The community rights extend to declaring some parcels of land for public use such as road construction, markets, meeting places, burial and sacred lands and grazing land. Where compensation is paid for the community land by the government, the payment goes for the use and benefit of

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[47] Yakubu, M. G. (1981). *Nigerian land law*. Macmillan. p.59-60.
[48] *Ibid.*
[49] Allot, *Essays in African Law*. p.70.

the whole community[50]. The same can be said of money collected from lease, loan or sale of the community land. The community has the reversionary right in cases of abandonment and revocation of grants to strangers[51].

The control and management of communal land is vested in the chief and his councillors who are the trustees of the community land hence the relevance of trust law to the community land. Although the chief is the chief executive with regard to control, his work is normally done by the ward heads. The ward-head allots land to members of the community freely without consulting the chief. However, the chief must be consulted where the grant is to a total stranger. The chief or ward-head may be called the "land lord"[52]. It should however, be stressed at this point that the word landlord here does not have the same meaning as the word landlord or tenant under the English Law. While the landlord in the latter is the proprietary owner of the land and has exclusive control and rights in the land, the former is only a trustee[53] and a representative of the community from whom he derives his powers over land. The authority of the chief over land is derived from: (a) His being the trustee of the community land[54] and (b) his being the legal representative of the community[55].

It should be noted that the trusteeship position of the chief over community land was clearly stated in the celebrated case of *Amodu Tijani v Secretary, Southern Provinces* [1921] 3 NLR 24[56] where the court said "… to some extent, the position of the chief with regards to community land is that of a trustee and as such he holds the land for the use of the community…" A distinction however should be drawn between

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[50] Yakubu, M. G. (1981*). Nigerian land law. Macmillan*. p.60.
[51] *Ibid.*
[52] Political Memoranda No. 10, Para. 11.
[53] [1921] 3 NLR 24
[54] *Ibid*
[55] *Ibid*
[56] [1921] 3 NLR 24

the trusteeship position of the chief on the one hand and that of English Law. The most crucial difference is that while under the latter the trustee normally has a legal title to the subject matter of the trust, while under the former the legal title is vested in the community[57]. He is only to manage or control the land on behalf of the community and he cannot do anything in connection with the land contrary to the established customary practices[58].

His position places upon him duties of a fiduciary nature towards the members of the community[59]. He is accountable for his dealings in the land[60] and has a duty of loyalty[61]. Therefore, he cannot be involved in such dealings with the community land where his personal interest may conflict with that of the community[62]. Trust law is relevant in this regard for the purpose of regulating the position which the chief or the community head occupies vis-à-vis the members of the community. He is required to discharge his duty in accordance with trust law.

**Family Title**

The family system of land ownership is a system whereby the whole family holds land jointly. They may use the land jointly or separately, but the ultimate ownership of the land lies in the whole family. One may rightly observe that family land-holding represents one of the main forms of land-holding in Nigeria. The ownership of the family land lies in the family as a corporate entity. The legal power to control and manage land lays in the family as a unit. This, therefore, means that all the family members have the rights and liabilities in the land. Thus, the holding of family

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[57] Yakubu, M. G. (1981). *Nigerian land law.* Macmillan
[58] *Ibid*
[59] Asante (1975). *Property law and social goals on Gana Acc.* p.58.
[60] Abude v. Onono [1946] 12 WACA 102 at 104
[61] *See* Amodu Tijani v Secretary Southern Province (*supra)*
[62] *Adedire v Ife Divisional Council* [1963] 1 AIIDCR 30

land under customary law is joint and indivisible[63] unless partition takes place. In fact, even when partition is said to have taken place upon the death of the individual owner his interest reverts back to his family and it thereby continues as the family property. The head of the family will in this regard be seen as a trustee[64] of the family land and this make his activities come under the trust law. Hence, relevance of trust law in administration of real property under customary law.

A head of family is the person who manages family property for and on behalf of other family members. The head of the family represents the family at any gathering or occasion. He is the family voice at the village or community meeting[65]. He is the trustee of the family property[66]. He is accountable to the family members as to how he manages the family property[67] and every other thing in respect of the family property[68]. He must relate to the family the decision of the village or community meetings, when family property is sold he must account to the family members[69]. The family head can be appointed by operation of law or expressly.

**Appointment of Family Head by the Operation of Law**

In *Lewis v Bakole* [1909] 1 N.L.R 81, it was held that on the death of the founder of the family the proper person to be the head of the family is the Dawodu[70] or eldest surviving son. However, there are conflicting views over the question of a successor to the Dawodu. In this case, a plaintiff witness gave evidence that according to Yoruba custom, on the death of the Dawodu the sons of the founder of family are taken in turn

[63] *Ogunmefun v Ogunmefun* [1961] 10 NLR 82
[64] *Adesoye v. Taiwo* [1956] 1 FSC 84
[65] *Adagun v. Fagbola* [1943] 11 NLR 110
[66] *Bassey v. Cobham* [1974] 5 NLR 90
[67] *Kosoko v. Kosoko* [1975] 13 NLR 131
[68] *Ibid*
[69] *Ibid*
[70] [1909] 1 N.L.R 81

and then the sons of the Dawodu and other sons' sons. In *Inyang v. Ita* [1929] 9 N.L.R 84 at p.85, this special privilege of the male was testified to and accepted by the court as a correct statement of customary law among the Effiks. It was ruled that the headship of a house belongs as of right to the senior male member of the house[71].

However, in the former case, that is *Lewis v Benkole* (supra), the court did not give much weight to the assertion of such a principle and it accepted as the better view, the evidence of the Lagos Chief, that after the death of the Dawodu "the eldest child becomes head." The most recent Supreme Court decision on this issue is that of *Otun v Otun* [2004] AII FWLR p.407 at 409[72]. The crux of this case is the administration of the estate of late Ashimi Otun, the parties' ancestor who died in June 1987, leaving seven wives, four male children and a daughter. The appellants are the grandchildren of late Ashimi Otun while the 1st respondent is the only surviving son. After the death of Ashimi Otun, the established practice within the Yoruba family is that the eldest son succeeds a deceased Mogaji or Dawodu. In other words, the male children succeed themselves in accordance with the Yoruba native law and custom. The last Dawudo died in December 1979 leaving the 1st respondent as the only surviving son, who, naturally, assumed the responsibility of managing his late father's estate as the Dawodu of the family. He applied and obtained letters of administration from the probate registry, Ibadan High Court but not before it had been gazetted and advertised as required by law and there was no objective from anyone.

After the letters of administration had been granted to the 1st respondent, the appellant, as plaintiffs claimed against the 1st respondent a declaration that the letters of administration were null and void and of no effect. They also sought an order of

[71] [1929] 9 N.L.R 84 at p.85
[72] [2004] AII FWLR p.407 at 409

revocation of the letters of grant on the ground that he obtained it by falsehood. At the end of the trial, appellant's claims were dismissed. Their appeal to the Court of appeal was also dismissed. Dissatisfied, the appellants appealed to the Supreme Court. The Supreme Court dismissed the appeal and held that under Yoruba customary law, the proper person to succeed as head of family is the eldest surviving son or Dawodu. The Dawodu so appointed by the operation of law becomes the trustee of the family property.

**Appointment of Family Head by the Founder**

The founder of family property has always been able to appoint a head of his own choice, with an unlimited and uncontrolled discretion in his choice, to the point of even selecting a stranger. As to what will be the position of the stranger who is appointed as the family head the case of *Sogbesan v Adebiyi* [1941] 6 N.L.R 26 at p.27[73] provide the answer by suggesting that if a person who is not a member of the family is appointed head, he is deemed to be included in the family with rights and duties as the natural members. In that case, the testator appointed a brother to be the head of his (the deceased's) family and directed that he should act in all family matters under the direction, control and advice of the testator's mother and aunt. The appointment was held valid.

Apart from any such express appointment however, younger brothers of deceased heads of families usually succeeded to the family headship under the ancient and, it would seem, many modern systems of land tenure[74]. In *Ajoke v Olateju* [1962] LLR 32[75] the plaintiff, Ajoke was one of the descendants of one Buko who was the

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[73] [1941] 6 N.L.R 26 at p.27
[74] Elias, T. O. (1971). *Nigerian land law.* Sweet and Maxwell: London. p.105.
[75] [1962] LLR 32

original owner of the family property at Surulere and the founder of the Buko family of which she was also the oldest living member. Mustafa the head of the family who died immediately before the institution of these proceedings had purported on his death- bed to appoint the defendant. Olateju, as the head of the family on the incorrect ground that no other relative of his was still alive, and also to authorise her to collect the rents from the property.

The plaintiff sued for a declaration that she was the family head, for accounts and for injunction restraining the defendant from collecting any more rents or otherwise dealing with the property. The plaintiff was a grand-daughter of Buko, but the defendant was not in the direct line. It was held that the plaintiff succeeded because, although the original founder of the family and owner of the property is entitled to make a death bed disposition of his property even so as to displace a person who would otherwise be entitled under customary law, a subsequent family head is not so entitled. There is no restriction on a female being appointed the head by the founder of the family[76].

**Appointment of Family Head by Members of the Family**

This will arise when the family head lost the support of his family members. In this regard, the family members may resolve to remove such head and appoint another in his place. Or, when there is a vacancy the family may look for a person they believe is best suited to hold the office and appoint him. There can be no doubt that female member may be elected by popular vote in this way[77].

**Rights and Duties of the Head of Family as a Trustee**

[76] James, R. W. (1973). *Modern law of Nigeria.* University of Ife Press: Ile-Ife, Nigeria.
[77] *Taiwo v. Sarumi* [1913] 2 NLR 84

Rights according to Black's Law Dictionary means "a power, privilege, faculty or demand inherent in one person and incident upon another rights as generally defined as power of free action". The head of the family is also a member of the family and whatever right is due to any member of the family is equally due to the head of the family. It is on this note and to avoid repetition, it will be neater and more convenient to treat the rights of the head of the family jointly with that of the members of the family. Thus, the general management and control of the family property is in the hands of the family head[78]. He is the proper person to look after the property. He keeps documents of title (if any) and other documents relating to the land. He also negotiates transactions affecting the land on behalf of the family. However, the consent of the family is required before he can dispose of family property. It is within his power to allocate portions of the family land or rooms in the house to members or strangers[79]. He does not require the consent of the family in order to exercise his discretion and unless it is misused, for example by treating the family property as his only property. It should be stressed here that the right of management vested in the head of family is a trust, which he must exercise in accordance with trust law.

In many cases, the duties of the head of the family are similar to those of a chief. Thus he is a trustee and beneficiary of the family land[80]. In *Bassey v Cobham* [1924] 5 N.L.R 90 and others, it was held that the head of the family in possession of family land is analogous to that of a trustee, and the members of the family being beneficiaries, any member may claim his duties, in respect of the family communal land, if the head neglects or refuses to assert such rights. The Head of family allocates family land to other members and where there is surplus he makes grants to strangers after

[78] *Adigun v. Fagbola* [1943] 11 NLR 100
[79] *Lewis v. Bankole* [1909] 1 NLR 82
[80] Yakubu, M. G. (1981). *Nigerian land law.* Macmillan

consultation with the elders of the family[81]. Actions affecting family land are brought by the head as a legal representative of the family. In *Aregbe v Adeoye & Anor* [1974] 5 NLR 90, the action was brought by the family heads of Eweino Court a compound in Lagos, praying that the defendants be restrained from building houses on an adjacent piece of land over which they had hitherto exercised by local law and custom such a degree of control as to entitle their families as owners and occupiers of the houses in the compound to use and enjoyment of the surrounding open space[82].

