

Consumer Protection and the Legal Regime for Transactions Relating to Interest in Land through the Power of Attorney Under the Nigerian Legal System: the Consumer's Nightmare

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ABSTRACT

Although a power of attorney is by its very nature known and taken to be and represent an instrument of appointment and thereby constitutes the donee thereof the agent of the donor, yet the use to which it is these days committed in transactions relating to land has so popularized it among the landed gentry in Nigeria that its legal meaning and nature have been largely misconstrued. It is in this wise generally taken to be an instrument through and by which interest in land is conveyed or more appropriately transferred to the donee by the donor. This practice which is now common place in most parts of Nigeria has led people to believe that once a power of attorney is donated over land, particularly where it is expressed to be given for valuable consideration and therefore irrevocable, it amounts to the sale of the land or more appropriately, alienation of interest over the land to the donee of the power of attorney who consequently goes home satisfied that he has indeed undertaken a purchase of the land or successfully acquired valid interest in land. Considered within the context of the law of consumer protection, the donee of the power of attorney is in this paper the consumer of the use of power of attorney and the extent to which he is protected under the transaction having regard to the available legal regime on the subject is the purpose of the analyses. It will be demonstrated that what is obtainable in practice is diametrically at variance with the state of the law on the subject resulting in exposing the donee consumer to avoidable risk for most part. It will consequently be recommended among other things that a paradigm shift be achieved via legislative intervention to establish and nurture a home grown Nigerian version of Power of Attorney so as to achieve a sustained protection for the donee consumer under the Nigerian legal system. The research methodology which resulted in this paper is the desk top approach by reason of the fact that the research materials are chiefly the relevant statutes, case law resulting from judicial interpretative approach to the subject matter, informed opinions of professionals in the field published in journals and textbooks. The analytical method of synthesizing the materials is adopted to critically assess the state of the law and come up with practical solutions to the problems thrown up by the research.

Keywords: *Consumer, Consumer Protection, Interest in land,
Power of Attorney.*

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Background to the Study

By general grammatical definition, a power of attorney is the authority or power to act conferred upon an agent and includes the instrument or document by which that power or authority is conferred or guaranteed³. It is also defined as a legal written authority to transact business for another⁴. In *Vulcan Gases Ltd v G F Ind AG*⁵, it was defined as a formal instrument by which one person empowers another to represent him or act in his stead. In this wise, power of attorney is to be understood in its general nature and character which is wider than the scope in which it is used in this paper, which is restricted and limited to its use in conducting transactions relating to land by the person to whom it is granted or donated known as the attorney or donee for and on behalf or in the stead of the person who granted or donated it known as the donor. In the general sense, the donor or grantor of the power of attorney is the principal while the donee or attorney is the agent under the general principles of the law of agency.

The Contextual Nature of Power of Attorney

For our present purpose, the judicial definition as given by the Supreme Court in the case of *Gregory Ude v Clement Nwara & Anor*⁶ aptly captures the appropriate legal meaning of power of the attorney. Nnaemeka- Agu JSC proceeded thus;

A Power of Attorney is a document, usually but not always necessarily under seal whereby a person seized of an estate in land authorizes another person (the donee) who is called his attorney to do in the stead of the donor anything which the donor can do lawfully, usually clearly spelt out in the power of attorney. Such acts may extend from receiving and suing for rates and rents from, to giving seisin to third parties. It may be issued for valuable consideration or may be coupled with interest. In either case, it is usually made to be irrevocable either absolutely or for a limited period.

On the specific question as to whether a power of attorney confers or transfers interest in land, the Justice of the Supreme Court clearly stated thus⁷,

A power of attorney merely warrants and authorizes the donee to do certain acts in the stead of the donor and so it is not an instrument which confers, transfers, limits, charges or alienates any title to the donee, rather, it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party. So, even if it authorizes the donee to do any of these acts to any person including himself the mere issuance of such a power is not per se an alienation or parting with possession. So far it is categorized as a document of delegation, it is only after, by virtue of the power of attorney the donee leases or conveys the property the subject matter of the power to any person including himself then there is an alienation.

