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THROUGH THE BACKDOOR, DRESSED IN BORROWED ROBES: THE USE OF POWER OF ATTORNEY FOR THE TRANSFER OF INTEREST IN LAND IN NIGERIA

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Abstract

Whether a power of attorney qualifies as an instrument for the transfer of interest in land in Nigeria, thereby necessitating the consent of the Governor before any such transfer, has become a thorny issue. Attempts to proffer an authentic answer to this question have sharply polarized scholars and stakeholders. This article is of the view that a power of attorney, by its nature, does not have the legal capacity to be used in transferring interests in land and posits that the current practice whereby documents of actual conveyance are masked as powers of attorney in order to escape the statutory requirement for governor's consent before alienation of interest in land amounts to gaining entrance into a premises through the back door, dressed in borrowed robes.

Keywords: Land, Land instrument, Power of attorney, Transfer of interest in land, Governor's consent,

1. Introduction

Ownership of property comes with a number of claims, liberties, powers and immunities with regard to the thing owned¹. The absolute power to alienate the thing owned is one of the incidents of ownership. In fact, one of the most radical ways of demonstrating ownership over a thing is the absolute power of the owner to sell or otherwise dispose of that thing at his will and without any let or hindrance. However, with respect to land, the introduction of the Land Use Act in Nigeria brought with it the vesting of the radical title in all lands comprised in every state in the Governor of that state to hold same in trust for the people². One of the most revolutionary provisions of this Act is the requirement of the consent of the governor as a condition precedent to the validity of any transfer of interest in land in Nigeria³. According to Abugu, in principle, there is really nothing wrong with this requirement as it is consistent with the present regime

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¹ See Reginald Akujobi Onuoha, 'Governor's Consent under Section 22 of the Land Use Act: The Position Since *Savannah Bank v Ajilo*' in IO Smith (ed), *The Land Use Act: Twenty Five Years After* (Lagos: Department of Private and Property Law, University of Lagos, 2003)199.

² Section 1 of the Land Use Act, 1978. (hereinafter, 'the Act').

³ See Uwakwe Abugu, *Land Use and Reform in Nigeria-Law and Practice* (Abuja: Immaculate Prints, 2012) 109.

which vests all land in the State in the governor, mandating him to hold and administer same for the use and common benefit of all Nigerians⁴. To effectively exercise this mandate, the governor needs to be able to keep track of the movement of land from one person to the other. However, in practice the consent requirement has brought untold hardship on many Nigerians and business outfits by reason of the tortuous process and the unreasonable length of time it takes to obtain such consent. As a result, legal practitioners have resorted to devising smart schemes to circumvent the consent requirement and ensure timeous and cost-effective modes of transferring interest in land. One of such schemes devised to avoid the consent of the governor is the use of Power of Attorney as a means of transferring interest in land. But to what extent can a power attorney achieve the legal requirements for transfer of interest in land? This article argues that a power of attorney, properly so called, in its normal nature and character, is not, in itself, an instrument for the transfer of interests in land in Nigeria. It is an appointing document of agency. The article, however, notes that through the negative application of some creative drafting ingenuity, practitioners have created a hybrid document which, while substantially retaining the form of a power of attorney, is essentially a deed of conveyance in content and effect.

2. Meaning, Nature and Form of a Power of Attorney

According to *Black's Law Dictionary*⁵ a power of attorney is an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal. It has also been defined as a formal instrument by which a person empowers another to act on his behalf, generally, or in specific circumstances.⁶ It is usually, but not always necessarily, under a seal whereby a person who is entitled to an estate in land(the donor) authorizes another(the donee) his attorney, to do in the donor's stead anything which the donor can lawfully do in respect of that land⁷. This is usually clearly spelt out in a document. It may be issued for valuable consideration and may be coupled with interest. In either

⁴ Section 1 of the Act. It should also be noted that Governor's consent to alienation of interest in land in Nigeria anchors its philosophical basis on the concept of ownership itself while its justification dates back to the customary jurisprudence of the consent of the family head and the landlord(in the appropriate cases) before any transfer of the respective interests can be validly effected.