The head men could under customary law grant permission to other people to occupy temporarily part of this open space, and they did permit one Labinjoh to erect a shed on part thereof since such a structure interfered little with their use and enjoyment of the land. But the plaintiffs in the instant case were non-suited by the Supreme Court overriding the Divisional Court, because instead of basing their claim on local law and custom they had claimed a prescriptive right of user - a concept of English law. Any member of the family may however, institute an action in the court to protect the family where the head is absent or has decided to keep quite. The head's routine and emergency actions in good faith bind the other members. Where it is not done in good faith, the head is personally responsible for his action[83]. In the case of *Fako v Fako* [1965] NMLR 3 the defendant, who was the head of Fako family, sold three houses belonging to the family with the consent of only one member.

An action was brought by the other members to the set aside the sales. The defendant argued that it would be inequitable to set them aside as the proceeds were expended to buy a chieftaincy title, which would benefit the family. The court rejected

[81] [1924] 5 N.L.R 90
[82] [1974] 5 NLR 90
[83] *Adegbite v. Lawal* [1948] 12 WACA 398

the argument of the defendant and said that the acquisition of a chieftaincy title for which the proceeds were used was a personal aggrandizement and therefore did not benefit the family as a corporate body[84]. The conclusion to be drawn from Fako's case is that where the head whose family's property was entrusted in his hand misapply the proceed of the sale or mismanage the property for his own selfish interest, he would be held personally liable, because he had breached the trust placed on him. But where, however, he used the proceeds of the sales in paying rates or dues, which were due to the family property, funeral expenses, or repairing the family property, or even paying for school fees of any member of the family the court will certainly uphold his action as valid.

The head of the family has a duty to keep accounts and the information available to other members. In *Kosoko v Kosoko* and others [1936] 13 N.L.R 131[85], the plaintiff claimed inter alia an account of rents and mesne profits of the family property of late Kosoko of Lagos under the control and management of the defendants as trustees for all the members of the Kosoko family. No accounts had been kept by the defendants until shortly before the claim was brought. They had managed the property for the family in accordance with usual custom which did not require the keeping of accounts. It was held that in the circumstances the plaintiff was not entitled to claim an account as of right and that his claim for an account must be dismissed.

Under the traditional practice, the head of the family was not accountable to other members of the family as to how he manages the family property. This was the position then, because in those days the needs of the society were very limited. The desire to hold property individually was rarely heard of. The paramount consideration

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[84] *Fako v Fako* [1965] NMLR 3
[85] [1936] 13 N.L.R 131

of the head of the family was the smooth running of the family's affairs not much concern was given to property.

It is my strong observation that this position should be looked at from a different angle today. It should be recognized that economic and social reality which is manifested by the community's aspirations and expectations in line with economic and social development today, necessitate that the head of the family gives an account of how he manages the family property. Gone are the days when the head of the family was looked upon as a God-fearing and an honest person. There are many tendencies today which may not make him act so honestly. For example, the head of the family may want to have the best handset and drive the best car and his children go to very good schools. Therefore, the right to demand an account should be a legal one. After all, native law and custom is a mirror of accepted usage[86]. This means that it is flexible and adaptable. It is not static. It changes as the society changes. Courts should therefore not feel bound always by their prior decisions on the principles of custom unless there is evidence that it still exist as the custom of the people.

**Rights and Duties of Family Members as Beneficiaries under Customary Trust**

Every member of family as a beneficiary has some inalienable right in the family property under customary trust. In fact, it was declared in *Thomas v Thomas & Anor* [1932] 16 N.L.R 5[87] that members of the family have reasonable ingress and egress on the family land, a voice in the management of the property, a share in the surplus income derived from it after necessary outgoings have been met.

[86] *Lewis v. Bankole* [1909] 1 NLR 82
[87] [1932] 16 N.L.R 5

Every member of the family including the head of the family has the right to reside on the family property[88]. This right basically includes use and enjoyment of the family property. This right springs from unity of possession, which exists from the nature of the title held by the family[89]. In a situation where the house is too small for the family or a portion has been let out, it cannot be occupied by all the members, in such cases, the right of possession will be represented by the right to share in the rents and profit derived there from. The position of the female members to reside in the family property is the same as that of their male counterpart. The only difference is that the males can leave with their wives and children[90] while in the case of the females the moment they marry, they do not have the right to bring their husbands on to the premises to reside with her and her husband has no interest in the property[91].

The issue that may come to mind at this point would be that of discrimination. By not allowing the female to bring in her family into the family property like her brother, it amounts to discrimination. It is the opinion of this writer that as long as anybody is a family member his or her right should not be short changed by virtue of his/her gender. If the female member decides to bring her family onto her family property she should be allow to do so. After all, they have equal right in the property. Above all, she did not choose her own sex, nor did anybody determine her sex. The next issue for determination is what will be the position if the family property is shared out?

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[88] *Coker v. Coker* [1938] 14 NLR 83
[89] *Ibid.*
[90] James, R. W. (Supra) at p. 88.
[91] *Ibid.*

This right was examined in *Lewis v. Bankole* [1909] 1 NLR 82[92] from the various pronouncements in that case, it appears that members must be considered in two different categories, firstly those residing in the family house secondly, those not so residing. Osborne C.J. held that with regards to the latter, no such right exists but they have a privilege to go in and out of the premises on those occasions when members of the family assemble for family purposes in the house. The right of ingress and egress is that right which a family member enjoys as a beneficiary of the family property, which is held in trust by the family head[93]. This right is not negotiable. It is due to the family member by virtue of his position. Therefore, trust law becomes relevant in this respect since the relationship of trustee and beneficiary is in existence.

This is no more than the right to be consulted as a family member before any important dealing with the family property is carried out and the right of members to be presented through their branches on the family council. The right of consultation is however, limited in respect of the persons to be consulted, and the occasion when consultation is necessary. The principal members of the family are to be consulted when alienation or sale takes place[94]. However, every member of the family enjoys that right of being informed about any dealings in respect of the family property. This way they express their views in the management of the family property.

Income or profit, whether in the form of rents, proceeds of sale, lease or compensation for compulsory acquisition by any governments, individual or corporate body that is realized from the family land, belongs to all the members of the family[95] and for this purpose a member is entitled to a share. The share of a member may be in

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[92] [1909] 1 NLR 82
[93] *Ibid.*
[94] Yakubu, M. G. (1981). *Nigerian land law.* Macmillan.
[95] Amodu Tijani v Secretary Southern Province [1921] 3 NLR 24.

money or in kind. It all depends on what is given out as compensation. The case of *Archibong v Archibong* [1947] 18 NLR 117[96] in this case, certain beach land belonging to the community of Duke-Town in Calabar had been compulsorily acquired by the Government and £3,000 paid as compensation. The money was given to the representative of the community who subsequently called the meeting of the community which he brought out the sum of £1,579 as compensation for the community land. Two other sub-family members of the community were not included in the meeting that took place nor was their share given to them. It was argued by the defendants that decision taken was the decision of the majority and therefore it bound the two members. In deciding in the favour of the plaintiffs the court observed.

It seems to me that he must be regarded as a kind of trustee and that each member of Archiding House has some kind of interest in the trust moneys. His obligations to the 'Cestuis que trust' are not nearly so high as those of a trustee known to English law… His actions must be capable of reasonable explanation at any time to the reasonable satisfaction of the members of the House…[97]

Another Instructive case on the issue was the case of *Odusi v Bolaji* [1961] LLR 217[98] where the plaintiff claimed a share in the income and account on the income paid as compensation on the community land acquired compulsorily by the Government. The court in ruling for the plaintiffs said:

> *He (the chief) has refused or failed to give the plaintiffs their shares or to render an account to them. The plaintiffs are left in ignorance as to the exact amount due to them and as to the facts from which such amount*

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[96] [1947] 18 NLR 117 also Akanda v. Akanda [1966] NBJ 86.
[97] *Ibid.*
[98] [1961] LLR 217

*could be ascertained… in the result, I am of the opinion that the plaintiffs must succeed in their claim against the defendant*[99]

**Village head as a trustee**

A village head is a trustee of the community land. He administers land for the use and common benefit of the people. He cannot sell or make an outright gift of community land. The Divisional Court at Calabar in the case of *Chief Omagbemi v Chief Dora Numa* [1923] 5 NLR 19 held that the land in dispute belonged to the community and the Chief was a trustee[100]. On appeal to the Supreme Court, the Court held that the Olu (Chief) held the land as trustee for the people and not as individual owner or on behalf of his family. By the village head being a trustee of the community land, means that he represents his community in all dealings related to the community land, and this of course, includes, any dispute in respect of the community land. Thus, he can sue and can be sued for any matter connected with the community land[101]. As a trustee the village head has to act in accordance with what is expected of a trustee that is, he has to act in good faith, he has to be accountable to the community inter alia[102].

**Rights and duties of Community Members as Beneficiaries**

The community members being the beneficiary of communal land, have some in a liable rights and duties owed them by the village head as the trustee of the communal land.

***Right to be Informed and Consulted:*** As pointed out above, the village head can sell communal land. If the need arises for sale of communal land, it is a matter of right for

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[99] *Ibid.*
[100] [1923] 5 NLR 19
[101] Nwabueze, B. O. (1973). *Nigeria land law* (supra).
[102] Ife v. Chief Adedire

the community members to be informed of such sale. It is also a matter of right for community (members) to be consulted when major decisions in respect of communal land has to be taken. It may include alienation of communal land by the village head.

***The Right of Allocation:*** The administrative and management control of communal land is vested in the village head who exercises it on behalf of members of the community. Every member has a right in conjunction with others in the use and enjoyment of Communal land. This right is an inherent right vested on every member of the family by virtue of his membership and can be enforced against the village head in the court[103].

***Duty to be Respectful and Obey the Laws of the Land:*** The community owes respect to the village head who is the trustee of the community. Without being respectful to the village head, he will find it virtually impracticable to discharge his responsibilities as a trustee. The foregoing are the rights and duties of community members under a communal trust.

## 3.4 CREATION OF TRUST

### Statutory Trust Over Land

Statutory trust is a creation of statute. This is a trust that derives its existence by way of legislation. For example under the Kaduna State property law, statutory trust exist by virtue of section 23 which provides as follows “for the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale after payment of rates, taxes, costs of insurance repairs and other

[103] Ajibola v. Ajibola [1947] 18 NLR 125.

outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the person (including an encumbrance of a former undivided share or whose encumbrance is not secured by a legal mortgage) interested in the land"[104].

Similarly, section 35 of law of property Act made provision for the existence of statutory trust in the same wordings with that of section 24 of Kaduna State property law, section 33 of the Administration of Estates Act declares that the personal representatives of an intestate are required to hold all the deceased's property upon trust with power to postpone the sale[105]. Further still section 33(1) of the Administration of Estates Act, as amended by Trusts of land and appointment of Trustees Act 1996 (TLATA), provides: "On the death of a person intestate as to any real or personal estate, that estate shall be held by his personal representatives with a power to sell it"[106].

Section 34(2) of the property law Act provides that where land is conveyed to persons in undivided shares it will vest in the first four named persons upon trust for all the beneficiaries as tenants in common. From the foregoing it is revealed that the moment a land owner dies without willing out his property, his intestate property will automatically come under the protection of the law and hence becomes a statutory trust. Under this arrangement the trustees of the statutory trust become the legal owner of the property while the beneficiaries become the equitable owner. Ownership of land statutorily speaking is vested it the authority as trustee while members of the public are the beneficiaries. This is graphically captured by the land use Act. For example, the preamble to the 1978 land use Act provides:

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[104] Kaduna State Property Law
[105] Administration of Estate Act 1925
[106] *Ibid.*

*An act to vest all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely in the Governor of the State, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individual resident in the state and organizations for residential agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on local governments*[107].

While section 1 of the said Act provides that:

*subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act*[108].

From the wordings of both the preamble and section 1 of the Land Use Act the ownership of Land is vested in a governor of every state in trust for the benefit of members of the public. It means therefore, that any person that needs Land for whatever purpose will have to approach the governor for the Land[109]. Even if the person is in possession of Land, and wants to effect any transaction in respect of that land, he still needs the governor's consent for such transaction e.g. assignment of his interest in land[110].