In dealing with the legal nature and effect of power of attorney, the prevailing climate of judicial opinion has been and continued to be as emphasized by Dahiru Musdapher (as he then was) in *Olorunfemi v NEB Ltd*⁸ that the grant of power of attorney transfers no interest in the

³Smith s. Stephenson Ed. *The New International Webster Comprehensive Dictionary of the English Language*. Encyclopedic Edition, Standard International Media Holdings, 2013 Ed. USA, P990

⁴*Ibid.* 94

⁵(2001) 9 NWLR (Part 719) 610@ 663-4.

land over which it is granted. In that case, the claim for the sale of property subject matter of the suit was made upon the strength of a power of attorney which was presented as the evidence of sale of the property. The Court of Appeal while rejecting the contention and concluding that the Power of Attorney evidenced no such transaction, stated as follows;

Ordinarily Alpha, as the donee of the Power of Attorney Exhibit 5 had the authority in its absolute discretion to alienate the donated property by sale thereof in the name of the appellant without any problem. But in the instant case, there is no evidence of sale as required by law. What was offered as proof of sale was Exhibit 10 which is clearly a Power of Attorney simply granted to the respondent. Even if Alpha had the express authority to appoint the respondent as another agent, the respondent remained an agent of the appellant notwithstanding that the appointment is coupled with interest. In any event, there is no authority to sell property by executing a Power of Attorney. It must be emphasized that the grant of Power of Attorney transfers no interest in the land.

Further on the nature of power of Attorney, Parts- Acholonu JCA (as he then was) in *Ndukauba v Kolomo*⁹ observed as follows;

It must be noted that a Power of Attorney is not an instrument that transfers or alienates any landed property. It is merely an instrument delegating power to the donee to stand in the position of the donor and do the things he could do. It is erroneously believed in not very enlightened circles particularly amongst the generality of Nigerians that Power of Attorney is as good as a lease or assignment. It is not whether or not it is coupled with interest. It may eventually lead to execution of an instrument for the complete alienation of land after the consent of the requisite authority has been obtained.

Judicial authorities are galore on the nature of a Power of Attorney not being one which transfers or alienates interest in land as between the donor and the donee in spite of the general belief that it does and by reason of which volumes of land transactions are erroneously undertaken on the strength of and through powers of attorney in the misguided belief that interests in the affected land are thereby effectively transferred and vested.

Relational for the Scheme of Power of Attorney

The reason for this state of affairs is not far-fetched. The introduction of the consent regime in the various state land statutes and state lease with the cumbersome processing procedures and fees led to the need to devise avenues through which to circumvent and beat the requirement of consent while at the same time achieving a semblance of conveyance transaction involving some nature of alienation of interest without necessarily running afoul of the law. Thus, in the words of a learned writer¹⁰, for many decades lawyers have sought to escape the claws of consent provisions of various statutes by preparing a power of attorney by which a vendor appoints his purchasers as agent to do everything on the land. The scheme is that the power of attorney is not an instrument of transfer of interest in land and so is not caught by the statutes

⁶(1993) 2 SCNJ 47 @ 66-67.

⁷Ibid.

⁸(2003) 5 NWLR (Part 812) p.1@ 21-22

that prohibited transfer of interest in land without obtaining the requisite consent. Thus, in actual fact, most legal practitioners are quite aware of the legal nature of power of attorney when they employ it, but for most part, the clients for whom the instruments are prepared are possessed of limited knowledge of the effect. But the predominance of the scheme gained impetus upon the enactment of the Land Use Act¹¹ which with the damnable consequence of section 26 of the Act for failure to secure consent pursuant to sections 21 and 22 has unwittingly resulted in greater majority of lawyers not actually being versed in the nature and legal effect of the instrument which they copiously employ in purporting to alienate and convey interests in land with the result that their donee clients stand faced with dire consequences when they realize that the instrument had not in deed advanced or protected their interest in the subject property covered thereby. In most cases the Power of Attorney is expressed to be irrevocable and coupled with interest or given for valuable consideration by which is meant that money or money's worth or some other advantage or forbearance is parted with by the donee/attorney. By being expressed to be irrevocable in that sense, the death or other legal incapacity of the donor will not affect the validity or subsistence of the power of attorney so as to revoke it. Certain statutory provisions lend validity to the irrevocability of power of attorney given for valuable consideration¹² and thus afford it a measure of legal stability and sustainability. By reason of this state of "irrevocability the power of attorney has enamored itself to solicitors as an instrument of conveyance"¹³.