⁵ Joseph R Nolan and others, *Black's Law Dictionary* 6th ed., (St Paul Minn., USA: West Publishing Co, 1997) 1171.

⁶Elizabeth Martin (ed.) *The Oxford Dictionary of Law* (London: Oxford University Press, 2002) .p.372.

⁷ Abugu (n 3) 110.

case, it is usually irrevocable either absolutely or for a limited period.⁸ Generally speaking, a power of attorney is revocable if the circumstances warrant that.

Discernable from the above definitions is the fact that a power of attorney, by its nature, is an instrument that creates an agency relationship. It is, therefore, subject to all the rules and principles of agency. It is the law that all the powers of the attorney (the donee) should be clearly and unequivocally set out. It has been stated that a power of attorney must be drawn in such a way that the powers of the donee are so exhaustively listed that a fair construction of the whole instrument will reveal whether a particular authority is provided for (or not) in the instrument either expressly or by necessary implication⁹. This is because a power of attorney is construed strictly and extrinsic evidence is not admissible to establish either what it was that an attorney should have the power to do or that it was intended that he should have additional powers. If the authority is exercised in excess and outside the reasonable scope of its power, a third party will not be able to make the donor liable¹⁰.

Quite a number of judicial authorities abound which celebrate the principle that a donee who acts outside the ambits of the powers set out in the power of attorney does so in vain and such an act is a nullity.¹¹ However, where the circumstances demand, a power of attorney may be given a purposeful interpretation to include powers necessarily incidental to the ones expressly given.¹² It needs to be pointed out that a power of attorney does not generally preclude the donor from also carrying out those acts for the performance of which he has already appointed an attorney. Unless a donor is statutorily barred from acting, or the power of attorney is given for valuable consideration and declared to be irrevocable, nothing stops him from doing the act himself even though he has donated the power to do same to an attorney¹³.

⁸ *Ude v Nwana* (1993) 1 NSCC 236 at 250; (1993) 2 NWLR(Pt 278) 638. See also Section 2(1) of the Law of Property and Transfer Edict, 1998 of Rivers State.

⁹ See Sylvester O Imhanobe, *Legal Drafting and Conveyancing* (Abuja: Temple Legal Consult, 2010) 509; *Re Bryant, Powis and Bryant v Banque de People* (1893) A.C 170 at 71; *Re Dowson and Jenkin's Contract* (1904) 2 Ch 219; *Melwani v Five Star Ind. Ltd.*(2002)3 NWLR (Pt 7531) 217.

¹⁰ *Idowu v Abayomi* (1960) SCNLR 511. See also UJ Osimiri, 'Third party Cannot Vary the Terms of Power of Attorney in Oil Spillage Compensation Claims' (1998) 1 JCPPL, p.54 ; Imhanobe (n 9) 509.

¹¹ *Ojugbele v Olasoji*(1980) FNLR 135; (1982) 1 all NLR (Pt 1) 43; (1982) 4SC31; *Amusan v Benthworth Finance Ltd* (1965-1966) 4 NSCC 309.

¹² See *Anglican Diocese of the Niger v Attorney General of Anambrra State* (1979) ANSLR 64.

¹³ See *Agwaramgbo v Nakande* (2000) 9N.W.L.R (pt.672) 341 See also the classic explanation of this common law principle by Coleridge CJ in *Huth v Clarke* (1897)13 QBD 391.

With respect to its form, it has been opined, and this article respectfully shares that view, that since a power of attorney is an instrument of appointment and not a product of a contractual relationship, it does not require the duality of execution or authentication¹⁴. It is a deed poll, requiring only the signature of the donor to authenticate it¹⁵. In practice, however, legal practitioners in Nigeria draft powers of attorney that make provision for the signatures of both parties as well as those of witnesses¹⁶. Some even extend the rights, duties and privileges enjoyed by the parties to their heirs, personal representatives, executors and assigns, giving the impression that these latter sets of people would inherit the rights, duties and privileges so created. It is submitted that this substantially detracts from the spirit, nature and character of a power of attorney as an agency transaction. A power of attorney is useful for many purposes and, as a general rule, it need not be by deed unless it is so required by law. However, if the authority conferred on the donee empowers him to execute a deed, then the power of attorney must itself be by deed.¹⁷ Thus, the power of attorney to sue on behalf of the donor, to collect rent, represent the donor at a meeting or to merely sign a document need not be by deed. But in all cases where a power of attorney gives the donee the power to effect a transfer of possession, title or ownership of land on behalf of the donor, it must be by deed.

