

## THE USE OF POWER OF ATTORNEY IN ALIENATION OF LAND IN NIGERIA: AN APPRAISAL OF THE CASE OF IBRAHIM V OBAJE

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### Abstract

*A Power of Attorney has always been used as an instrument of delegation, created as a deed poll where a principal donates specific powers to an attorney to be executed in the name and on behalf of the principal. In some instances, a power of attorney can be made to be irrevocable when backed up by consideration or coupled with an interest. Such irrevocable Powers of Attorney are usually given to a purchaser of land in a land transaction pending the transfer of the legal interest in the subject matter. The Supreme Court of Nigeria, in the case of Ibrahim v Obaje, delivered a judgment that appeared to depart from the traditional use of a Power of Attorney, as an instrument of delegation, when it held that in certain instances it could be used to transfer interest in land, without the need to obtain the consent of the Governor as required by the Land Use Act, 1978. The paper adopts the doctrinal methodology by analyzing judicial decisions relating to the subject under discourse and opinions of other authors. This paper examined the decision of the Court, against the traditional purpose and use of a Power of Attorney and the mandatory requirement of the consent of the Governor or Minister of FCT for a valid alienation of legal interest in land. As part of its recommendations, the paper upheld the rule against sub-delegation in land alienation.*

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## 1. Introduction

A Power of Attorney has always been traditionally used as an instrument of delegation,<sup>1</sup> whereby the Donor of the powers also known as the principal, donates specific powers to another known as the attorney, such powers are to be executed in the name and on behalf of the principal<sup>2</sup>. A Power of Attorney may be general or specific, depending on the scope of authority granted to the attorney by the principal.<sup>3</sup> The use of general and specific Powers of Attorney may differ between jurisdictions and what the Power of Attorney is sought to be used for.<sup>4</sup> Generally, specific Power of Attorney is limited in scope, in that it narrows the powers granted to the attorney,<sup>5</sup> while a general Power of Attorney as the name implies is broad in the scope of the powers donated, permitting the attorney to deal with the property that is the subject matter of the Power of Attorney in a wide range of transactions.<sup>6</sup> The powers in a Power of Attorney are construed strictly, therefore, the powers must be couched in very clear and unambiguous terms.<sup>7</sup> It is generally an agency relationship,<sup>8</sup> but one that is in a class of its own because it has to be in writing and when the Attorney is required to execute a deed under the Power of Attorney, it

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<sup>1</sup>S.C. Udemezue, 'Providing Answers to Some Controversies Arising from The Use of Powers of Attorney in Real Property Transaction in Nigeria' *NAU. JCLP* Vol. 8 No. 1 (2021)

<sup>2</sup>Y.Y. Dadem. *Property Law Practice in Nigeria*. Jos: Jos University Press Ltd, 2009 p.39

<sup>3</sup>Ibid p.40

<sup>4</sup> Imam Sujuno, 'A Power of Attorney Legality for Indonesian Citizens from Overseas to Proceed in Indonesian Courts.' DOI:10.30996/jhmo.v.2.6407

<sup>5</sup>Y.Y. Dadem. *Property Law Practice in Nigeria 4<sup>th</sup>Edn*. Jos: Jos University Press Limited, 2018. P. 51

<sup>6</sup>Ibid

<sup>7</sup>Sylvester Imhanobe. *Legal Drafting and Conveyancing 3<sup>rd</sup>Edn*. Abuja: The Legal Temple Consult, 2010. P. 509.