Irrevocable Power of Attorney Construed as an Instrument of Conveyance?

A few cases suggest that the general nature of power of attorney revocable or not may not altogether be held not to amount to a conveyance of title to the donee. In *Ejukorlem & Co Ltd v Chief Inspector of Mines*¹⁴ where two companies which were granted a mining lease executed a power of attorney in the appellant's favour to mine the minerals which had been granted them. By the provision of section 13 of the Minerals Ordinance there was a prohibition of assignment of a mining lease without the Governor's written consent and it was a crime to mine minerals without a lawful grant by the Governor. The donee company was therefore charged and convicted under the ordinance because the power of attorney which was made irrevocable empowered the company to do everything which the companies were authorized to do under the mining lease, namely, to take possession of the properties and work the mines, prosecute anyone and sell all minerals and retain the proceeds without liability to account to the donors. The power of attorney was held to be a subterfuge to get round the Minerals Ordinance by enabling a person who did not secure consent from the Governor to assign the lease and was consequently void. In the judgment of the court, Hurley Ag SPJ stated inter alia as follows;

The power of attorney is not a sublease for there is no reversion. It is not a license, for it is unconditionally irrevocable and it confers a right to possession. This instrument then which takes effect as a conveyance can operate to assign the interest which it conveys. That, in- deed is what it was intended to do as can be seen when it is looked at as a whole..... The attempt fails, for what it amounts to and what the power of attorney effects is an assignment of the right and interests in question and the assignment is void for want of consent¹⁵

While the decision in *Ejukorlem & Co Ltd* was a High Court decision, a similar conclusion was reached by the Supreme Court in *Dickson v Solicitor- General, Benue Plateau State*¹⁶. The

⁹(2001) 12 NWLR (Part 726) p117@ 127.

¹⁰Chianu, Prof E. Law of Sale of Land. Law Lords Publications, Abuja, Nigeria, 2009, p113.

¹¹Cap L.5, Laws of the Federation of Nigeria 2004.

holder of a right of occupancy under the Land Tenure Law sold the right to the second defendant who in turn executed a Power of Attorney in favour of the first defendant. The first defendant took up possession and none of the transactions had the consent of the Governor as required by the Land Tenure Law, pursuant to its Sect 28(1) which is *impairi materia* with Section 22 of the Land Use Act. In an action by the Solicitor-General to evict the defendants from the premises, the Supreme Court held that the power of attorney required consent and in the absence thereof the action of the plaintiff must succeed and in the words of Coker JSC¹⁷.

The first clause in the power of attorney which admittedly is unusually exhaustive and elaborate transfers, to the donee of the power of attorney the right to the possession of the premises in question. As this is one of the matters contemplated by section 28(1) it is manifest that the power of attorney itself offends against that section. It is easy to see that the defendants had made out no case at all to entitle them to be in lawful possession of the property in question, they should be evicted.

While these two cases would appear to be at variance with the present state of judicial approach to the legal effect of powers of attorney considering the Ude v Nwara line of cases, it is easy to see why they did arrive at the conclusions they reached given the absolute nature of the clauses in those instruments under consideration. Even today's powers of attorney are couched in more absolute and much wider terms which show clearly that what are actually intended are alienations dressed up as Powers of Attorney. Such terms and clauses giving the donee power to take full and complete possession, empowers the donee to perfect the title to the subject property in his name, sell and even devise the property in his name, develop it and secure the issuance of certificate of occupancy in his own name and for his benefit and all these and more without further recourse to the donor or consultation with him.

A similar circumstance arose in Lababedi v Odunlana¹⁸ and Taylor C. J. took the view that the clauses in the power of attorney which empowered the donee to develop the land subject matter of the power for building purposes and to build house(s) thereon in accordance with his own style, approval and design, mortgage, charge, lease, and sell was made for protecting or securing the interest of the agent since it was not likely that a person with no interest could assign and execute all the necessary documents pertaining to the assignment and in addition develop the property at his own expense and still pay consideration to the donor. The Learned Chief Judge therefore gave effect to the substance of the transaction and the true intent of the parties and disregarded the subterfuge that was dressed up as power of attorney and held that a sale was contemplated by them and the instrument showed either a purchase or assignment of the interest of the donor to the donee.