3. Registrability of a Power of Attorney

The answer to the question, whether a power of attorney is a registrable instrument depends on (a) the nature of the power ceded to the donee by the donor under the power of attorney and (b) whether it is classified as an 'instrument' under the relevant land instrument registration law applicable in the state where the land is located. Where a power of attorney gives power merely to sue and defend actions, collect rents, build a house or renovate a building, it is not a registrable instrument.¹⁸ It is registrable where it gives power to the donee to transfer an interest or title in a piece of land to a third party. This will be the case even where the same power of attorney contains other powers that would ordinarily make same not registrable. It has been contended that every power of attorney which empowers the donee to effect a transfer of title or interest in land

¹⁴ Abugu (n 3) 114.

¹⁵ Imhaanobe (n 9) 521.

¹⁶ Ibid. The learned author notes that an advantage of dual execution is that if the document is registered, the donee's signature therein contained can be compared with any other signature purported to have been signed by him at any time in future in transactions dealing with the same land.

¹⁷ *Abina v Farhat* (938)13 NLR 17; *Abubakar v Waziri* (2008)14 NWLR (Pt 1105) 507.

¹⁸ *Abu v Kuyabana* (2002) 4 NWLR (Pt758) 599

in Nigeria is statutorily and compulsorily registrable.¹⁹ Section 2 of the Land Instrument Registration Act,²⁰ defines a registrable instrument as:

A document affecting land in Nigeria whereby one party, (hereinafter called the grantor) confers transfers, limits, charges, or extinguishes in favour of another party (hereinafter called the grantee) any right or title to or interest in land in Nigeria, and includes a certificate of purchase and a power of attorney under which any instrument may be executed, but does not include a will.

Thus by the various land instrument registration laws in Nigeria only powers of attorney “under which any instrument may be executed” are registrable i.e. powers of attorney to execute deeds transferring interest or title to land and not merely powers of attorney to sign documents. Note that in Enugu State, any document which purports to confer, transfer, limit, charge or extinguish any right to or interest in land is a registrable instrument.²¹ With this inclusion, Enugu State has considerably solved the puzzle created by legal practitioners who creatively craft documents which, in form, may present the appearance of powers of attorney or even ordinary purchase receipts, but which in substance, are instruments that effectively transfer interests in land. It is urged that other states should take a cue from Enugu.

This writer is in agreement with the view expressed by Abugu that perhaps, the quality of a power of attorney as a registrable instrument as securing priority and, in contest for title upon registration, in favour of the donee explains the attractions which Legal Practitioners have for it as a means of transferring land. But if a power of attorney does not meet other legal requirements for effective transfer of land, mere registration would not add any further value to the document. In fact, registration is not a magic wand that cures any defect in a registered instrument. A defective or invalid document remains defective or invalid even if it has been registered.

4. Power of Attorney as an Instrument for the Transfer of Interest in Land and the Issue of Governor’s Consent

It has become a topical issue for discussion among lawyers and other stakeholders in the real property industry whether a power of attorney qualifies as an instrument for the transfer of interest in land in Nigeria, thereby necessitating the consent of the Governor before any such transfer. Attempts to proffer an authentic answer to this question have sharply polarized scholars and stakeholders, producing in their wake, two schools of thought. On the one side

¹⁹ Abugu (n 3) 116.

²⁰ See Land Instrument Registration Law, Cap 72, Laws of Eastern Nigeria, 1963 and s 2, Land Registration Law Cap 58, Laws of Northern Nigeria, 1963 which are the same as that of Lagos. These have been enacted into laws by the various states in the respective regions, retaining substantially the provisions of this section.