<sup>8</sup>Catherine Seal, 'Power of Attorney: Convenient Contract or Dangerous Document?', *Marquette Elder's Advisor* Vol. 11 No. 2 (2010)

must be created by deed.<sup>9</sup>A Power of Attorney is generally not an instrument of transfer of an interest in land, the form and formal parts of a Power of Attorney do not convey interest in land to the donee.<sup>10</sup>

A Power of Attorney may be revocable or irrevocable,<sup>11</sup>a revocable Power of Attorney may be withdrawn by the principal expressly, by implication or operation of law.<sup>12</sup>However, an irrevocable Power of Attorney cannot be revoked in any of the ways mentioned above except with the concurrence of the donee<sup>13</sup> or subject to certain conditions, like when a Power of Attorney is coupled with an interest and declared to be irrevocable until the interest is realized, such a Power of Attorney will stand revoked upon the realization of the interest for which it was made<sup>14</sup>. A Power of Attorney that is backed up with consideration and declared to be irrevocable is usually made in favor of a purchaser of land in a land transaction to allow the purchaser to deal with the property pending the transfer of the legal interest in the land to such a purchaser.

In Nigeria, some legal practitioners attempt to use a Power of Attorney to transfer interest in land to circumvent payment of taxes and avoid obtaining the Governor's consent.<sup>15</sup>This has always been discouraged and frowned upon as a sharp practice until the decision of the Supreme Court in the case of *Ibrahim & Ors. v Obaje*,<sup>16</sup> where the Apex Court in Nigeria held in unequivocal terms that a Power of Attorney can be used as an instrument of transfer of an interest in land under certain circumstances. The decision of the Apex Court is binding on all other

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<sup>9</sup>Ibid n.3

<sup>10</sup>Ibid n 7

<sup>11</sup>Raof, Nurazlinaand Abdullah, Nuraisyah. 'A Review on Irrevocable Power of Attorney: Malaysia and United Kingdom Compared.' (2018). 331-340. 10.5220/0010054203310340.

<sup>12</sup>Ibid

<sup>13</sup> Ibid

<sup>14</sup>Olanrewaju, D. 'The Fallacy of Using Power of Attorney to Avoid the Consent Provision Under the Land Use Act.' [www.academia.edu](http://www.academia.edu) accessed 7<sup>th</sup> November 2022.

<sup>15</sup>Ibid

<sup>16</sup>Engr. Yakubu Ibrahim &Ors V Mr. Simon Obaje (2019) 3NWLR (Pt. 1660) P.389

Courts in the country and can only be reversed by the same court.<sup>17</sup> This paper sets out to critically examine the decision of the Apex Court in the case of *Ibrahim v Obaje*, to analyze the effects of the decision and its implications on property law practice in Nigeria.

## 2. Conditions Precedent for a Valid Alienation of Land in Nigeria

The word 'alienation' in property law has been described as the voluntary transfer of an interest in land from one person to another on a temporal or permanent basis.<sup>18</sup> Alienation generally has to do with the voluntary, lawful transfer of real property to another. The Legal Information Institute (Wex Definitions) describes alienation as follows:

Alienation refers to the process of a property owner voluntarily giving or selling the title of their property to another party. When the property is considered alienable, that means the property can be sold or transferred to another party without restriction.<sup>19</sup>

It follows that alienation of land is the voluntary transfer of an interest in land capable of being transferred and not subject to any restriction by one party to another party. Alienation of land may take different forms, but the features of a valid alienation of land are similar regardless of the nature of the transaction.

Every alienation of an interest in land depends on the nature of the interest that is sought to be alienated. Interest in land can be under the customary land tenure system,<sup>20</sup> deemed grant<sup>21</sup> and actual grant.<sup>22</sup>For

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<sup>17</sup>Sokefun, J. and Njoku, N. 'The Court System in Nigeria: Jurisdiction and Appeals.' *International Journal of Business and Applied Social Science*, Vol. 2 No. 3 (2016).

<sup>18</sup> Bala, H. 'An Appraisal of the Alienation of Right of Occupancy Under Nigerian Law: Issues and Challenges.' A Thesis Submitted to the School of Postgraduate Studies, Ahmadu Bello University, Zaria, August 2015.

<sup>19</sup> Legal Information Institute. <https://www.law.cornell.edu/wex/alienation> accessed on the 6th November, 2022.