¹²Sec 8, Conveyancing Act 1882, (A statute of General Application under the Nigerian Legal System applicable to some states of the federation), Sec. 143(1), Property and Conveyancing Law, Cap, 100. Laws of Western Nigeria 1959 (applicable to the states created out of the old western Nigeria) Contract Law, Cap 26, Revised Laws of Enugu State 2004 and sections 728 and 729 Contract Law Cap 30, Revised Laws of Anambra State 1991

¹³Chianu, op. cit.p 115.

¹⁴(1957) NRNLR 200

¹⁵Ibid at 206

¹⁶(1974) All NLR 248

The Legal Effect of the Present Judicial Approach to Powers of Attorney on the Protection of the Consumer

It is surprising that earlier judicial attitude was to take a critical look at the totality of the instrument paraded as a power of attorney and see if it indeed represented what it claimed to be or whether it was an alienation dressed up and masquerading as an instrument of authority, whereas the current approach insists on treating the instrument as a power of attorney notwithstanding the largess of latitude given to the donee to deal with the property subject matter of the transaction. The obvious effect is that notwithstanding the extent of the powers exercisable by the donee under the power of attorney, the instrument is still construed as not being able by itself to effect a transfer of interest in the land in favour of the donee but to continue to be a vehicle through which the transfer could be achieved. This judicial attitude created a problem for the donee of the power of attorney that for the purpose of this exercise implies the consumer the extent of whose protection is the subject of this enquiry. It has become widely known that the need for consumer protection has gained popularity all over the world. The expression consumer protection is thus understood to mean the prevention or reduction of or shielding the consumer from injuries, losses, wrongs and damages from occurring or happening to the user of goods and services and the provision of remedy to the consumer in a situation where he suffers injuries¹⁹.

Therefore, within the context of this enquiry, it would mean the shoring up of the donee and in some cases even the donor who is adversely affected by the consequences of lack proper conveyance services in the preparation of the appropriate of effective instrument of title to secure his interest over the land subject matter of the transaction. It has been contended that the present attitude of the court towards all categories of power of attorney creates a quagmire for the donee of the power even though some may see the position of the law as an advantage in disguise²⁰ perhaps in the sense in which the Court approached it in *Ude v. Nwara* and extrapolating from that, it will be conceded that although it could be applied to advantage, yet its flaws and weaknesses far outweigh the gains.

Thus, other than expressing a power of attorney to be irrevocable and given for valuable consideration the value of which in most cases is never expressly mentioned so as to avoid the payment of stamp duty *ad valorem* the power of attorney cannot be taken or understood under the law to be evidence of sale transactions between the donor and the donee and without proof of such sale transaction, the donee cannot be taken to have acquired equitable interest in or over the property subject matter of the power of attorney. This is because if it were possible to qualify as a sale or purchase transaction, and the donee has possession thereby, he would have been enabled to contend for an equitable estate over the land, but without such a legal enablement, he cannot mount any serious claim to any proprietary interest over the land whether equitable or legal²¹. The position of the donee is consequently precarious and he runs the risk of being overreached by the action of the donor who has been held to be able to validly exercise the very same powers he had granted to and conferred upon the donee under the instrument as long as the donee has not yet exercised the same in a number of cases including; *Ude v Nwara*²² *Ajuwon v Adeoti*²³ *Oshola v Finnih*,²⁴ and *Chime v Chime*²⁵. The danger this portends is that the valuable consideration so furnished by the donee and for which he was granted the power of attorney may not be enough assurance to him that his interest is so well secured as not to be subverted by the self same donor.