**Trust for Sale of Land**

[107] Land Use Act 1978
[108] Section 1 Land Use Act 1978
[109] Section 2 Land Use Act 1978
[110] Section 21, *ibid.*

This is a situation where the mechanism of trust law is employed to achieve a particular goal, for instance, creation of trust for sale of Land. Thus, S.63 of the Settled Land Act, provides that:

> *whereby any instrument, land or any estate or interest therein is subject to a trust or direction for sale or the proceed of sale or income is to be applied or disposed of for any person or persons for life or any other limited period, such land is to be deemed settled within the Act*[111].

The result is that the trustees cannot exercise their power of sale given them by the settlement unless the tenant for life gives his consent. However, where the tenant for life is unable to exercise his statutory powers unless he obtains an order of the court, until such an order is made, the trustees are empowered to sell without the consent of the tenant for life[112].

By the word settlement as used in the settled land Acts, it means all kinds of arrangements whereby property is given to particular person in succession[113]. For example, A makes a will leaving property to B for life with reminder to C in fee simple. The essence of settlement is a successive creation of interest by a single gift either by deed or will. Under strict settlement the tenant for life has wide powers to deal with the property subject matter of the settlement. For example, if land is settled on A for life remainder to B for life remainder to C and if A sells the property the legal fee simple is vested in the purchaser free from legal rights of A, B and C, their rights switch to the capital money.

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[111] Settled Land Act 1982, Section 63.
[112] S. 6, *ibid.*
[113] *See,* Megary and Wade, *The Law of Real Property* (4th Ed.) Chap. 6.

By bringing trust for sale under settle land Act, it was the beneficiary and not the trustees who can exercise the power of sale. This has caused a lot of inconveniencies. To correct it, S 7 of the settled Land Act provides that in the case of trusts for sale the tenant for life should be unable to exercise the powers of the Act without the order of the court, and that until such an order was made, the trustees could sell without the consent of the tenant for life. This section gives a purchaser some measure of security in dealing with trustees for sale unless such an order has been registered as a pendens (pending action). However, the Act does not give the trustees for sale powers of management, for example power to lease the property.

Back home in Nigeria, in States like Ogun, Oyo and Ondo the relevant law is the Property and Conveyancing Law. This law adopted the English Trust for Sale Act but the English Settled Land Act was regarded as unsuitable on the ground of its technicality and complicated Conveyancing processes. The result is that in the above-mentioned States, the only method of limiting Land to persons in succession is by means of a trust for sale. S. 32(1) of the Property and Conveyancing Law provides that:

> *where any land is limited to or in trust for any person by way of succession the same shall be deemed to be held on a trust for sale upon such trusts and subject to such powers as are necessary to give effect to the rights of the persons to whom the land is limited. Accordingly, a conveyance or devise creating a trust for sale or succession of interests inland which fails to vest the land in trustees upon trust for sale in accordance with the provisions of S.32 operates to vest the land in the trustees of the settlement upon the trusts specified. A trust for sale arises also where there is a conveyance of a legal estate in land to an infant jointly with one or more other person of full age and where an infant is*

*beneficially entitled to land either for an estate in fee simple or for a term of year absolute by reason of intestacy.*

Under the Kaduna State Property law, trust for sale is contained in section 39 to 44. Section 39 of the said law provides that:

*where any land is before the commencement of this law limited to or in trust for any person by way of succession, the same shall be deemed to be held on a trust for sale upon such trusts and subject to such powers as are necessary to give effect to the rights of the persons to whom the land is limited and after the commencement of this Edict, land may be limited as aforesaid only by the creation of such trust for sale*[114].

The powers of trustees for sale are contained in S.38 of the property and conveyance law, and S.45 of the Kaduna State law of property edict. The trustees may sell the trust land or otherwise deal with the land in any way they deem fit provided that they obtained the best consideration in money that can reasonably be obtained. Where trustees are authorized by the trust instrument, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in their possession[115]. The trustees can insure the trust property against loss or damage by fire[116]. If the trustees for sale refuse to sell or to exercise any of the powers conferred upon them any interested person may apply to the court for an order requiring them to exercise these powers.

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[114] Section 39 Kaduna State Property Law
[115] Section 8 (i) Trustee Law, CAP. 125 Laws of Western Nigeria 1959.
[116] *Ibid* Section 11

From the foregoing, it is revealed that trust law can be used for the Sale of Land. This again demonstrates the working significance or relevance of trust Law in the administration of real property in Nigeria.

**Trust for Purchase of Land**

This may arise in two circumstances the first is where a trust is created and a trustee is appointed specifically for purchase of land. Where, he is so appointed he is to act in accordance with the instruction of the appointing instrument. In this regard he is expected to be diligent in the purchase of land. Where the appointing instrument does not restrict his discretion he is free to do so. However, where he decides to exercise his discretion he should do so in line with the standard of prudence expected of a businessman[117]. Thus if the discretion relates to purchase of land, the trustee is expected to exercise such care and caution as an ordinary business man would. Also apart from purchasing only the type of land within the terms of his trust, he must avoid any land, which is subject to any encumbrance or prone to litigation no matter how profitable they seem to be.

The trustee should also avoid speculative business which depends on contingencies, or unproductive investments which produce no income for the trust estate. For instance, in Re power, the purchase of a house with trust funds for the occupancy of a beneficiary and which produces no income for the trust estate was held not be an investment[118].

The second situation is where trustee is statutorily given an inherent power to invest trust fund. Thus, Trustee Investment Act[119] stipulates the range within which

[117] Section 28, Trustee Law, CAP. 125 Laws of Western Nigeria 1959
[118] Speight v. Gaunt [1883] 9 APP. Case 1
[119] Trustee Investment Act CAP. 44 Laws of the Federation of Nigeria 1990

trustees can invest trust property. By the provisions of the Act a trustee can only invest in authorised and specified securities. The Act stipulates that a trustee can invest in the following securities:

a. Federal Government Securities

b. State Government Securities

c. Securities of Companies or Corporations[120] incorporated directly by an Act or Law specified in the Schedule to the Act.

d. Debentures and fully paid shares of any company incorporated and registered under the companies and Allied Matter Act (CAMA), not being a private company.

Furthermore, trustees appointed, for purpose of investment must act honesty. However, so long as the trustee acts in the honest discharge of his duty, he is protected by law. But where any loss results from a breach of his duties under the instrument of trust that will render him or her liable to make up the lost incurred. From the foregoing discussion, there is no gain saying that the effectiveness of trust Law with regard to transaction relating to Land has once more been revealed.

## 3.5 FORMALITIES IN CREATION OF TRUST

No formality is required for the creation of a trust if the property involved is in personalities, i.e. tangible personal movable properties, such as vehicles, shoes, television, etc. including money. What is essential is that, the manifestation of the intention to create a trust on the part of the settlor must be very clear, such is the case

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[120] *Ibid* Section 2 & 3

in *Paul v. Constance* [1977] WLR 521[121]. Mere intention to benefit an imprecise person will not be sufficient, *Jones v. Lock* [1865] L.R. 1 Ch. App. 25[122].

If the property is realty (i.e. immovable property, such as land), the intention to benefit someone must be evidenced in writing as required by the Statute of Frauds, Section 7; which requires that any declaration of trust relating to land to be evidenced by a memorandum in writing signed by the party creating the trust. The position on the States forming the old Western Nigeria is captured by Section 78(1)(b) of the Property and Conveyancing Law, which provides to the same effect that any declaration in trust in respect of land or any interest therein must be evidenced and proved by some writing signed by some person who is able to declare such trust or by his will. See *Forster v. Hale* [1798] 3 Ves 696 per Arden M.R[123].

The addition of the words "signed by some person who is able to declare such trust or by his will", is a clear indication that there are some persons who do not have capacity to declare inter vivos trust or by will. This is the reason why we have to treat the issue of capacity in separately in this unit, to enable you know those who have legal capacity and those who have not.

One must know that failure to comply with the above formalities may be fatal as the trust will be rendered unenforceable. Also note that, writing is not required in respect of constructive and resulting trusts in realty since these are implied and arise independently of the exercise of the will of the parties.

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[121] [1977] WLR 521
[122] [1865] L.R. 1 Ch. App. 25
[123] [1798] 3 Ves 696 per Arden M.R

However, the formality of writing[124] is further required in respect of a disposition of an equitable interest in both personality and realty under a trust by the beneficiary. Failure to do so renders the disposition void., this is as spelt out in Section 9 Statute of Frauds and Section 78(1)(C) of Property and Conveyancing Law.

In order to create a trust by will, some formalities are required both for the validity of the will and of the trust. According to the law, (The Will's Act 1837 Section 9 as amended by the Wills Amendment Act 1957 and the Wills Law 1959 Cap. 133 Laws of Western Nigeria 1959 applicable to the States forming the old Western Nigeria), requirements to create a trust by will are:

i. The will must be in writing[125].
ii. It must be signed by the testator or by some other person in his presence and by his direction.
iii. The signature of the testator must be attested by two witnesses, who must be present together in the presence of the testator[126].

Failure to comply with the above provisions of the law will render the trust to be void and no interest will pass under the will. Exceptions to this are secret trusts, whereby irrespective of the non-compliance with the provisions of the law, dispositions made under such trusts can be enforced in equity.

It is of note that, despite compliance with the provisions of law in creating a trust, coupled with the presence of clear intention of the testator to create a trust, such trust may run into trouble waters if the testator does not convey the property which is

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[124] Section 53 (i)(b) Law of Property Act 1925
[125] *Ibid* Law of Property Act 1925
[126] Section 9 Wills Act 1837

to be the subject matter of the trust to the trustee, a process called constitution of trust[127]. The importance of this is that, the beneficiary upon conveyance of the trust property to the trustee, an equitable interest is created in his favour while the legal interest is vested in the trustee. Thus, where the settlor conveys no property, then the trust is said not to be constituted and no interest passes to the beneficiary[128].

In order to create a valid express trust, part of the requirements is the legal capacity of the settlor, whether individual, corporation or statutory bodies, to create it. Related to this is the capacity of a person to hold interest in real property. Where a person cannot hold interest in land, this will affect the capacity to create a trust. The situation of capacity to hold interest in land varies according to the operative law. The issues will now be examined as follows:

## 3.6 CAPACITY TO CREATE TRUST

At common law for instance, an infant is capable of holding a legal interest in landed property. However, a sale or disposition of such property is voidable and may be repudiated before the infant attains the age of majority or within a reasonable time after attaining the age of majority. At common law, 21 years was adopted as the age of majority and anyone below this age is an infant. Thus, the position of an infant or a minor who attempts to create a trust, especially in a situation where the trust is not in his interest, will have the same effect at common law.

### Individual

In common law, age of majority is 21 years and this position has been restated by some State laws in the Federation, example is Section 2 of the Infants Law, Cap. 49

[127] AIB Group (UK) Plc v. Mark Redler & Co. [2014] UK Sc. 58
[128] Thomas v. Times Books [1966] 1 WLR 911

Laws of Western Region which states that, an infant is someone under the age of twenty-one years[129]. This has been adopted and now applicable in States forming the old Western Region of Nigeria. Consequently, any person of 21 years of age and above is regarded as of full age and has the capacity to hold legal interest in real property. Although, some statutory provisions have specified 18 years as “age of majority” or “full age”, for example, section 277 of the Child’s Right Act, Sections 29 (4)(a) and 35(1)(d) of the 1999 Constitution, and Section 20(1)(a) of the Companies and Allied Matters Act. The age of majority in Nigeria for other purposes nevertheless remains 21 years. This was the position of the Court of Appeal in *Elias v Elias* [2001] 9 N.W.L.R. (Part 718) p. 429[130].

With respect to the States where the Settled Act, 1882 operates in Nigeria, and an infant has interest in a real property, such land becomes a settled land. Thus, the infant becomes a tenant for life and the statutory powers vested in the infant as tenant for life will be exercised on his behalf by the trustees of that settlement[131].