<sup>20</sup>Ezeh, Christopher & Emeribe Ph.D, Chukwudi & Ogbomida, Emmanuel & Ubachukwu, N.N.. (2022). Land Tenure System in Nigeria and the need for

transactions under the customary land tenure system, the requirements for validity are the concurrence of the family head and the principal members of the family. Any alienation without the concurrence of the family head is void, while any alienation without the consent of the principal members is voidable.<sup>23</sup> Certainty of the property that is the subject matter of the transaction, certainty of parties, certainty of the price or consideration for the transaction, and the presence of witnesses are the basic requirements for the transfer of an interest in customary land. There is no requirement for the consent of the Governor for such transactions as such land held by the family units is freehold.<sup>24</sup> Deemed grants and actual grants under the Land Use Act, 1978 are subject to the provisions of the Land Use Act, this implies the requirement of the consent of the Governor under section 22. Section 22 of the LUA prohibits and makes unlawful any alienation of an interest in land by way of assignment, mortgage, transfer of possession, and sublease or any other means whatsoever unlawful without the consent of the Governor of the state first had and obtained. Section 26 of the Act invalidates any transaction that is not in compliance with the provisions of Section 22 of the Act. Therefore, any purported alienation of land without the consent of the governor first had and obtained is void. The position of the Minister of the Federal Capital Territory is the same as that of the Governor of a state concerning the administration of land under the Land Use Act.

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Environmental Sustainability. 9-18. [www.researchgate.net](http://www.researchgate.net) accessed on 8<sup>th</sup> November 2022.

<sup>21</sup>Otubu, A., 'The Land Use Act and Land Administration in 21<sup>st</sup> Century Nigeria: Need for Reforms.' *Afe Babalola University Journal of Sustainable Development Law and Policy* Vol. 9 No. 1 (2018) pp. 80-108

<sup>22</sup>Ibid

<sup>23</sup>Ilori, A. and Adebayo, A.K., 'Customary Land Tenure System and the Land Use Act: A Comparative Analysis.' *Nigerian Journals Online*. Pp 92-99 [www.nigerianjournalsonline.com](http://www.nigerianjournalsonline.com) accessed 8<sup>th</sup> November 2022.

<sup>24</sup>Udoekanem, N., David, A. and Onwumere, V. 'Land Ownership in Nigeria: Historical Development, Current Issues, and Future Expectations.' *Journal of Environment and Earth Science*. Vol. 4. No. 21 (2014). Freehold land is the opposite of leasehold interest. While leasehold interest is for a term, like that which is granted under the Land Use Act for a maximum term of 99 years is leasehold, freehold interest is held in perpetuity.

The focus of our discussion is on alienation subject to the provisions of the Land Use Act, where the consent of the Governor or that of the Minister of the Federal Capital Territory is required in Nigeria. A grant of Statutory Right of Occupancy under the Land Use Act is for a term of 99 years subject to renewal in favor of the grantee or any person entitled to the reversionary interest. Alienation by way of assignment is the transfer of the unexpired residue of the term granted to the holder including the reversionary interest.<sup>25</sup> Alienation by way of mortgage is a conditional transfer of the proprietary interest in the land to the mortgagee subject to reconveyance or *cessar* upon redemption of the mortgage by the mortgagor.<sup>26</sup> Alienation by way of sub-lease of transfer of possession has to do with the transfer of the possession, where the lessee or the person is given possession enjoys exclusive possession of the property or a part of it for a term certain, but the reversionary interest remains in the holder of the Statutory Right of Occupancy. Donation of power by way of a Power of Attorney is not considered under section 22 of the LUA as a means of alienation, and even though S22 LUA is open-ended and accommodates any other means of alienation whatsoever that are not captured under the specific transactions listed in the section, donation of power by way of Power of Attorney is fundamentally not a transaction that alienates interest in land but could be a vehicle through which that can be achieved.<sup>27</sup> This position was settled in the case of *Ude V Nwara*<sup>28</sup> by the Supreme Court before the decision of *Ibrahim V Obaje*.