¹⁹Ibid at 250

¹⁸(1973) 4 CCHCJ.92

While it may be taken to be advantageous in the sense that it does not come within the purview of the transactions which require consent under the Land Use Act and therefore it is easily registered, yet it has been amply and sufficiently shown that registration in that sense does not confer on the Power of Attorney any legal effect which it does not have by its very nature and legal signification. Therefore, even where it is registered, the interest of the donee is still subordinated to that of the donor for whom the donee continues to function as an agent in respect of the property covered by the instrument as he cannot do or perform any of the acts or powers conferred upon him in his name but in the name and stead of the donor even if the donor directs that he does not have further recourse to him in doing so. That is clearly demonstrative of an imperfect exercise of dominion over the property.

It has also been contended and rightly too that where the donee of a power of attorney has improved the Land he occupies under and by virtue of the powers in the instrument, the current judicial position suggests that he may be entitled to nothing, at least in law, if the donor happens to contend for the compensation in the event of revocation of right of occupancy which the revoking authority has paid or intendeds to pay²⁶. This is clearly in spite of the fact that the powers granted to the donee under the power of attorney will usually include the power to apply for, the compensation on behalf of the donor, receive and keep for his own use and benefit such compensation as may be paid over the land in the event of the exercise of power of revocation of right of occupancy over the land²⁷.

What Protection or Remedy Avails the Donee Consumer?

It has been established that the consumer within the context of this paper is largely or mainly the donee of the power of attorney in respect of the land covered by the instrument. It may however be possible for the donor of the power to be categorized as the consumer when viewed from the conveyance or Solicitor whom he engaged to ensure the preparation of the appropriate legal instrument for an effective alienation and conveyance of his interest over the land to the donee, but who negligently prepared the power of attorney in that regard. The donor will in that sense be the consumer and in the same category as the donee as neither of the two set out to deliberately take undue advantage of the other under the transaction.

However, by reason of the fact that when push comes to shove, the donee will be the one standing on the weaker wicket and therefore vulnerable, and running the risk of losing both the land and the valuable consideration, furnished by him, his interest is more in focus for purposes of achieving the requisite protection. Some of the remedies available to the donee consumer may include the following;

Protection under the Contract

Even when the hard line approach currently favoured by the court is adopted to insist that other than an instrument of appointment the power of attorney cannot be taken to have crystallized into a sale or other form of alienation in line with the *Ude v Nwara* line with cases, yet the situation would appear not to be altogether hopeless and the donee consumer is not completely

¹⁹Obumne-Okafor Dr. N J: The Legal Regime for Consumer Protection in Nigeria and the Consumer of Conveyancing Services: The Registration of Instruments Affecting Land in Focus (2014) 10 NJI Law Journal, 209 @ 217

²⁰Attah M. Dealings in Land through Power of Attorney-A Quagmire for Donees? (2007) 8 Nigerian Law and Practice Journal 13 @ 27.

²¹Ogunbambi v Abowaba (1951) 15 WACA 222, Oshodi. V. Balogun (1936) 4 WACAI and Ozua v Suleiman (2009) 11 WRN 154

²²Suprs

²³(1990) 2 NWLR (Part 132) 271

²⁴(1991) 3 NWLR (Part 178) 192

²⁵(2001)3 NWLR (Part 701) p 527@ 549 and 554.

helpless. By reason of the fact that the transaction evidenced by the Power of Attorney as an instrument of appointment arises out of the contract of agency the donee is largely enabled to enforce his rights under the contract of agency²⁸ if and when his principal being the donor attempts to overreach him or act in any manner at variance with or detrimental to his interest. Thus, while it is conceded that following *Ude v Nwara*, *Ajuwon v Adeoti*, *Oshole v finnih* and *Chime v. Chime* amongst others, the donor could still exercise the powers conferred on the donee as long as he has not yet exercised them during the subsistence of the power of attorney, yet it is submitted that the donor does not have an unfettered and untrammled power or right to do so particularly when the power of attorney is one given for valuable consideration and thus coupled with an interest. It is contended that as long as the consideration furnished by the donee and for which the power was donated has not been fully appropriated, the donor will not be at liberty to shortchange or overreach him and if he must also exercise such power while the power of attorney still subsists and is current, it must be exercised in a manner that is not inconsistent with the interest of the donee and indeed must be done subject to his interest. This must be so because to allow the donor such an un-circumscribed liberty where the donee has not breached the terms of the power of attorney would amount to approbating and reprobating. Again, it will run counter to the statutory provision and general principles on the construction of powers of attorney. For example the available legal framework which governs the use and legal effect of power of attorney in Enugu State²⁹ provides in section 616 that the authority, express or implied of every agent is confined within the limits of the powers of his principal and section 617 of the law specifically deals with the construction of powers of attorney and provides that they must be strictly construed and interpreted as giving only such authority as they confer expressly or by necessary implication and no oral evidence could be admitted to add to or vary the power of attorney³⁰.