²¹ Section 2 Land Instrument (Preparation and Registration) Law, Cap 100, Revised Laws of Enugu State of Nigeria, 2004.

are those who contend that a power of attorney, given for valuable consideration or coupled with interest, has the inherent capacity to effectively transfer an interest in land. On the other side is the school peopled by scholars and stakeholders who believe that a power of attorney, by its special nature, as an appointing document of agency does not have such a capacity. The greatest support for the former point of view has its constituency in the general (if ignorant) assumption by members of the public that a power of attorney is an instrument of transfer of proprietary interest, which assumption originated from, and is encouraged by, legal practitioners whose drafting creativity gave birth to the use of power of attorney in transferring interests in land.

It has been earlier on stated that this practice was invented as an escape route from the mandatory requirement of governor's consent for alienation of interests in land. The proponents of this school contend that an irrevocable power of attorney has the trappings of a conveyance and should, therefore, be seen as such. Accordingly, they argue that it would amount to defrauding the system to insist that an irrevocable power of attorney is not more than an agency document subject to the general rule of *delegatus non potest delegare*. Prominent among the supporters of this view is the very learned scholar, Professor Emeka Chianu who forcefully posits that construing a document headed 'irrevocable power of attorney' as nothing but an ordinary power of attorney amounts to underrating custom and practice as a source of law, given the current common practice whereby practitioners load powers of attorney with all manner of authority, including the power of outright alienation without accounting to the donor²². To the adherents of this school, through common custom and usage, a power of attorney has acquired the status of a registrable instrument of proprietary transfer comparable to deeds of assignment, sale, mortgage, gift or conveyance.

This argument sounds so attractive and plausible that it even received some early judicial nods. In *Ejukorlem & Co Ltd v Chief Inspector of Mines*,²³ two companies which were given a mining lease executed a power of attorney in appellant's favour to mine minerals which had been granted the companies. Section 13 of the Minerals Ordinance prohibited the assignment of a mining lease without the Governor's written consent. The Ordinance made it a crime to mine minerals without a lawful grant from the governor. Consequently, the appellant company was charged and convicted. It appealed the conviction and the issue turned on the effect of the power of attorney. The instrument, which was declared irrevocable, empowered the company to do everything which the companies were authorized to do: take possession of the properties and work the mines, prosecute anyone, and sell all minerals and retain the proceeds without accounting to the donors. Dismissing the appeal, it was held that the power of

²² Abugu (n 3) 128.

²³ *Ejukorlem & Co Ltd v Chief Inspector of Mines* (1957)NRNLR 200.

attorney was a subterfuge to get round the Minerals Ordinance and as such void. In a very illuminating exposition of the law, Hurley Ag SPJ concluded:

It is an attempt to get round the provisions of section 13 by giving the company what section 13 says shall not be assigned to it without the governor's consent.... The attempt fails, for what it amounts to, and what (the power of attorney) effects, is an assignment of the rights and interest in question, and the assignment is void for want of the consent

The Supreme Court of Nigeria endorsed this position later in the case of *Dickson v Solicitor-General of Benue Plateau State*²⁴ where the court held that the power of attorney required consent since it transferred to the donee the right to the possession of the premises in question.

As expected, the practice and judicial support for alienation of land through an irrevocable power of attorney has attracted the attention of governments which are forever in search of means to improve the revenue base of the state. Consequently, some state governments in Nigeria have, by legislative fiat, extended the requirement for the payment of consent fee applicable to all instruments of alienation of land to power of attorney affecting interest in land. It has been stated that in Rivers State, the same consent fee of 5% percent of the capital value of property or of the consideration, whichever is higher, is charged for both assignment and power of attorney coupled with consideration or interest.²⁵ According to Abugu, Lagos State has also specifically made a requirement that the grant of a power of attorney in respect of any dealing with any state lease must be preceded by the governor's consent while the consent fee of 12.5% of the capital value of the property is charged for irrevocable power of attorney coupled with interest or given for valuable consideration.²⁶

While this article may concede that an irrevocable power of attorney given for valuable consideration or coupled with interest (especially as currently masked and crafted by Nigerian lawyers) has the capacity, as between the donor and the donee, to have the effect of a transfer of interest in land, thereby making the requirement of governor's consent and consequent payment of consent fee for such documents justifiable to avoid the institution of fraud against the state, it is humbly submitted that this practice substantially alters the original nature and true essence of a power of attorney as an appointing instrument of agency.