However, in some other States in Nigeria forming the old Western and Mid-Western Nigeria, an infant cannot hold a legal interest in real property and where land was conveyed to an infant, this will result in the creation of a trust for sale in favour of the infant.

It follows from the above that an infant cannot create a trust of real property or create a valid will except such an infant is a soldier at war or mariners at sea. An infant can however create a trust over both legal and equitable interest in pure personality and over equitable interest only in real property.

[129] Section 2, Infant Act CAP. 49 Laws of Western Region
[130] [2001] 9 N.W.L.R. (Part 718) p. 429
[131] Settled Act 1882

**People with Mental Disability**

People with mental disability also cannot validly create or have a trust enforced directly against them since their mental deficiency may itself encumber their ability to validly dispose their properties or make will. Some of the things that may invalidate such trusts are the possible contradicting instructions of the insane settlor/testator or that he/she does not appreciate the nature or effect of such instructions as seen in Re Beaney [1978] 1 W.L.R. 770[132]. It is however possible to approach the courts for directions in respect of the settlement to be made on the property of an insane person. For example, Section 180 of the Property and Conveyancing Law and Section make provisions as to how to deal with such property. If the trust was created during the time that such an insane settlor was in his lucid period and he/she fully understands the nature of his act and the consequences of the same, such trust may be upheld as valid[133].

**Statutory and Incorporated Companies**

Statutory bodies and incorporated companies can also create trusts if the power to do so is contained in their enabling law and memorandum of association, otherwise any trust created will be declared ultra vires. By virtue of Section 38(1) of the Companies and Allied Matters Act, incorporated companies have all the powers of a natural person of full age and capacity in the execution of its business and objects. In effect, they can create trusts without such powers being expressly contained in their memo, the power to do so may be limited by their memorandum of association or by law[134].

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[132] [1978] 1 W.L.R. 770
[133] Section 180, Property and Conveyance Law CAP. 100 Laws of Western Region of Nigeria
[134] Section 38(i) CAMA 2004

From the foregoing, it is of note that compliance with the requirements for the creation of a trust is sine qua non if such trust is not to be declared invalid. With a critical examination of the requirements analyzed above, one will realize clearly that creating or settling a trust is something that should be given to professionals to handle in order to perfect the intricacies, including ensuring that there is legal capacity on the part of the settlor/trustee. In addition, experts' involvement will prevent any pitfalls which can render the trust from been declared void by the courts.

# CHAPTER FOUR

# APPLICATION OF THE CONCEPT OF TRUST IN INSTITUTIONS, CONSTRUCTIVE TRUST AND CASE LAW IN NIGERIA

## 4.1 INTRODUCTION

For centuries, trusts were primarily used in family relationships. The instrument of trust was a safe haven for fathers who sought to secure family wealth for their children who could not at the time due to obvious incapacities be vested with title to the property. The need to provide property for mistresses, illegitimate children, pursue educational, charitable and religious purposes was one of the chief motives behind the use of trust. Security of testamentary property, faithful distribution and accountability of the trustee were added attractions to its continued importance and increasing popularity in the family. However, with the massive growth of commerce and industry, complex business transactions arose. These commercial relationships, as was bound to be, posed their own peculiar problems. There then arises the dire need for protection of hugely contrasting commercial interests. Happily, the equitable trust, once again,

provided the solution. It was developed beyond its previous family boundaries to accommodate commercial relations[135]. Some rules like those relating to investment and delegation were perfectly suited to the commercial world and became guidelines for the administration of financial and economic related trusts. Interestingly, in the different spheres of commerce, one of the areas which warmly embraced the application of trust principles was retirement benefit schemes otherwise known as pension schemes[136].

## 4.2 TRUST AND PENSION SCHEME

For a trust to be validly created, certain property must vest in a person known as a trustee who holds it for the benefit of another or in some cases for his own benefit. The trustee's title, having been validly vested by law, is usually legal while that of the beneficiary is, consequently, equitable and the property so vested may be personal, real or tangible.

A pension trust is a type of trust through which pension funds are vested in a trustee or trustees for the benefit of an employee under a pension scheme. Pension, however, is a periodic payment made by a government or private organization, by virtue of a fund etc. to an employee, whether private or public, on retirement or on the attainment of a specific age in order to take care of his needs after retirement and as a reward for his service. It has been defined by the Court of Appeal as "a contract for a fixed sum to be paid regularly by installments on retirement from service"[137] and as "an accrued right of an employee, be it the right in money or other consideration, on retiring from the services of his employer and satisfying the conditions for payment of the said

[135] Security and Exchange Commission Rules and Regulations 2002, 2003, 2005 for its regulation on collective investment schemes through trust, particularly unit trusts.
[136] Moffat, G. (2005). *Trusts Law, Text and Materials*. 4th ed. (Cambridge: Cambridge University Press).
[137] Kasim v. NNPC [2013] 10 NWLR (Pt 1361) pg. 69, para C-D.

pension"[138]. The English court also defined pension in *British Transport Commission v Gourley* [1969] 1 AE & R pg. 555 at 556[139] in the following words:

> *"The fruit through insurance of all money that was set aside in the past in respect of past work. Pension also differs from gratuity which is usually, the payment of a lump sum in one single instance. Unlike a will, pension becomes operative only after the tenure of employment not of the person".*

Pension trusts are occupational in nature; that is, they revolve around the relations between an employer and an employee, with the employee as the beneficiary and, in traditional common law pension trusts, the employer as the settlor[140]. Pension trusts came into use for the protection of pension scheme at the beginning of the 20th Century. In 1921, trust became the basis for safeguarding private occupational pension schemes because of the introduction of tax relief. After the Second World War, pension trusts became firmly established and is widely used in England, Canada, Australia etc[141]. The traditional pension trust was created by the employer setting up a pension scheme and vesting the title of any contributions made by him or both him and the employee in the trustee through a trust deed. The trustee was responsible for the administration and management of the trust in line with the terms of the trust and contract of employment. The pension trust was suitable for both the defined benefit scheme, where the employer contributed all the money and the contributory scheme where both the employer and employer and employee contributed.

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[138] Momodu v. National Union of Local Government Employees [1994] 8 NWLR (pt 362) pg. 336.
[139] [1969] 1 AE & R pg. 555 at 556
[140] Moffat, G. (2005*). Trusts Law, Text and Materials*. 4th ed. (Cambridge: Cambridge University Press). Pg. 670.
[141] Moffat, G., op. cit. pg. 645

The Nigerian Pension Reform Act 2014 establishes a contributory pension scheme for payment of retirement benefit of employees to everyone the scheme applies to[142]. The scheme involves the creation of a retirement savings account in the name of the employee in which contributions to the pension fund created by the Act will be credited[143]. The contributions will be made by both the employer and employee. The Act defines a retirement savings account as "an account opened with a pension fund administrator…[144]" while a pension fund is defined as "an investment fund within the pension scheme which is intended to accumulate during an individual's working life from contributions and investment income, with the intention of providing income in retirement from the purchase of an annuity or in the form of a programmed withdrawal, with the possible option of an additional tax free cash lump sum being paid to the individual"

The pension fund administrator (PFA) where the retirement savings account is domicile in the manager of the fund while a pension fund custodian (PFC) established by the Act keeps custody of the pension fund.

The contribution of the employer and employee is a minimum of ten percent and a minimum of eight per cent, respectively, of the employees' monthly emoluments. An employee who operates the contributory pension scheme shall, upon retirement or attaining the age of 50 years, whichever is later, utilize the amount credited to his retirement savings account for:

i. a withdrawal of a lump sum from the total amount credited to his retirement savings account provided that the amount left after the lump sum withdrawal

[142] Section 3(i) of the Pension Reform Act 2014
[143] *Ibid* Section 11(i)
[144] *Ibid* Section 120

shall be sufficient to procure a programme fund withdrawal or annuity[145] for life in accordance with extant guidelines issued by the commission, from time to time

ii. programmed monthly or quarterly withdrawals calculated on the basis of an expected life span,

iii. annuity for life purchased from a life insurance company licensed by the national insurance commission with monthly or quarterly payments in line with guidelines jointly issued by the commission and national insurance commission[146].

However, professors covered by the Universities (Miscellaneous Provisions Amendment) Act, 2012 shall receive retirement benefits in accordance with the Act so will other categories of employees entitled, by virtue of their terms and conditions of employment, to retire with full retirement benefits[147].

It will be no surprise if the question as to whether the Pension Reform Act has created a pension trust in favour of employees is answered in the negative. For the Act[148] seems to give passing reference to the concept of trust and neglect the importance of a trust to the contributory scheme. This is notwithstanding the vast protection which the Act gives to employees under the scheme. The scant attention given to the pension trust under the Act may be due to the unique kind of pension trust created by the Act.

[145] Section 120 of the Pension Reform Act 2014
[146] *Ibid* Section 7(i)(a)-(c)
[147] *Ibid* Section 7(i)(d)-(e)
[148] The Pension Reform Act 2014 will herein after be referred to as “the Act”.
The use of Pension Trust under the common law in this essay is not to imply that there is a common law trust as opposed to equitable trust, but to describe the rules and nature of pension trust developed by the English Courts.

For as we shall see, the trust created under the Act is diametrically different from the traditional pension trust under the common law.

Two provisions in the Act expressly create a trust in favour of the employee and, happily, leave no trace of doubt that a pension trust exists under the Act. First, Section 57(c) of the Act states that a PFC shall:

> *"hold pension funds and assets in safe custody on trust for the employee and beneficiaries of the retirement savings account".*

The trust in the Act is also reaffirmed by section 62(d) of the Act which says:

> *"An application for license to act as a Pension Fund Custodian shall not be approved by the Commission unless such applicant undertakes to hold the pension fund assets to the exclusive order of the Pension Fund Administrator on trust for the respective employees as may be instructed by the Pension Fund Administrator appointed by each employee".*

Apart from the Act, the Guidelines for The Operations of Pension Fund Custodians released by the National Pension Commission[149] states in paragraph 4.01 that, the "PFC shall open a trust account or accounts for the deposit of contributions with one or more banks. The PFC shall seek the commission's prior approval for the appointment of a receiving bank, other than its parent". This guideline mandates the PFC to open a trust account, which is an account opened by a trustee for the benefit of beneficiaries. This suggests that the PFC is a trustee. From the above provisions, it is

[149] Publication on the official websites of the National Pension Commission. Accessed 1st of September, 2018 at http://www.pencom.gov.ng

the view of the present writer that the Pension Reform Act 2014 is unequivocally affirmative of a pension trust for the benefit of the employees.

As we have seen, the Act creates a trust for the protection of the pension fund. This trust, having been created by statute, is a statutory trust. However, this statutory trust remains inoperative till it is set in motion by the beneficiary, that is, the employee. Unlike the traditional trust which is “kick-started” by the settlor. The beneficiary to a pension trust has to choose his PFA as provided by the Act[150]. He, of course, must consider factors like; the investment choices the PFA offers, the number of changes in investment options it allows the beneficiary to make in a year, its network of branch offices, its regular provision of investment and retirement planning advisories, and its use of cutting - edge information and communication technology[151]. After the PFA has been chosen, the PFA shall then choose a suitable trustee.

In the Pension trust under the Act, it is submitted that the PFA is the settlor, being the person who creates the trust in favour of the beneficiary. Under the Act, the PFC becomes a trustee by virtue of contract. The Act does not stipulate the contents of the contract between the PFA and the PFC but provides, and rightly in the writer’s view, that a PFA shall not keep any pension fund or asset with a pension fund custodian in whom the PFA has any business interest, share or any relationship whatsoever. This will help to minimize collusion between the PFA and PFC to defraud the beneficiary. The Pencom guidelines[152], happily, provide some mandatory contents of the contract between the PFA and PFC. Most relevant to this part of this discourse is paragraph 8.4 and 8.41 of the guidelines for the operations of Pension Fund Administrators. Paragraph

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[150] Section 11(i) of the Act
[151] Odulana, F. O. (March 26, 2006). *How to choose your pension fund administrator*. Accessed on 14th of September, 2018 at http://www.proshareng.com
[152] Guidelines for the operations of Pension Fund Administrators and Pension Fund Custodian.