Strict Construction of Power of Attorney

The principle of strict construction of power of attorney will also enable the donee consumer who is about to be expropriated of the land or have his interest overarched by the donor to institute an action under the contract of agency to enforce his strict legal rights against the donor. There is no evidence that the general principles governing the use of power of attorney have created any room by which power of attorney has been exempted from the application of the contractual doctrine of *pacta sunt servanda* which recognizes and enforces the principle of sanctity of contracts under which contracting parties are held bound by the terms agreed by them and upon which they contracted. The doctrine of *pacta sunt servanda* has received judicial application under the Nigerian jurisprudence in many cases including *Amizu v Nzeribe*³¹, and *Ojediran v Governor of Oyo State & Anor*³².

Judicial Ingenuity and Activism

Another form of protection for the donee consumer lies in the judicial ingenuity and activism provided by the earlier decisions typified by the cases of *Ejukorlem & Ltd v Chief Inspector of Mines*, *Dickson Solicitor-General and Lababedi v. Odunlana* as opposed to the not so satisfactory stance taken in the *Ude v Nwara* line of cases by which the modern trend of judicial opinion is propelled. Thus, a power of attorney over land expressed to be given for valuable consideration and Irrevocable should be strictly construed and given effect to for what it is worth, an alienation, in spite of the nomenclature employed in the instrument and how it is dressed up for according to Chianu³³, the court should go behind the sham nomenclature to

²⁶Attah, M . op. Cit at 32

²⁷Ibid.

²⁸*Vulcan Gases Ltd v G F Ind A.G. Supra @ 637-838 and Sec 615, Contracts Law Enugu State, Supra.*

unmask the transaction in order to ascertain its true intent and give it effect as it is unrealistic to regard the written contractual instrument as the definitive expression of the contracting parties' wishes without considering the general premises.

While condemning the Supreme Court's stance in *Ude v. Nwara, Oshimiri*³⁴ contended that there was no justification why the faultless line of judicial reasoning in *Lababedi v. Ogunlana* was neglected in *Ude v Nwara* so as to hold that the substance of the power of attorney under consideration in the case was an assignment, purchase and parting with possession of the stated land lease and accordingly the attorney in that case reaped all the benefits in the state lease while pretending to act for the donor and concluded that it was actually difficult to see the basis on which the Supreme Court decided that there was no alienation, assignment or parting with possession. It was his view that the presence of money's worth or pecuniary consideration and wider authorities given to secure the interest of the donee should be enough to be called in aid to clothe the transaction with the character of alienation. Thus he submitted that where a transaction involving the use of irrevocable power of attorney to dispose of interest in land and whose real substance is a gift, pledge, mortgage, sale, assignment, transfer of possession, or sublease is in focus, the same should be taken to be a disguised alienation as was held in *Lababedi v. Odunlana* and *Ejukorlem & Co Ltd v. CIM* as the emphasis should be on the substance as deductible from the express and implied intentions of the parties but not the form in which such intentions had been disguised. This approach will afford adequate protection to the donee consumer and shore him up to be able to realize the true intention of the transaction.

The Principle of Irrevocability

Furthermore, the common law principle of irrevocability of the power of attorney particularly one coupled with an interest affords the donee consumer another form of protection. Once there is clearly evinced an intention to protect the interest of the donee particularly where there is a clear agreement that the authority so conferred will be irrevocable and coupled with interest or valuable consideration, whether or not it is in writing the protection ensures to his benefit. This common law approach has been given statutory expression in respect of powers of attorney under the Property and Conveyance Law. Thus whereas the statutes require an express statement of irrevocability, the common law only requires an express intention to protect the donee's interest.