The institutional economic benefits accruable from according a power of attorney the character of a conveyance prevents the proponents of this view from really addressing the more vexed issue of whether a donee of an irrevocable power of attorney can effectively transfer his interest under the power of attorney to a third party by executing another power of attorney in favour of the new

²⁴ (1974) 1 ALL NLR (Pt 1) 276.

²⁵ Abugu (n 3) 130.

²⁶ Ibid.

donee (a third party)? The same practice among legal practitioners has shown that donees have had recourse to powers of attorney to transfer their interests to the point of having as many as four successive people acquiring interests in the same property through powers of attorney. This practice flies in the face of the hallowed and time-tested principle of agency, *delegatus non potest delegare*. Judicial authorities show that at best a power of attorney can only be utilized by a donee to transfer interest in the property subject of the power by the execution of a proper lease or assignment acting for the principal (owner) of the property and not merely by executing another power of attorney, which would amount to an agent appointing the purported purchaser as another agent of the same principal. This view has been upheld by the courts in a plethora of cases. In the case of *Ude v Nwana*,²⁷ the government of Eastern Nigeria granted a lease of State land to the appellant for a term of seven years; it effluxed on December 31, 1971. During the term, the appellant appointed a third party an attorney over the land. In February 1973 the Rivers State Abandoned Property Authority issued the appellant a declaration releasing the property to him. Ten years later the Rivers State Government sold the property to the respondent who trespassed on the premises. The appellant sued for a declaration that he was a lessee of the premises and sought to recover damages for trespass from respondent. The Rivers State Government contended that by executing the power of attorney, the appellant was in breach of the covenant in the lease which prohibited alienation without the Government's consent. The Supreme Court rejected the contention, holding that a power of attorney does not constitute an alienation of land. Nnaemeka-Agu JSC stated:

A power of attorney merely warrants and authorizes the donee to do certain acts in the stead of the donor and so is not an instrument which confers, transfers, limits, charges or alienates any title to the donee, rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third part. 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 of the power, to any person including himself then there is an alienation. There is no evidence in this case that that stage had been reached. Until that stage is reached and as long as the donee acts within the scope of the power of attorney, he incurs no personal liability: any liability is that of the donor.

This decision was followed by the Court of Appeal in *Olorunfemi v Nigerian Education Bank Ltd.*²⁸

An extension of the principle that a power of attorney whether irrevocable able or not or whether given for valuable consideration or coupled with interest or not

²⁷ (1993) 1 NSCC 36; (1993) 2 NLR (Pt 278) 638.

²⁸ (2003) 5 NWLR (Pt 812)

cannot effect a transfer of the property subject of the power is the rule that a power conferred by a power of attorney is not transmissible by the death of the donee. In other words the interest of the donee secured power of attorney is not an inheritable property by reason only of the power conferred on the dead donee. As such unless the donee exercised the option of transferring or ring the interest in the power to himself or to another person, the interest is not more than a precarious non-transmissible one that does not survive him. This principle is the natural consequence that follows the nature of a power of attorney as mere instrument of agency. Of course, the power of an agent to act for the principal cannot survive the agent so that the same may be carried out by the donee's personal representatives, heirs, assigns, or the executors of his Will.

In *Ndukauba v Kolomo*,²⁹ the Eastern Nigeria government granted a 99 year term to one Ezeakunne who in turn executed a power of attorney in favour of the plaintiff's father to manage the property. The plaintiff's father erected a building on the land and remained in possession through tenants. In 1982, the Rivers State government transferred the land to tow defendant. After this suit was instituted the donee of the power died and his son continued with the suit. It was also in evidence that the donor had also died at the time of the suit The Court of Appeal held that with the demise of the don and the donee of the power, the agency determined and tl plaintiff had no locus standi to prosecute the claim. His Lordship, Ogebe JCA set out the law in the following words:

From the reading of the document it is clear that the power of attorney only delegated the authority of the donor to appellant's father personally. It was not meant to transfer the authority from father to son. It therefore followed that when the appellant's father died on 29th of October, 1988 during the pendency of the case in the lower court the appellant had no *locus standi* to pursue the matter.