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<sup>25</sup>Wallace, L.H. 'Assignment and Sublease.' *Indiana Law Journal* Vol 8. No. 6 (1933): 359-387

<sup>26</sup>Brown, M.E. and Evangel A. 'Mortgage, Pledge and Charge Transactions in Nigeria: Comparative/Distinctive Analysis and Legal Examination.' *IOSR Journal of Business and Management* Vol. 13 No. 6 (2013): 100-107

<sup>27</sup>Nwabueze, R.N., 'Alienation Under the Land Use Act and Express Declaration of Trust in Nigeria.' *Journal of African Law* Vol. 53 No. 1 (2009) 59-89 at 83

<sup>28</sup>*Ude V Nwara* (1993) 2NWLR (Pt. 278) 63

### 3. The Use of Power Of Attorney in Land Transactions

A Power of attorney is an instrument of delegation usually executed by one person called a donor in favour of another person called a donee.<sup>29</sup> It is an instrument that empowers the donee to act on behalf of the donor for certain purposes. The instrument creates an agency relationship between the donor who acts as principal and the donee who acts as agent on behalf of the principal.<sup>30</sup> A power of attorney is an instrument of authority that empowers the attorney to perform certain obligations or responsibilities on behalf of the principal.<sup>31</sup>

As a document, a power of attorney may be under seal and though it authorizes the attorney to lawfully act on the behalf of the donor, it is not an instrument of transfer of title. Power of attorney does not transfer interest in land but can be a vehicle through which interest in land is alienated. It is simply a channel through which the acts of the donor can be executed for and on behalf of the donor towards a third party.<sup>32</sup> When the donee does not go outside the powers conferred on him by the donor in the power of attorney, no liability will be incurred and any such liability incurred in the exercise of powers granted is borne by the Donor.<sup>33</sup> Conversely, where the donee goes outside the powers conferred or granted by the power of attorney, such donee becomes strictly liable for any acts or omission done outside the powers so granted and the donor will not be held vicariously liable in such instances or circumstances.

A Power of Attorney is a deed poll and not an indenture because it is not *inter-partes*. *There is* only one party who makes and executes it which is the donor. The donee in this case is not a party in the true sense of the word because he is only carrying out the directives or

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<sup>29</sup>A. Odor, F. Oniekoro and M. Onoride. *Source Book on Property Law Practice in Nigeria 2<sup>nd</sup>Edn.* Jos: Jos University Press Ltd, 2022. P.35

<sup>30</sup>Ibid

<sup>31</sup>Ibid

<sup>32</sup>Y.Y. Dadem. *Property Law Practice in Nigeria 4<sup>th</sup>Edn.* Jos: Jos University Press Ltd., 2018

<sup>33</sup>Ibid

instructions of the donor as contained in the power of attorney.<sup>34</sup>The form which a Power of attorney takes is dependent on the purpose for which it is given in the first place. Where the power to be executed by the donee involves the execution of a deed on behalf of the donor, or it involves the transfer of any interest in land, the power of attorney must be by a deed.<sup>35</sup>Where however the obligation to be carried out by the donee does not involve the execution of a deed or transfer of any interest in land, the Power of attorney ought not to be by deed as was held in the case of *Abina v Farhat*.<sup>36</sup>

The case of *Abina v Farhat* is quite instructive in this sense as it outlined certain cardinal principles on the essence and nature of a power of attorney. In that case, the court held that a power of attorney expressly specifies the powers which a donee as an agent of the principal/donor can lawfully exercise and that so long as the donee acts within the scope of the powers donated, he incurs no liability, even when one arises, it will be incurred by the donor.<sup>37</sup>

It is important to note that only a person with a legal personality, natural or juristic is capable of being appointed as an attorney. The capacity of the donee to act on behalf of the Donor is fundamental in determining the validity of a Power of Attorney.<sup>38</sup>Therefore, where a Power of Attorney is granted to a person without legal personality, such a Power of Attorney is invalid and cannot be relied on for any purpose.