Legislative Intervention

Legislative intervention as a means of protecting the consumer in Nigeria and particularly within the context of this enquiry is multi-dimensional. The first is the overdue need for an all encompassing or comprehensive statute dealing with consumer protection as a subject. This is without prejudice to the extant legislation under which the Consumer Protection Council was established but which to all intents and purposes cannot be said to be a comprehensive and standard statute on the subject. A call is therefore made for the enactment of such a compressive legislation to adequately cover the field on the subject and create the general principles based upon which the consumer can derive proper and effective protection, under the Nigerian Legal system in general and the consumer protection jurisprudence in particular.

²⁹Contract Law Cap 26 Supra

³⁰*Abina v farthat* (1938) 14 NLR 17 and *Jacobs v Moses* (1902) 1 ch 816

³¹(1989) 4 NWLR (part118) 755,

³²(2013) 47 WRN 160@ 177.see also Garner Bryan Ed. Black's Law Dictionary 9th Ed. West Publishing Co, USA, 2009 P. 1217.

³³*Ibid* at 121

³⁴*Oshimirli Uche; The Test Whether Power of Attorney is An Alienation of interest in Land Depends on the Substance and not the form Re; Ude v Nwara* (1993) 2 NWLR (pt 278) 638; (1999) 3 Lawyers' Bi-Annual, 214@224-225

Another aspect of legislative intervention is the one which should be done with the subject matter of his paper in focus; namely, power of attorney. Admittedly, a few states have already taken the step in the right direction on this. Rivers State and Lagos State have adopted some positive legislative measures to specifically require that powers of attorney coupled with interest come within the purview of instruments for which consent is required to be registered with fees specified whereas those not coupled with interest may not be so required³⁸. It is advocated that every state of the federation should adopt the same legislative approach on the issue while the Federal Government should also do the same in the Federal Capital Territory and as may be applicable.

More Pro-active and Conscious Effort at Consumer Protection

What has emerged from the examination of the available remedies or protection for the donee consumer in this regard is the reliance on the legal principles of the law of contract, and more particularly the law of agency. Thus, left as it is to the dynamics of the application of those principles of law with heavy reliance on the judicial interpretative approach, which, as has been seen has manifested ancient and modern approaches with the ancient approach seen to be more dynamic, activist and fair and just, it becomes necessary for a more positive legislative intervention in solving the problem faced by the donee consumer within the practice of the use of power of attorney to conduct transactions relating to land.

Paradigm Shift in Judicial Interpretative Approach

The sharp division between the groups of cases on the subject has brought to the fore the urgent need for a paradigm shift. A return to the old or ancient trend of undertaking a critical examination of the instrument to discover the real intention of the parties as was done in the Ejukorlem line of cases is advocated while a more cautious application of the Ude v Nwara line of cases will be highly beneficial and better promote the ends of justice. Chianu's suggestion for judges to feel some measure of reluctance in order to conclude that a bargain freely negotiated and intended to be binding is nevertheless non-existent because of the type of document their Solicitor chooses to adopt is quite instructive and valuable here. His admonition that a judge should approach an instrument with reasonable goodwill, genuinely seeking to discover its meaning is adopted. Also accepted is his view that where the Solicitor to a client in preparing title documents commits a blunder by preparing an ineffective document the courts should not be in a haste to declare the instrument valueless where there is no evidence that the purchaser who would be the worse for it contributed to the preparation of the ineffective document. It is humbly advocated that the judicial interpretative approach should consciously adopt the approach of drawing clear distinction between powers of attorney coupled with interest and accordingly irrevocable and those not so coupled, pronounce those expressed to be coupled with interest as crystallizing into alienation of interest in land as long as that is collectable from the confines of the instrument as that will always result in achieving the best ends of justice.