8.4 provides that "the following are areas that shall be included in any contractual arrangement between a PFA and PFC". Paragraph 8.41 then provides that:

> *"There must be a formal contract whereby a PFA appoints a PFC to receive contributions and take title of property, money or marketable securities in trust and to hold and otherwise deal with such assets strictly in accordance with instructions given by the PFA" (emphasis mine).*

The above, without doubt, is the clause in the custody contract between the PFA and PFC which transfers the legal estate of the pension assets to the PFC. On the execution of the contract, the PFC, most certainly, becomes a trustee of the pension assets.

**The Distinction between the Pension Trust Created by the Nigerian Pension Reform Act 2014 and the Pension Trust under the Common Law**

The statutory trust created under the Nigeria Pension Reform Act 2014 is at variance with the pension trust under common law. The Pension Trust created by the Act is sui generis. It fundamentally departs from the classical pension trust developed by the English Court and is weaved around its own unique laws better suited to chart its peculiar waters. Thus, it will be no exaggeration to say that both kinds of pension trusts are worlds apart. The major differences between the trust under the Pension Reform Act 2014 and the common law pension trust are stated below.

1. The classical pension trust is based on the contract of employment and the terms of the trust deed. Thus, the employer has a lot of discretion as regards the operation of the trust. As the court observed in *Mettey Pension Trustees Ltd v*

*Evans* [1991] 2 AllER 513 at 537[153] that: "The member's rights have contractual and commercial origins. They are derived from the contracts of employment of the members".

Under the Act, the above dictum will be wholly inapplicable as the pension trust is largely governed by statute, in this case, the Pension Reforms Act 2014 and Guidelines from Pencom. It is only supplemented by general principles of trust and the custodial contract between the PFA and PFC. The terms of the custodial contract are also governed by statute, though not absolutely. Thus, the much admired flexibility of the traditional trusts and consequently common law Pension trust has been eroded by the Act.

2. At the root of the difference between both kinds of trust is that under the common law pension trust, the employer is generally under no obligation to create a pension scheme for the employees[154]. The employers, however, usually offer a pension scheme which they initially solely-sponsored. They are therefore deemed to be the settlors of the scheme as they appoint the trustees and may terminate the scheme. As Moffat explains[155], "in classic trusts law, the employer is the settlor of the trust. As such, it may reserve certain conditions to itself when setting up the trust. In OPT terms, this equates to the retention of powers within the trust deed to, for example, give or refuse consent to increases in pensions in payment, or to wind up the scheme, or to modify the terms of the scheme".

   However, the case is completely different with the trust under the Act. As already shown, the PFAs are the settlors who vest the legal estate to the fund on

[153] [1991] 2 AllER 513 at 537
[154] Hudson, A. (August, 2005). *Equity and trust*. 4th ed. London: Routledge Cavandish.
[155] Graham, M. Op. cit. Pg. 670.

the PFC by way of a custodial contract. They have the power to terminate the trust, subject to the Act or Pencom guidelines.

3. Another fundamental change in the traditional pension trust brought about by the Act is the diminution of the traditional powers of a trustee. Under both a classic trust and a classic pension trust, the trustee manages and invests the trust fund. As regards a pension fund, the trustee's duty to invest the trust fund is unshaken[156]. The trustees are entitled to delegate their responsibilities and be free from liability provided that they have made a reasonable selection of delegates and undertaken reasonable supervision of the delegate[157]. Under the Act, however, the duties of investment, administration or management of the fund are vested exclusively in the PFA. The PFC's primary duty is to have custody of the pension fund[158]. As Fashola has rightly said: "The trust relationship is however distinct from the more usual type where the trustee actively manages the beneficiary's assets and investments…. Hence, the role of the PFCs is passive; as "bare" "trustees, with PFAs maintaining the most active role in pension fund administration"[159].

An illustration of the wide powers of a traditional trustee came up in the recent case of *Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd & others* [2015] EWHC 448 (CH)[160]. One of the principal issues in the case was whether the trustee of the pension fund could exercise powers to impose new contribution liabilities on employers of the fund under its trust deed and rules. Justice Asplin held that the pension

[156] Hudson, A. Op. cit. Pg. 985.
[157] Speight v. Grant [1883] UKHL 1
[158] Section 62 of the Act
[159] Fashola, L. (June 21, 2013*). Safe-keeping and custody of Pension Assets:* The Nigerian experience, ESQ Legal Practice. Pg. 1
[160] [2015] EWHC 448 (CH)

fund trustee could exercise its unilateral power of amendment to introduce a new contribution regime to the fund whereby the employers would be obligated to contribute to the fund. Such powers will not only be absurd but also unlawful under the Act for the contributions to the fund under the Act are statutory and cannot be varied by the PFA or PFC.

Again, in the traditional pension trust, the role of the trustee can be played by anyone. That is, since the employer is the creator of the trust, the directors of the employer can be trustees, if the employer is a company. The door as to who can be a trustee is widely open that even the employer itself can be the trustee as was the case in *Mettoy Pension Trustees v Evans* [1991] AIIER 523[161] where the employer was also a trustee of the fund. The position was aptly summarized by Alastair as follows:

> *"The trustees of the fund are generally directors of the settlor company. It is important to recall that it will be the employer (typically a company with separate legal personality) which acts as settlor alongside employee – contributors. The director – trustee will generally be part of the controlling mind of that company but not the same legal person as the settlor. The director trustee can also be a member of the pension scheme as a beneficiary. Therefore, the director occupies the position of controlling mind of the original settler, a settler in her own right as well as being a personal contributor to the fund, a trustee of the fund, and a personal beneficiary of the fund"*[162].

[161] [1991] AIIER 523
[162] Hudson, A. op. cit., pg. 995

This obviously inexorably leads to a barrage of conflicts of interests[163] which deepen the complexity of pension trusts. The Pension Reform Act 2014 obviates such complexities by giving the beneficiary of the scheme the latitude to choose their own PFA and mandating PFAs to keep pension funds or assets with a pension fund custodian otherwise than one in whom the pension fund administrator has any business interest, share or any relationship whatsoever[164].

It is beyond dispute that for the creation of a valid express trust, the 3 certainties of intention, subject matter and objects must co-exist[165]. The pension fund established under the Nigerian Pension Reform Act 2014 contemplates the creation of an express pension fund by the PFA in favour of the PFC. It is not in doubt that from the contractual relation between the PFA and PFC, the intention to create a trust is manifest. Also, the beneficiary of the trust stands out a mile, as the entire Act revolves around the protection of the beneficiary that is the employee. However, as regards the condition of certainty of the subject matter, the nature of the pension assets may, arguably, fall short. This will depend on whether the pension assets are regarded as fungible or non – fungible. This challenge of fungibility was rightly pointed out by D. Fashola[166]. Assets are said to be fungible if they are capable of mutual substitution or capable of being substituted in place of another.

That is, if such assets are identical to each other and can be used to replace each other. According to Benjamin and Yates[167], if "the custodian aggregates the holdings in securities of a particular issue which it holds for its various clients into one comingled

[163] The English Court of Appeal considered the problem of trustees' conflict of interest in. Edge v. Pensions Ombudsman [2000] ch. 602, CA
[164] Section 77 (2) of the Act
[165] Charti Commissioner for England and Wales v. Franjee [2014] EWHC pg. 2507
[166] Fashola, D. (2013). *Safe-keeping and custody of pension assets: The Nigerian experience*. ESQ Legal Practice, June 21. Pg. 1.
[167] Benjamin, J. & Yates, M. (2002). The law of global custody 2nd ed., Butter Worths.

holding", such assets will be fungible. Thus, if the PFFC aggregates, that is, mixes up in one account the pension assets of different beneficiaries, the assets will be fungible given that the pension assets are identical. The implication of this is that the pension assets will not be identifiable and, in turn, will fail for uncertainty of subject matter as in *Sprange v Barnard* [1789] 2 BROCC 585 where a trust was held void due to, among other things, lack of certainty of the subject matter.

However, in the words of D. Fashola[168], the Consolidated Rules of the Security and Exchange Commission requires custodians to refrain from comingling investor assets but are required to operate separate custody accounts in their records for each client, resulting in non – fungible arrangements[169]. Hence, the fungibility of pension assets and, invariably, certainty of subject matter of pension matter is wholly dependent on the PFC abiding by the Rules. It is suggested by the present writer that this be made a clause in the custody contract between the PFA and PFC so that he can be subject to the equitable remedy of specific performance if he fails to keep separate accounts or the injunctive remedy to restrain him from comingling the accounts. As between the beneficiary and the PFC, the beneficiary's remedy of injunction under trust still subsists and he can put it to effective use against the PFC in the event of an imminent disobedience to the rules.

Given the numerous statutory protections of the contributory pension scheme, the continued importance of a trust to the scheme may be brought into question. As a pension trust under the Act forms the kernel of this work, it is expedient to justify the creation of trust by the Act.

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[168] Fashola, D., op. cit.
[169] [1789] 2 Bro CC 585

Though the provisions of the Act protecting the beneficiary may seem adequate, they are, ironically, very much limited. Under the Act, the beneficiary has no direct relationship with the trustee. The Act, in fact, prohibits the beneficiary from dealing with the PFC with respect to the retirement savings account except through the PFA[170]. With the introduction of trust under the Act, an instrument with which the beneficiary can bring personal actions against the PFC comes in sight. The beneficiary overcomes the hurdle of going through a third party and the PFC is held more accountable.

Another route through which accountability is sustained by the introduction of trust is the fact that the beneficiary is not left with one remedy. He has ex-contractu rights against the PFA, an option to request review from the pension commission[171] and the several remedies for breach of trust against the PFC. The PFA can also exercise remedies as settlor against the PFC

The various lacunae in the Act which may arise in the future are covered through the general principles of trust law. Although, as noted earlier, the Act has laid aside much of the flexibility of the general trust, the "remnants of trust" constitute effective weapons in proffering solutions to unforeseen problems that may arise between the relevant parties.

Lastly, the PFC now has more duties in addition to the traditional fiduciary duties codified by the Act. All these certainly prevent any form of negligence from the PFC.

In conclusion, the trust in the Pension Reform Act remains just as important to pension law as it is to family relationships. It is unsurprising, therefore, that in 1989,

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[170] Section 11(8) of the Act
[171] Section 106(1) of the Act

following the review of occupational pension law by the Occupational Pension Board in England, it accepted that: "trust law should continue as the legal basis for pension.

Unlike a traditional pension trust where the trustee, employer and employee are parties, the pension trust under the Act revolves around the triangular relationship of the employee, PFA and PFC. Hence, the parties to the pension trust under the Act are the employee, the PFA and the PFC. In this chapter, the PFA and the PFC will be critically examined with a view to understanding their legal status as provided by the Act.