A Power of Attorney can be made over personal or family property and when it involves family property, the consent of the family head and principal members is required to donate a power of attorney.<sup>39</sup> Any transaction done without the consent or approval of the family head is void, while any transaction done without the consent and approval of principal members is voidable, provided there is no delay

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<sup>34</sup>Ibid

<sup>35</sup>Ibid

<sup>36</sup>(1938) 14 NLR 17

<sup>37</sup>Ibid

<sup>38</sup>See *National Bank of Nigeria Ltd v Korban Bros Ltd & Anor.* (1976) 1 FNLR 116

<sup>39</sup> *Osundire & Ors v Ajamagun & Ors* (1992) LPELR-2819 (SC) pp. 53-54



on the part of the aggrieved principal members to act.<sup>40</sup> The consent of the family head or principal members of a family is no longer required to be sought by the attorney once a Power of Attorney has been granted, in subsequent dealing with family land, though the family still retains their power as recognized under customary law to deal with family property provided it is not an irrevocable Power of Attorney.<sup>41</sup>

As a result of the special nature of a Power of attorney, it can be given for valuable consideration and may be declared to be irrevocable. It may be declared either irrevocable for a specified period or absolutely.<sup>42</sup> For instance, it could be given to a purchaser and the purchaser may now deal with the property pending the grant of the Governor's consent for the transfer of the interest to him. A Power of attorney does not require the Governor's consent for its creation and registration except in some jurisdictions like Lagos State.<sup>43</sup>

A Power of attorney can be general or specific and revocable or irrevocable. Where the powers are stated to broadly accommodate issues relating to the subject matter, it is said to be general, but where power is given concerning specific acts to be done, it is said to be specific.<sup>44</sup> Similarly, a revocable power of attorney as the name implies is one that can be revoked or withdrawn by the donor at any time and for any reason so long as the donee has not exercised the power granted under it.<sup>45</sup> An irrevocable power of attorney on the other hand is coupled with interest or consideration and cannot be revoked until the fulfilment of a condition or obligation. It could be for a fixed period, not usually more than twelve months. An irrevocable

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<sup>40</sup>Ibid

<sup>41</sup>Ibid

<sup>42</sup>Ibid n. 34

<sup>43</sup> See Sections 56(2,) and (4), 57 and 94 Lagos State Land Registration Law 2015. The various sections state when a Power of Attorney may be registered and when the consent of The Governor must be endorsed on the Power of Attorney before it will be accepted for registration.

<sup>44</sup>Ibid n. 34

<sup>45</sup>Raof, N.A. and Abdullah, N.C. 'Review on Irrevocable Power of Attorney: Malaysia and United Kingdom Compared.' *iN-LAC 2018 International Law Conference* (2018): DOI:10.5220/0010054203310340

Power of Attorney can only be terminated with the consent of the donee.<sup>46</sup>

As already discussed, a Power of attorney is an instrument only to the extent that an instrument like a deed of assignment may be executed under it. Hence, it cannot transfer any interest in land or extinguish interest in land as has been held in a plethora of authorities decided by courts in Nigeria such as the cases of *Olorunfemi v Nigeria Educational Bank Ltd*<sup>47</sup> and *Ezeigwe v Awudu*.<sup>48</sup> Thus, in light of the foregoing, it is pertinent to note that as far as the subject of alienation of land is concerned, the proper instrument of conveyance and not power of attorney should be used to alienate the unexpired residue of a term in a Certificate of Occupancy.