The principle that emerges from this case appears to be that while the death of the donor cannot revoke a power of attorney given for valuable consideration or coupled with interest as it relates to the act of the donee or a purchaser deriving title from him, the death of the donee effectively determines a power of attorney irrespective of its form and content. Accordingly, no personal representative or legatee in the donee's Will can step into the donee's shoes to take the interest secured by such a power of attorney beneficially, unless the donee had taken steps to vest the property in himself pursuant to the power of attorney before his death.

It is hereby reiterated that a power of attorney is not a document whereby interest in land in Nigeria can be transferred, and that the current trend among state governments whereby they enact laws specifically requiring the governor's consent for a power of attorney affecting interest in land does not cure that defect. Pats-Acholonu JCA puts it succinctly:

²⁹(2001) 2 NWLR (Pt 726) 117.

It must be emphasized that a power of attorney is not an instrument that transfers or alienates any landed property. It is merely an instrument delegating powers 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.³⁰

Abugu's learned view that obtaining a governor's consent for a power of attorney amounts to putting the cart before the horse and is of no legal significance is unimpeachable. The governor's consent must be predicated on an instrument which is capable of transferring interest in the land and duly executed pursuant to the power of attorney. It is submitted that all the prevailing laws on payment of consent fees for powers of attorney or that make governor's consent a condition precedent to execution of a power of attorney can only be a clever device by the relevant governments to attract revenue by exercise of its legislative authority. But whether such legislation are constitutional or legal is highly questionable. This is because the governor's power to consent is limited to instruments which are capable of transferring interest in land. Any such consent endorsed on a power of attorney in favour of a third party does not transform such a power of attorney into an instrument of alienation. And to collect consent fee to do what they have no power to do, nor power to achieve, amounts to fraud on members of the public.

Also, any document which pretends to be a power of attorney by simply assuming to be one, but whose contents and substance have the effect of a transfer of interest in land is indeed not a power of attorney. It should, therefore, be treated as a document of conveyance.

5. Conclusion

Recourse to the use of power of attorney as an instrument for the transfer of interests in land in Nigeria grew out of the attempts by stakeholders to circumvent the stress and expenditure involved in securing the consent of the governor before any alienation of interest in land. It is suggested that the procedures and the cost for obtaining the said consent be reviewed, making it less burdensome for citizens. This will discourage practitioners and other stakeholders from the unwholesome practice of dressing instruments of conveyance in the borrowed robes of powers of attorney. It will also encourage people to always opt for the proper documents for all transactions relating to land. It is also suggested that the laws on registration of instruments be amended to reflect the view that documents purporting to be powers of attorney but which in fact transfer interests in land should be denied registration as such. Furthermore, the states' land registries need some uplifting with respect to their

³⁰ Ibid 127.

working infrastructure and quality of personnel. Documents should be properly read and scrutinized before being accepted for registration. This article is a modest contribution to the on-going debate, among scholars and legal minds, on the use of power of attorney to transfer interests in land in Nigeria. It attempted the question as to what extent a power of attorney can effectively and legally be used to transfer interests in land in Nigeria. To do this, it analysed the meaning, nature and form of a power of attorney and came to the conclusion that a power of attorney is an appointing document of agency, governed by all the principles of agency. It also discussed the practice by governments who make laws requiring governor's consent for the validity of powers of attorney, an act which cannot be justified in law. The current practice whereby documents of actual conveyance are masked as powers of attorney in order to escape the statutory requirement for governor's consent before alienation of interest in land was also discussed. Affirming that a power of attorney, by its nature, does not have the legal capacity to be used in transferring interests in land, the article posits that practice amounts to gaining entrance into a premises through the back door, dressed in borrowed robes.