**The Pension Fund Administrator (PFA)**

The PFA is by far the most dominant party to the pension trust under the Act. Being the settlor and manager of the trust, the PFA is undoubtedly the dynamo around which the pension trust under the Act revolves. As at December 30th, 2018[172], the number of PFAs in Nigeria were twenty-one. The Act defines a PFA as:

> *"anybody corporate licensed by the commission as a Pension Fund Administrator"*[173]

A person who intends to operate as a PFA must apply to the Commission for a licence in the prescribed form together with fees prescribed by the Commission[174] and if the Commission is satisfied that the applicant meets the requirements set out in Section 60 of the Act, it may issue a licence to the applicant to operate as a PFA subject to such terms and conditions as the Commission may consider expedient and

[172] List of licenced Pension Fund Administrators in Nigeria, 30th December, 2018. Accessed on 30/12/2018 at http://www.pencom.gov.ng.
[173] Section 120 of the Act
[174] *Ibid,* Section 58(1)

necessary in the circumstances[175]. Section 60 of the Act states that an application for licence to operate as a PFA shall not be granted unless the applicant is a limited liability company incorporated under the Companies and Allied Matters Act whose object is to manage pension funds, has a minimum paid up share capital of such sum as may be prescribed, from time to time, by the Commission, satisfies the Commission that it has the professional capacity to manage pension funds and administer retirement benefits; has never been a manager or administrator of any fund which was mismanaged or has been in distress due to any of its subscribers, directors or officers; undertakes to the satisfaction of the Commission, that it shall not be engaged in any business other than the management of pension funds; and satisfies any additional requirement or condition as may be prescribed, from time to time, by the Commission[176]. Any company and institution already engaged in the management of pension funds who have not been licensed by the Commission shall, at the commencement of the Act, compute and credit all contributions to the retirement savings account opened by them for each contributor including distributable income and transfer all pension funds and assets held by them to PFAs and PFCs as may be determined by the Commission[177].

**The Legal Status of the PFA – Is the PFA a Trustee or an Agent?**

It was earlier stated the PFA, being the one who creates the trust, is the settlor of the pension trust. But this is just one side of the coin, for it only describes the legal status of the PFA from one perspective. The other side of the coin, however, is the legal status of the PFA as between him and the employee when he is chosen by the employee to manage the pension fund. In accepting this important but demanding duty,

[175] Section 58(2) of the Act
[176] *Ibid,* Section 60(1)
[177] *Ibid,* Section 60(2) - (3)

what legal relationship has the PFA entered into? This question is important as it determines what remedies the employee can seek in court against the PFA. That a contract is at the basis of their relationship stands out a mile but the question as to what legal relationship is created by the instrument of contract persists. To this question only two answers stand a chance - the PFA is either a trustee who is saddled with the responsibility of managing the pension assets or is an agent charged with the task of acting on behalf of the employee.

At first glance, the conclusion that the PFA is a trustee is irresistible because the duties of the PFA under the Act are very much that of the traditional trustee. The PFA has the duty to manage, administer and invest the pension assets as a trustee will normally do. The fiduciary duties of a trustee are also clearly spelt out in the Act as duties of the PFA. The PenCom Guidelines also provide that marketable securities shall be registered in the joint name of the PFC and PFA in the format, Abc PFC for Xyz PFA[178] and immovable property in the joint name of the PFC and PFA in the same format above[179]. The above guidelines may be supportive of the contention that the PFA is a trustee as they suggest joint title or ownership with the PFC. However, the strong temptation to describe the PFA as a trustee notwithstanding, the present writer submits that this should not be done in haste as the argument that the PFA is a trustee is not without its defects. To put it more strongly, it's the opinion of the present writer that, far from what appears to be the case, the PFA is not a trustee.

The first premise upon which the argument of trusteeship will be rebutted is that in trust law, it is not disputed that the duties of management, administration and investment, the foremost duties of the PFA, are not exclusive to a trustee. They are

[178] Paragraph 4.04 of the National Pension Commissions Guidelines for the Operation of the PFCs
[179] *Ibid,* Paragraph 4.08

obligations which can be imposed on an individual without recourse to any form of trust by a contract such as agency. A trust and agency are immensely similar. They both flow from an identical stream of a fiduciary relationship. In *UBA PLC v Ogochukwu* [2014] LPELL – 24267 (CA) pgs. 42-43, paras. B-B[180], the Court of Appeal stated that an agent is in a position of utmost trust and the status of being in a fiduciary position gives rise to certain legal incidents and obligations which the agent must perform. Hence, the powers of the PFA do not suggest only the relationship of trusteeship.

Again, the duties aforementioned, though usual earmarks in a trusteeship, are not indispensable. The hallmark of a trust is that the trust property is vested in the trustee. As the court correctly stated, in *Iwok v University of Uyo* [2011] 6 NWLR (pt 125) 1 Sc. at pg. 236, paras. G-H[181]:

> "*An essential element of the trustee/beneficiary relationship is that the property subject of the trust must be vested in the trustee".*

Thus, the court in the above case held that since the housing units in dispute which the 1st respondent claimed to be a trustee were not vested in the 1st respondent, the 1st respondent was not a trustee[182].

Kodilinye also notes that:

[180] [2014] LPELL – 24267 (CA) pgs. 42-43, paras. B-B
[181] [2011] 6 NWLR (pt 125) 1 Sc. at pg. 236, paras. G-H
[182] *Ibid,* pg. 237, paras. B - E

*"The main characteristic of a trust is that the property is vested in the trustees not for their own benefit, but for the benefit of the beneficiaries"*[183].

Hence, a trust can very well exist in the absence of the above classic powers of investment and management of a trustee and it should not be immediately concluded that the PFA is a trustee. On the contrary, the PFA lacks the inextricable element of a trustee which, as seen above, is that the title to the property or assets subject to trust must vest in him. In the Pension Reform Act 2014, the title to the assets evidently does not vest in the PFA. For the Act is very explicit as to the fact that the property or title to the assets vests in the PFC as clearly shown in the "vesting clause" of the custodial agreement between the PFA and PFC[184].

On the contrary, the status of the PFA as an agent is devoid of the above objections. "Agency" was described in *Idowu v Olorunfemi & Ors* [2013] LPELR-20728 (CA) pg. 22-24, paras. G-H as:

*"the relationship between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other who consents to represent the former"*[185].

Though it can be impliedly created, it is often constituted by agreement[186]. Unlike a trust where the beneficiary can sue the trustee, as long as the principal in an agency relationship is disclosed, the agent is not liable[187]. Another essential difference

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[183] Kodilinye, G. (1975). *An introduction to equity in Nigeria* .1st ed. London: Sweet and Maxwell, pg. 57.
[184] Paragraph 8.41 of the Pencom Guidelines
[185] [2013] LPELR-20728 (CA) pg. 22-24, paras. G-H
[186] Achoru v. Decagon Investment Ltd & Anor [2014] LPELR – 24143 (CA) pg. 16, paras. E – G.
[187] New Age Beverage Co. Ltd. v. Aramide [2014] LPELR 23266 (CA) Pg. 13-14, Paras. G – E.

between them is that title to property or assets is generally not vested in the agent. This is obviously superfluous as the agent merely acts on behalf of the principal.

A close perusal of the Act with respect to a PFA shows that the PFA perfectly fits into the doctrine of agency. As has been established, there are three inextricable elements of agency. These are consent by the principal and agent, action by the agent on behalf of the principal and control by the principal. These three elements are patently present in the Act. It's also settled that an agent may be general or specific. While a general agent is given authority to act on behalf of the principal with respect to every kind of business for a particular purpose, a specific agent is limited to a specific function. An example of a general agent is a managing director who as an agent of the company acts on behalf of the company for every aspect of the company's business subject to the articles and memorandum of association of the company. The PFA has all the characteristics of a general agent who performs all forms of functions within the scope of the management of the assets.

In addition, there are ample provisions where the Act would have expressly stated that the PFA was a trustee as it did with the PFC. However, the Act repeatedly emphasized that the PFA was only a manager of the assets and was totally barred from holding the funds[188]. Also, with the PFC acting as a custodian trustee it would be most unnecessary to make the PFA a trustee since the PFC holds the funds on trust to the exclusive order of the PFA[189]. The PFA would after taking a decision give the PFC instructions to put the decision to effect.

[188] Section 77(i) of the Act
[189] Section 62(d) of the Act

Hence, it is submitted that the maxim *expressio unius est exclusion alterius* is in every way applicable to the issue at hand, for the Act having mentioned that the PFC is a trustee excludes all other possibilities of trusteeship in other parties to the trust.

In the final analysis, in view of the aforementioned reasons, the PFA falls short of a trustee and is, rather, an agent with the statutory duty to act on behalf of the employee.

Having established that the PFA, in relation to the employee, is an agent, questions relating to the degree of liability of the principal (the employee) to third parties may arise. The principal's degree of liability depends on certain factors like whether he's disclosed or not disclosed. It is well-settled that when an agent acts on behalf of a disclosed principal, the principal, not the agent, is liable. This is an exception to the privity of contract rule and was clearly stated in *Ihesiaba & Ors v Ochepa* [2015] LPELR-24822 (CA) as follows:

> *"An agent acting on behalf of a known and disclosed principal incurs no personal liability.... The respondents... by the pleading of the appellant, are unmistakably agents of a revealed principal and as agents they cannot be liable under all the circumstances of the case...."*[190].

The reverse is somewhat the case when an agent acts on behalf of an undisclosed principle. In this case, both the principal and agent can incur liability[191]. The third party may sue the principal or the agent but cannot sue both and once an election is made by a third party, it is generally irrevocable[192]. However, it need not be said that the third

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[190] [2015] LPELR-24822 (CA)

[191] Per Lord Lyold in SinYin Kwam (Administratix of the Estate of Cham Ying Lung. Deceased) and Anor v. Eastern Insurance Co. Ltd. (1994) 2 (AC) 199, Pg. 207.

[192] Bell v. Borders, 205 ky, 181 (Ky. 1924)

party can only exercise the right to election when the identity of the principal becomes known. If the principal remains undisclosed, his only remedy will be against the agent. Under the Act, it is submitted that the PFA must be deemed to be acting on behalf of an undisclosed principal. Surely, this conclusion is inescapable for the PFA acts on behalf of a huge number of principals. It is also submitted that the status of the PFA as agent is only as between the PFA and the employee. As between the PFA and the PFC, the PFA must be deemed to be an independent party who enters into a contract creating a trust with the PFC. Hence, the rule that a principal is liable for the fraud of his agent if the fraud is committed within the scope of the agent's actual or implied authority[193] should not apply either.

**The Pension Fund Custodian (the PFC):**

As variously stated earlier in the work, the PFC is the trustee in the pension trust created under the Act. This is an indubitable fact. The aim of this part is to examine some peculiarities of this trustee created by the Act.

According to Leo, a corporate trustee "is a corporate entity that holds and manages the properties or the assets of the trust for the benefit of the institutions called lenders who have advanced credit and other facilities to the borrower"[194]. The above definition, though correct for the above writer's purposes, is very restrictive. The definition envisages the corporate trustee created by the Investment and Securities Act[195] which contemplates that the corporate trustee will play roles such as representing the interest of all the lenders for whose benefit the trust is set up by a borrower; keeping the title of any collateral property so that the borrower does not deal with them without its consent,

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[193] Restated by Obaseki – Adejumo JCA in UBA Plc v. Ogochukwu [2014] LPELR 24267 (AC) Pg. 41-42, Paras. D-B.

[194] Okafor, L. (2010). *Leo on Cooperate Trust*, 1st ed. Lagos: Prestige Books 2010, pg. 24.

[195] The Investment and Security Act 2007

taking legal action against the borrower on behalf of the lenders etc[196]. Thus, the corporate trustee created by the Pension Reform Act is outside its ambit.

A corporate trustee is generally regarded as a company which acts as a trustee. The trustee is "corporate" because it has been conferred with legal personality and is not subject to the frailties of life as is a human being. Thus it has perpetual succession, can enter into contracts and can sue and be sued.

According to the Act, a PFC means a company incorporated under the Companies and Allied Matters Act that has been licensed by the Commission under the Act[197]. Also, a person proposing to act as a PFC shall be a limited liability company incorporated under the CAMA[198] by a licensed financial institution with the sole object of keeping custody of pension fund and retirement benefits assets and must fulfil the following conditions: a minimum paid up capital of such sum that may be prescribed by the commission from time to time and is wholly owned by a licensed financial institution with net worth of a minimum of ₦25,000,000,000 or as may be prescribed from time to time. It must show that the parent company has issued a guarantee to the full sum and value of the cash float of pension funds and assets held by the PFC Company, as may be determined by the commission, from time to time. It undertakes to hold the pension fund assets to the exclusive order of the PFA on trust and has never been a custodian of any fund which was mismanaged or has been in distress due to any default of the PFC[199].