#### **4. An Overview of the Case of Ibrahim v Obaje**

The case of *Ibrahim v Obaje*<sup>49</sup> resulted from a land transaction between the Respondent Mr. Simon Obaje and one Mr. Otitoju Bonte over the sale of a piece of land at Dutse Alhaji, Bwari Area Council of the FCT, known as Plot F96 covered by C of O No. FCT/M2TP/OD/276 which was granted by the Bwari Area Council on the 15<sup>th</sup> of June 1995. Mr. Otitoju Bonte conveyed the land to the Respondent under an irrevocable Power of Attorney dated 19<sup>th</sup> October 2000.<sup>50</sup> The Respondent obtained a building plan from the relevant authorities and commenced developing the property by constructing a single room self-contained before the altercation between the Respondent and the Appellant resulting in the Appellant destroying the already completed unit and damaging other building materials belonging to the Respondent. The Respondent instituted an action at the High Court of the FCT in his name not that of the Donor Mr. Otitoju Bonte and judgment was entered in his favor by the High Court. The appellant appealed to the Court of Appeal which upheld the

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<sup>46</sup>Ibid

<sup>47</sup> (2003) 5NWLR (PT. 812) 1

<sup>48</sup>(2008) 11NWLR (PT. 1097) 158

<sup>49</sup> (2017) LPELR- 43749 (SC)

<sup>50</sup> *Ibrahim v Obaje* (2019) 3NWLR (PT. 1660). P 389 at 392

decision of the trial Court resulting in the appeal to the Supreme Court. The Supreme Court dismissed the appeal and found for the Respondent on the following reasons which formed the basis of the decision of the Court:

- i. When the facts of the case are placed against the definition of principal and agent as per the definition in *Vulcan Gases Case*<sup>51</sup> it is apparent that the Respondent is not an agent of the Donor, the respondent bought and paid for the land and by that, the Donor was removed from the scene, the Respondent was not meant to have recourse to the Donor, and the Donee (Respondent) can execute any instrument in his name, with his signature and seal.
- ii. Technicality will always lead to injustice; the Court should always aim at justice which is the purpose of why it is put in place.
- iii. Based on the decision in *Cardoso V Daniel*<sup>52</sup> parties can contract in ways suitable to them.
- iv. Application of the Land Use Act must be with the view of the intendment of the makers of the law which the Court held will be found in the history that led to the making of the Land Use Act which could be found in the minority report of the Land Use Tenure set up in May 1977<sup>53</sup> and can be seen in the reading of the preamble of the Land Use Act, but the Court did not specifically refer to the portion of the preamble of the Land Use Act they were relying upon. The preamble to the Land Use Act provides as follows:

An Act to vest all land comprised in the territory of each state (except land vested in the federal government or its

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<sup>51</sup>*Vulcan Gases Ltd v Gesellschaft Fur Ind. Gasverwertung A.G.* (2001) LPELR-3465 (SC) pp 87-88 para G-B. The court held that agency exists between two persons when one of whom expressly or impliedly consents that the other should act on his behalf to affect his relations with third parties and the other of whom similarly consents to so act.

<sup>52</sup>*Cardoso V Daniels & Ors* (1986) LPELR-830 (SC)

<sup>53</sup> Oshio, P.E. 'Indigenous Land Tenure and Nationalisation of Land in Nigeria.' *Journal of Land Use and Environmental Law* Vol. 5 No. 2 (1990): 685-701

agencies) solely in the Governor of the state, who will hold such land in trust for the people and would henceforth be responsible for the allocation of land in all urban areas to individuals resident in the state and organisations for residential, agricultural, commercial and other purposes while similar powers concerning non-urban land are conferred on local government.<sup>54</sup>

- v. That the intention of the Land Use Act was not to deny parties their right to use and enjoy land and the fruit thereto in a non-contentious transaction or alienation *Abioye v Yakubu*.<sup>55</sup>
- vi. That Section 22 of the Land Use Act should not restrict parties' right to a non-contentious transaction or alienation, the section should not be given a literal interpretation because of the preamble, and the section should not restrict the transfer or alienation of land between two private individuals where there is no overriding public interest or conflict of interest between the parties.