Constant Updating of the Applicable Statutes

A system of progressive legislative activism is advocated. By this means, the emerging legal principles formulated and arising from judicial decisions on the subject should constantly be enacted into law so as to give them statutory force instead of being left to the uncertainty of

³⁵See generally Attah Supra @ 33

³⁶Sec 143 (1), see also Sec 8 Conveyancing Act 1881,

³⁷Consumer Protection Council Act, Cap. C5 Laws of the Federation of Nigeria 2004

³⁸Rivers State Lands (Fees) Regulations 1987, and Lagos State Lands Law 1994. Sec 7(b) (111) and Lagos State Land Use (Amendment) Regulations. LSLN No.9 1985 Regulation 49(c)

choice of judicial application. This will ensure a more effective and dynamic consumer protection regime on the subject for the benefit of the conveyancers and their largely uninformed clientele.

Adopting More Pragmatic Conveyancing Approach

A resourceful conveyancer or Solicitor who wishes to err on the side of caution should proceed with the aim of putting the intention of the parties beyond equivocation by preparing more instruments even where he wishes to employ the use of the irrevocable power of attorney to facilitate the securing of the interest of his client. Thus, experience has shown that even where the expressed valuable consideration for which the power of attorney is granted is not stated so as to avoid heavy stamp duty, yet it is not altogether useless or disadvantageous to prepare such additional instruments as purchase receipt which shows the actual purchase price without the risk of attracting heavy stamp duty because every receipt, no matter the sum covered by it attracts only nominal stamp duty. Thus apart from showing consideration by way of purchase price, it will provide the lacuna in the power of attorney by showing unequivocally that it is indeed a sale, an assignment, a lease or such other form of alienation. In addition, where necessary, a deed of assignment or deed of lease or gift, as the case may be or where the transaction is conducted under native law and custom, a deed of customary grant of land should also be prepared and executed by the parties so as to put the transaction beyond conjecture or equivocation. All of them will demonstrably present the clear intention of the parties and assist the court in doing justice.

Specific Provision in the Land Use Act

Persistent calls have been made for the amendment of the Land Use Act. In this vein another specific provision to be included in the amendment is the express inclusion of irrevocable power of attorney over land as part of the instruments over which the consent of the Governor or approval of the Local Government should be secured as applicable under sections 21 and 22 of the Act. This will put it beyond doubt as to whether it is taken within the purview of the Act as an instrument of alienation of interest in land.

Development of A Home Grown Type of Power of Attorney in Nigeria

The pervading climate of divergent judicial opinions on the nature and legal effect of power attorney is engendered by the continued reliance on and application of the law on the subject in line with the received law.

There is need to break this trend by way of judicial consciousness to promote a truly Nigerian brand or specie of power of attorney which need not fall in line with the nature of the instrument under the received law. With the way and manner in which the instrument has wittingly or otherwise become popular in the conveyance practice, there is need to fashion it out to be able to capture the essence of its popularity and obliterate or eliminate the chances of disappointment when it is employed and fails to achieve the desired effect, namely; valid transfer of interest in land using a power of attorney as the vehicle. A Nigerian type of power of Attorney must not toe the line of those developed and in use in such other jurisdictions as either the United Kingdom or the United States of America. A unique and peculiar type developed by and under the Nigerian Legal System is not an aberration as long as it has legal backing and practical value and acceptability in Nigeria. The applicable legislations should be consciously amended to reflect and accommodate the Nigerian type of power of attorney and the donee

consumer who is indeed all and every citizen of Nigeria will be the better if not the best for it.

Conclusion

One gratifying result of this enquiry is the discovery that the consumer as the donee is not altogether bereft of remedy or protection under the law even though his position still largely appears precarious and portends danger under the prevailing legal regime. However comfort is provided by the realization of the fact that there is awareness of the danger lurking in the corner and gradual legislative intervention is on course towards achieving a more protected and consumer friendly environment for the practice of dealings in land through the use of power of attorney.

Recommendation

It has been seen that in spite of the seemingly weak and vulnerable position of the donee consumer under the transactions conducted using the power of attorney, he is not altogether without remedy.

However, in spite of his acknowledged multifaceted means of protection, there is still dire need for conscious efforts to be made to ensure effective protection for the donee consumer since the use of power of attorney has gained so much popularity that more and more innocent and uninformed people will fall victims to the imperfect state of the law on the subject. The exploitation theory of consumer protection aims at providing the vulnerable consumer with protection from exploitation by the providers of goods and services³⁹. The following recommendations will go a long way in achieving a good measure of protection for the consumer.

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