The above provisions are abundantly clear as to the corporate status of the trustee. The corporate trustee under the Act is similar to David's and Anthony's trust

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[196] Rule 205(i) – (iv) Rules and Regulation of the SEC
[197] Section 120 of the Act
[198] Company and Allied Matter Act
[199] Section 62 of the Pension Reform Act 2014

corporation which they described as applying to "a body corporate, such as a bank or insurance company, which undertakes the business of acting as a trustee and fulfils certain conditions"[200].

The advantage of corporate trusteeship created by the Act is that the employee enjoys the benefits of a body corporate such as perpetual succession etc. This, in turn, ensures better protection for the employee

**The PFC as a Custodian Trustee**

In addition to the PFC being a corporate trustee, the PFC is also a custodian trustee. That is, a custodian in whom the legal title is vested for the benefit of another. The Act leaves no doubt as to this. It provides that:

> *"From the commencement of this Act, pension funds and assets shall only be held by pension funds custodians licensed by the Commission under this Act".*

A custodian is a person, corporate or otherwise who is in possession of property or assets for the benefit of another. Custodians are usually banks and other companies. The idea of a custodian trustee is not novel to Nigerian Law. The Public Trustee Law established by several state laws empowered the Public Trustee to act as a custodian trustee[201]. In particular, Section 6(1) of the Public Trustee Law of Lagos State empowers the Public Trustee to, if he thinks fit, subject to and in accordance with the provisions of the law and the regulations made thereunder, act as an ordinary trustee; act as a custodian trustee, or be appointed trustee by the court. It further states that where the Public Trustee is appointed to be custodian trustee of any trust, the trust

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[200] Parker D.B and Mellows A.R (1983) *The Modern Law of Trust*,5th ed.
[201] Trust and Equity Law of Enugu State CAP 153, Revised Laws of Enugu State.

property shall be transferred to the custodian trustee as if he was sole trustee, and for that purpose vesting orders may, where necessary, be made by the Court[202]. Also, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property[203]. A natural consequence of being a custodian is the duty to keep the assets safe. The Pension Reform Act does not overlook this when it states that, a PFC shall:

> *"Hold pension funds and assets in safe custody on trust for the employee and beneficiaries of the retirement savings account"*[204].

The effect of this is that the custodian owes a duty of care to the owner of the property and will be liable in negligence if such duty is breached and the owner suffers damage. This is in line with the ordinary law of negligence and thus confers on the employee a right to sue the PFC in tort for negligence. To successfully maintain a claim in negligence, the 3 essentials elements of duty of care, breach of such duty and damage must be proved[205]. Some cases on custodian trusteeship illustrate this point. In *IRA v State Street Bank and Trust* [1995] 908 F. Supp.1019 (D.mass)[206] the Court of Appeals of the United States dismissed a claim against a custodian based on negligence and the custodian contract. The court held that none of the three traditional elements of negligence had been proved. Also in the Zimbabwean case of *Standard Chartered Bank Zimbabwe Ltd v Chipiningu* [2004] (302/2000) ZWSC 152[207] the Zimbabwean Supreme Court upheld the decision of the Appeals Board of the National Employment Council for the Banking Undertaking that failure by the respondent to take care to

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[202] Section 8(2a) of the Public Trustee Act CAP P27, Laws of Lagos State 2004
[203] Section 8 (2d) of the Public Trustee Act CAP P27, Laws of Lagos State 2004
[204] *Ibid* Section 57 (c)
[205] Nsima v. NBC [2014] LPELR – 22542 (CA) PP 53-54, Para B-C
[206] [1995] 908 F. Supp.1019 (D.mass), http://law.justia.com>district-courts accessed on 4th of September, 2018.
[207] [2004] (302/2000) ZWSC 152

protect the appellant's money against theft by the co-custodian of the money did not constitute gross negligence causing serious loss to the bank. However, in *Carlson v Wells* [2011] 281 VA 173.705 s.e.2d 101[208], the Supreme Court of Virginia ruled that custodians of UTMA accounts were in breach of their duty of care owed under the Uniform Transfers to Minors Act and awarded children compensation damages, attorney fees and costs.

The two major duties of the PFC are – the duty to hold the pension funds and the duty to keep the funds safe. This was extensively discussed under the last heading. Other duties of the PFC include the duties to: on behalf of the PFA, settle transactions and undertake activities relating to the administration of pension fund investments including the collection of dividends, bonus, rental income, commissions and related activities, report to the Commission on matters relating to the assets being held by it on behalf of any PFA at such intervals as may be determined, from time to time, by the Commission; undertake statistical analysis on the investments and returns on investments with respect to pension funds in its custody and provide data and information to the PFA and the Commission and execute in favour of the PFA relevant proxy for the purpose of voting in relation to the investments. Finally, the Act also mandates the PFC not to utilize any pension fund or assets in its custody to meet its own financial obligation to any person whatsoever[209].

Similarly, there exist trust relationships in oil and gas practice especially under charitable trust. A pointer to this is the novel arrangement of the Petroleum Host Communities (PHC) Fund provided for in the Petroleum Industry Bill. The Bill has being held to be such that will reform the oil and gas industry not only for incumbent

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[208] [2011] 281 VA 173.705 s.e.2d 101

[209] Section 70 (2) of The Pension Reform Act 2014

administration but for subsequent administrations to come. An example of such reform is the 'Petroleum Host Communities Fund' created in favour of oil producing states whereby oil companies shall donates certain monies for the improvement of the lives of people in those states. In essence by analogy, a trust is created specifically an express public trust (Charitable Trust), as the oil companies are settlors, the state is the trustee, while the people in the oil producing state are the beneficiaries.

The basic rationale behind this novel concept is for the development of the economic and social infrastructure of the communities within the petroleum producing area. All upstream petroleum producing companies are required to make monthly payments of 10% of their net profits.

While profits derived from upstream petroleum operations in onshore, offshore and shallow water areas are to be remitted directly to the PHC Fund, profits derived from upstream petroleum operations in deep-water areas are to be remitted into the fund for the benefit of the petroleum producing littoral states of Nigeria.

The literal interpretation of the above is that, oil companies engaging in the exploration of crude oil shall pay certain monies, which is 10% of their net profits (deduction of gross profit from cost incurred in the exploration of oil) both in onshore, offshore, shallow waters and in deep-water upstream petroleum operations; these monies will be sent to the newly created PHC Fund and applied solely for the benefit of states considered to be oil producing states.

Furthermore, while 10% of net profits contribution to the PHC Fund places additional fiscal obligation on companies in the upstream subsector, such contributions constitute an immediate credit against a contributing company's total fiscal rent

obligations. This brings about some form of advance payment of taxes as contributions to the PHC Fund are eventually deductible for final tax purposes.

## 4.3 CONSRUCTIVE TRUST

The courts in Nigeria rarely consider constructive trust, rather cases bordering on possible constructive trust remedies are considered under the general scope of breach of contract consequently, damages are routinely awarded as fair remedy. Although, there are few case laws that exemplify the willingness of the court to develop the doctrine of constructive trust in Nigeria. For example, in *AG of the Federation v. AG of Abia State & Ors* [2002] 4 SCNJ[210], the Supreme Court held that, the federation account that is used to retain some federal revenues which are shared by all the states and the central government is held on constructive trusts by the Federal Government. The judgment implies that, the federal government cannot unilaterally manipulate the revenue, where it does so, it must account for the profits. This means that, the federal government cannot unjustly enrich itself at the expense of the states thereof. The federal government as a constructive trustee is thus, an agent. In *Odudu v. Onyibe* [2001] 13 NWLR (pt. 720) 140 at 157 para. D-E[211] the court said that:

> *"....an agent must not allow his own interest to conflict with his obligation to the principal. Where such a situation occurs to the knowledge of the third party, the contract is voidable at the option of the principal.*

By this token, the federal government has the obligation to ensure fair dealings with the said revenue. In another relatively new case of *First Bank Nigeria v. Ozokwere*

[210] [2002] 4 SCNJ
[211] [2001] 13 NWLR (pt. 720) 140 at 157 para. D-E

[2013] 12 (pt 11) M.J.S.C 60 at 77-78[212] the Nigerian Supreme Court recognized that unjust enrichment is a viable cause of action where the ingredients are plausible that may not only be bound by the doctrines of tort and contract. *In Eboni Finance & Sec. v. Wole-Ojo Technical Services* [1996] 7 NWLR (pt. 461) 464 at 478[213], the court held that, in a proven circumstance where a party unjustly enriches himself at the cost of another, the duplicitous party must be "made to disgorge it". The court further explained *inter alia*:

> *"Therefore, in consonance with the principles enshrined in the restitution a remedy shall be available whenever the defendant is unjustly enriched at the expense of the Plaintiff."*

Even though the court did not specifically impose a constructive trust, it did acknowledge its relevance as a model of restitution. Nigerian courts appear to treat unjust enrichment cases within the broad scope of restitution as a guided remedy which streams from the doctrine of equity hence, reluctant to see such cases as of constructive trust. The basis for restitution is the proprietary interest which a claimant holds in the enrichment obtained by the trustee. The right to restitution is principally within the scope of law and equity.

Rather than use the phrase constructive trust, some courts in Nigeria have coined the terms constructive fraud as cause of action for certain instances of unjust enrichment for example, in *Nsirim v. Onuma Construction Co. (Nig.) Ltd.* [2001] 7 NWLR (pt 713) 72 at 757[214], the court explained that a "person will be liable for constructive fraud in circumstances where as a result of his breach of duty, though

[212] [2013] 12 (pt 11) M.J.S.C 60 at 77-78
[213] [1996] 7 NWLR (pt. 461) 464 at 478
[214] [2001] 7 NWLR (pt 713) 72 at 757

without an actual fraudulent intent, gains an advantage. In other words, a person will be liable for constructive fraud in circumstances where a person benefits from a breach of duty to another[215].

According to the Food and Agriculture Organization (FAO), land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land [hence], land tenure is an institution, i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.

Historically, it is common knowledge that the Nigerian land tenure system evolved from native traditional land holding system. In the Northern territories land was held by the sovereign rulers in the form of native trustee for the various segments that were mainly communal. In the Southern territories, land was under the community leaders, who partitioned the units to the families that made up each segment of the communities. The process of acquiring land by community members was by oral application to the communal head for use of land. When the land is allotted, the applicant acquired the equitable interest therefore has the right to possess and enjoy the land in accordance with the laid down rules of the community. Some communities prohibited alienation rights but approved transfer of interest to descendants. The

[215] Kayode, O. (2015). Perspective on Fraud and Unjust Enrichment under Nigeria Law. Accessed on 27th of November, 2018 at https://www.iiste.org/ariticle/viewfile.

foregoing discourse implies that community leaders acted as trustee. For example, in *Adewoyin v. Adeyeye* [1961] AIINLR 5[216], the court held that,

> *"... once an Ooni [community head] allocates a portion of community land to a native of Ife for the family use, the allottee enjoys possessory rights to the exclusion of other members of the community."*

In *Chukwu v. Uche* [1976] 9 and 10 Sc 173 at 176[217] the violation of the terms of the allotment of land to a community member may lead to the revocation of the rights to the property by the community or family head. In *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C 399[218] the court stated that:

> *"… fact which is important to bear in mind in order to understand native law is the notion of individual ownership which is quite foreign to native ideas that land belongs to the community, the village or the family, never to the individual…" Also in Arase v. Arase [1981] 5 Sc 33 at 37[219], the Supreme Court explained that: "It is now settled by decided cases that basically all land in Benin is owned by the community for whom the Oba of Benin holds the same in trust, and it is the Oba of Benin who can transfer to any individual the ownership of such land."*

Similarly, the family head or community head could be held to account for unjust benefits obtained by him through the reckless handling of the common property[220]. The position of a reckless community or family head that unjustly profit

[216] [1961] AIINLR 5
[217] [1976] 9 and 10 Sc 173 at 176
[218] [1921] 2 A.C 399
[219] [1981] 5 Sc 33 at 37
[220] Bassey v. Coban (1924) 5 NLR 92

from a community property is that of constructive trustee even though it is not often made clear by the Nigerian courts.