In delivering its judgment, the Supreme Court sought to distinguish the case from the case of *Ude v Nwara* where the Supreme Court spelt out that a Power of Attorney cannot be used to alienate interest in land but could be a vehicle through which that is done, and held that the case was not on all fours with the case of *Ibrahim v Obaje* when the Court held as follows:

I seek to say at this point that the decision in *Ude v Nwara* supra is distinguishable clearly from the decision of the present case under consideration. For the purpose of recapitulation, the 2<sup>nd</sup> Respondent in *Ude v Nwara* issued a Power of Attorney while the statutory lease period of the Appellant had not been properly terminated as required by the Eastern Nigerian Law. The 2<sup>nd</sup>

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<sup>54</sup> The preamble to the Land Use Act, of 1978

<sup>55</sup> *Abioye v Yakubu* (1991) 11 NWLR (PT.190). The Court held that where the words of a statute are clear and unambiguous and unequivocally express its intention, the meaning should not be cut down by the preamble. It was also held in the same case that in the interpretation of statutes, it should not be interpreted in a manner that will deprive a citizen of the right to his property.

Respondent therein who was the Attorney General of the state who donated this Power of Attorney should not have done so... From the facts on the record, the Power of Attorney given to the Respondent by Mr. Otitoju Bonte has transferred the interest in Plot F.96.<sup>56</sup>

The facts recapitulated by the Court in the case of *Ude v Nwara*, captured the fact that the Appellant had a subsisting lease. Nevertheless, it will be important to review some other facts of the case of *Ude v Nwara* to ascertain whether, by the decision of *Ude v Nwara*, it was contemplated that a Power of Attorney could be used to convey interest in land. The Court held in the case of *Ude v Nwara* as follows:

A power of attorney merely warrants and authorizes the donee to do certain acts in the name of the donor and so it is not an instrument which confers, transfers, limits, charges or alienates any title to the donee: rather it is 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 for any person including himself, the mere issuance of such power is not per se an alienation or parting with the 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.<sup>57</sup>

From the pronouncement of the Court in the case of *Ude v Nwara* and the pronouncement of the Court in the case of *Ibrahim v Obaje*, it is clear that the attention of the Court in *Ude v Nwara* was on the *instrument*, that is, a Power of Attorney cannot be used to convey interest in land, while the attention of the Court in the case of *Ibrahim v Obaje* was on the *transaction*, that is, the transaction in question was not a donation of power, but an alienation. The question that is raised by this paper is whether a transaction of sale or alienation of an

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<sup>56</sup> *Ibrahim v Obaje* (2017) LPELR- 43749 (SC) pp 26-27

<sup>57</sup> *Ude v Nwara* (1993) LPELR- 3289 (SC) pp. 32-33

interest in land as in the case of *Ibrahim v Obaje* can be consummated by a Power of Attorney. It must also be noted that the Appellant in the case of *Ude v Nwara* developed the property in question through his attorney and put tenants on the property. The court held that such an act did not amount to parting with possession of the property, a basis upon which the lease could be terminated. Therefore, the subsequent sale (not grant of Power of Attorney) by the 2<sup>nd</sup> Respondent upon such faulty grounds was nullified.<sup>58</sup> The import of the decision of the Court in *Ude v Nwara* was to the effect that the Power of Attorney granted by the Appellant did not amount to an alienation unless and until the attorney exercises the powers under the power of attorney to alienate same.