In a similar vein, the preamble of Nigeria's Land Use Act 1978 states as follows:

> *"An act to vest all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely in the Governor of the State, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals' resident in the state and organizations for residential agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on local governments"*[221].

Section 1 of the Act vests all land comprised in each state (except lands vested in the Federal Government for its agencies) solely in the hands of the governor of the state, to hold in trust for the people. By this provision, there exist statutory trusts on all lands thereof.

From the construction of the preamble and section 1 of the Act, it implies that the governor of every state as trustee of the lands ought and should act reasonably in the administration of lands. Although, there are currently seems to be no authority to illustrate unjust enrichment of any governor resulting from reckless handling of lands, the Land Use Act appears to give room for the governors to be held accountable for misuse of trust powers over lands. Where such event arises, the possibility of the court to create constructive trust is foreseeable. This means that, the governors cannot

[221] Land Use Act 1978

unjustly enrich themselves or breach the duties confined within the scope of the Land Use Act[222].

# CHAPTER FIVE

# SUMMARY, CONCLUSION AND RECOMMENDATIONS

## 5.1 SUMMARY

The evolution of the concept of trust has been explored and its incursion into Nigeria legal system traced back to the Statute of General Application January 1st, 1900 which mandated laws operating in England applicable in Nigeria, as well as, other British colonies[223].

Although it was argued that trusteeship is an old practice among various ethnic groups in Nigeria. For instance, it is not unusual for a man with young children to put his property in the care of a trusted friend or family member for onward transfer of such to his children when they come of age. However, it should not be mistaken or compared with the modern English concept of trust.

Under the customary law system, there is no duality of ownership but on the contrary, the trust concept creates dual ownership i.e. legal trust vested in the trustee and the equitable title held by the beneficiary.

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[222] Land Use Act 1978
[223] Statute of General Application 1900

Trust has also evolved from traditional function and its primary use in family relationship such as, securing family wealth for children who are incapable to be vested with title t proper, education, charity and religious purposes. Today, trust is being put to use in commercial relationship both in private and public sectors. A typical example is the application of trust in the Nigeria Pension Scheme, where pension funds are vested in a trustee (s) for the benefit of an employee under the Pension scheme. The fund is to be paid to the beneficiary at the attainment of a specific age of retirement.

Trust had dealt also with the issue of unjust enrichment whenever a person breaches his fiduciary duty, either with or without fraudulent intent, constructive trust will apply. See *Nsirim v. Onuma Construction Co. (Nig.) Ltd*. [2001] 3 Sc. 168[224].

## 5.2 CONCLUSION

The concept of trust cannot be said to be alien to the Nigeria legal system prior to the partition of Africa and the subsequent colonization of Nigeria. The concept of family ownership of land in Nigeria served a purpose similar to that of trust, where the concept of individual ownership is a foreign one, rather, land belongs to the family and the head of family holds the family land for the use of the family members. The head of family to some extent assumes the position of a trustee and all members of the family have equal right to the property, as held in *Amodu Tijani v. Secretary of Southern Nigeria* [2002] 4 SCNJ[225] per Lord Haldane. The concept of trust under customary law is however different from that under the English law because while the trustee is regarded as the owner of the trust property, the head of family is not regarded as the owner of the family property, but rather as the caretaker[226].

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[224] [2001] 3 Sc. 168
[225] [2002] 4 SCNJ
[226] *Ibid*

The Land Use Act also embodied the concept of trust by vesting the control and management of land in each State of the federation in the Governors to be held in trust and administered for the use and common benefit of all Nigerians. See the Supreme Court decision in *Abioye v. Yakubu* [1991] 5 NWLR (Pt. 190) p. 130[227].

The very nature of a trust had been explored and in doing so, a number of key features relating to it had been examined. In particular, the respective positions of the trustee and beneficiaries under a trust and the nature of their interests. This work has further explored the instrumental role of trusts in achieving a number of social and economic goals and eventually contributing to law reform. It was observed that one of the main characteristics of a trust is its versatility and flexibility. It is because of this characteristic that the trust has been employed in both family and commercial settings to resolve entitlement. The basic feature of the trust is that it facilitates the fragmentation of ownership of property, thereby creating duality of rights in respect of the same thing. Although the legal title to the trust property is vested in the trustee, the equitable interest belongs to the beneficiary. The importance of the trust in English law cannot be under- estimated and it is for this precise reason that Maitland was to comment that it is one of the greatest achievements of English[228].

With the massive global growth of commerce and industry, complex business transactions arose, but one fact that is undisputable is that trust as a concept has help in solving many of these problems as they arise. These commercial relationships, as was bound to be, posed their own peculiar problems. There then arises the dire need for protection of hugely contrasting commercial interests. Happily, the equitable trust, once again, provided the solution. It was developed beyond its previous family boundaries

[227] [1991] 5 NWLR (Pt. 190) p. 130

[228] Moutland, F. W. (1936). Equity (2nd ed.). P. 23.

to accommodate commercial relations. Some rules like those relating to investment and delegation were perfectly suited to the commercial world and became guidelines for the administration of financial and economic related trusts.

Attempt had also been made to explore the practicability of the concept of trust in some of Nigeria's institutions. For example, pension trust which is a type of trust through which pension funds are vested in a trustee or trustees for the benefit of an employee under a pension scheme.

It had been shown that a constructive trust is not a voluntary creation, but a mechanism by benefit of which precise property is vested in a trustee on trust for ascertainable beneficiaries. It was also shown that constructive trust may arise due to a breach of fiduciary obligations. However, the duty of a constructive trustee is less arduous than those of the express trustees in the sense that, they do not have to comply wholly on the usual duty of care. However, failure to comply with the terms of the constructive trust may result in stricter sanctions by the court. According to Smith: "There is an obligation on the [constructive] trustee: to convey the trust property to or to the order of the beneficiary. A breach of this obligation would create a personal liability. But the trustee cannot, without fiction, be said to have assumed obligations of the utmost selflessness. The only way to reach the contrary conclusion would be to say that this is the technique of equity: to subject trustees, even unwilling ones, to the fiduciary standard, so as to generate the corresponding liabilities. That however, would be using the fiduciary relationship in a wholly instrumental way"[229].

In view of the emphasized basic principles of constructive trust, the conclusion is that, the settings in which constructive trusts have been adjudicated by the courts in

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[229] Smith, L. D. (1999). 59 CLJ194 at 301.

England and elsewhere, to exist are yet to be fully explored in Nigeria. Nigerian courts are therefore, urged to explore the constructive trust as a valuable remedy for breach of fiduciary duties especially where the recovery of a trust property is still in the possession of the defendant. Alternatively, to aid in the tracing of the proceeds where there are evidences to show that the constructive trustees have disposed of the trust property. Active application of constructive trust by the Nigerian courts will encourage litigants to utilize the remedy against the constructive trustees, for various cause of actions including proprietary estoppels as in *Taylor Fashions ltd v. Liverpool Victoria Trustee* [1982] QB 133[230]. Nonetheless, we wish to emphasize that, constructive trust should not only be pinned down to express trust but should be widely applied. For example, a person who has made a representation or allowed another to labour under misapprehension should not be allowed, after the other person has acted upon it to his detriment, to deny that which has been represented or misapprehended. It matters not that there are no contractual or other enforceable obligations nor that the required formalities have not been satisfied.

In essence, the claimants should have various options available to them where the property upon which the constructive trust is imposed is still identifiable in the hands of trustees, the beneficiary may choose either to exercise his proprietary rights in the subject-matter of the constructive trust, or to rely on the personal liability of the constructive trustee to account, or, to exercise both of these remedies.

## 5.3 RECOMMEDATIONS

There still exists gap between the concept of trust as practice in England compare to what we have here in Nigeria. Trust as a foreign concept of law, and like

[230] [1982] QB 133

other received English laws have failed to yield much result in Nigeria due to the fact that those laws are built on English ideals which are not compactable with our own ideals, culture, customs and traditions. In a heterogeneous society like Nigeria, customs, traditions, religious beliefs and to some extent disagreement between the beneficiaries of a trust are some of the causes of the problems associated with trusteeship. To this end, attempt should be made to find a balance between these onerous contending factors and harmonize them in order to unified and ideal trust law in Nigeria.

The trust concept in the Nigerian Pension Reform Act 2014 can be expounded through detailed provisions in the Act spelling out the operation and ambit of the trust. It is interestingly so that Section 115(1) of the Act empowers the National Commission to make regulations, rules or guidelines as it deems necessary or expedient for giving full effect to the provisions of the Act. The Act do not really need any amendment; it will suffice if the Pension Commission should make guidelines for the pension trust in the Act. The adequacy of this recommendation is fortified by the fact that Section 115(2) of the Pension Reform Act makes it an offence to contravene the regulations, rules and guidelines made by the Pension Commission. Given that the guidelines on the pension trust can only be made if the Commission deems them expedient, it is hoped that this work will totally bring to light the importance of the concept of trust to a viable contribution pension scheme.

## BIBLIOGRAPHY

### BOOKS AND STATUTES

Adigun, O. (1987). Cases and texts on equity trust and administration of estate. Abeokuta: Ayo Sodimu Publication Limited. 1st edition.

Bakinbinga, D. T. (1989). Law of trust in Nigeria. Ilorin: Unilorin Press. 1st edition.

Bemire, M. A. (2002). The Nigerian law of trust. Lagos: Excel Publication Service.

Company and Allied Matter Act 2010 (NGR).

Elias, T.O. (1971). Modern land law of Nigeria. Ile-Ife: University of Ife Press.

Fabunmi, J.O. (2011). Equity and trust in Nigeria. Ile-Ife: University of Ife Press.

Hudson, A. (2005). Equity and trust London: Routledge Cavandish. 4th edition.

Investment and Security Act 2007 (NGR).

James, R.W. (1973). Modern law of Nigeria. Ile-Ife: University of Ife Press.

Jegede, M.I. (1981). Principle of equity. Benin City: Ethiope Publication Service.

Keeton, G.W. (1963). The law of trust. London: Isaac Pitman & Son Ltd. 8th edition.

Kodilinye, G. (1975). An introduction to equity in Nigeria. London; Stevens and Maxwell. 1st editon.

Maitland, F.W. (1949). Equity. Cambridge: Cambridge University Press. 2nd edition.

Megary, R.E. and Wade, H.W.R. (1975). The law of real property. London: Stevens and Sons. 4th edition.

Moffat, G. (2005). Trust law – texts and materials. Cambridge: Cambridge University Press. 4th edition.

Nwabueze, M.O. (1973). Nigeria land law. Enugu; Nwanife Publishers Limited.

Okafor, L. (2010). Leo on cooperate trust. Lagos: Prestige Books. 1st edition.

Parker, D.B. and Mellows, A.R. (1983). The modern law of trust. London: Sweet and Maxwell. 5th edition.

Pension Reform Act 2014 (NGR).

Settled Land Act 1982 (ENG).

Trust Investment Act 1982 (NGR).

Yakubu, M.G. (1981). Nigerian land law. London: Macmillan.

**JOURNALS AND ARTICLES**

Asiedu-Akrofi, D. (1989). Judicial recognition and adoption of customary law in Nigeria. The American Journal of comparative law (Vol.37, pp. 571-593). London: Oxford University Press.

Fashola, L. (2013). Safe keeping and custody of pension assets: The Nigerian Experience. Esq. Legal Practice Magazine.