### **5. An Analysis of the Implication of the Decision of the Supreme Court**

The implications of the decision of the Court in *Ibrahim v Obaje* could be far-reaching as it touches not only the uses of a Power of Attorney but the mandatory requirement of the Governor's consent for alienation of an interest in land under the Land Use Act, 1978. The effect of the decision as it appears is that the intention of the parties and not the form matters in a transaction that involves the transfer of an interest in land. The question that comes to mind as a result is whether, by the form of a Power of Attorney, any conveyance of an interest in land can be affected. The clauses in a Power of Attorney do not include 'words of grant'<sup>59</sup>, or a '*habendum*'<sup>60</sup> which conveys a specific interest in land from one person to another. The absence of such clauses in a Power of Attorney clearly shows that a Power of Attorney as an instrument lacks potency and cannot be efficacious in transferring an interest in land from one person to another. Every instrument in conveyancing practice serves a purpose, a deed of

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<sup>58</sup> Ibid pp. 25-26, 30-33

<sup>59</sup>The Yale Law Journal Company Inc. 'Operative Words of Conveyance.' *The Yale Law Journal* Vol. 35 No. 6 (1926): 733-739. Words of grant is a word or group of words that aptly describe the intention of the grantor.

<sup>60</sup> Veasey, J.A. 'The Law of Oil and Gas IV (4) The Habendum Clause.' *Michigan Law Review* Vol. 19 No. 2 (1920): 161-189. The habendum follows the words of grant and defines the term of the grant.

assignment cannot be used to create a leasehold interest in land for example.

The decision of the Court also opened a new vista in conveyancing practice as it relates to Governor's consent. Governor's consent under Section 22 of the Land Use Act is mandatory and any purported alienation of an interest in land without the consent of the Governor cannot transfer the legal interest in the property even when the transaction is consummated and executed in the proper form. At best it can only transfer equitable interest in the subject matter of the transaction. This has been settled in the case of *Savannah Bank of Nigeria Ltd v Ajilo*.<sup>61</sup> It was conceded by the Court in deciding the case of *Savannah Bank V Ajilo* that the effect of the enforcement of the requirement of consent could be suffocating, yet that is the law and it can only be changed by an amendment of the relevant provision by the legislature.<sup>62</sup> In as much as the decision in the case of *Ibrahim v Obaje* seems to have eased up the stress and undue delays in land transactions, it also seems to have raised another legal issue, and the question that begs to be answered is, when then will the Governor's consent be required? Can Governor's consent be disposed of in simple commercial transactions including mortgages and charges? The implication of the decision in *Ibrahim v Obaje* could therefore be far-reaching.

Substantial issues of law were addressed by the Court in the case, and its far-reaching effects are probably yet to be seen. The unwholesome practice of lawyers in real property transactions in Nigeria might be viewed as having received the blessings of the Supreme Court, even though that might not be the express intention of the Court.<sup>63</sup> and we may yet see a brazen abuse of the use of a Power of Attorney and circumvention of the Governor's consent in land transactions. This is

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<sup>61</sup>(1989) 1 NWLR (PT. 97). The Court held that a statute should not be given an interpretation that will defeat its purpose.

<sup>62</sup>Sholanke, O.O. 'Is the Grant of Governor's Consent Under the Nigerian Land Use Act Automatic?' *Journal of African Law* Vol. 31 No. 1 (1990): 42-52

<sup>63</sup> M.E. Jemialu. *Nigerian Property Law and Practice*. Lagos: Law Lord Publications, 2023. p 74

not to mention the evasion of taxes charged *ad valorem* for alienation of an interest in land compared to fixed stamp duties charged on a Power of Attorney. However, this possible challenge has been taken care of in Lagos where Powers of Attorney are assessed *ad valorem* for taxation before they are accepted for registration.<sup>64</sup>

## 6. Conclusion

The far-reaching implications of the decision of the case of *Ibrahim v Obaje* may not be fully appreciated or captured in this work or any single work. It would only take time for different implications to manifest, through legal issues arising from transactions entered into by people based on their understanding of the decision of the case before the full implications of the decision can be grasped. Nevertheless, the safest form of practice for the use of Powers of Attorney will be to abide by the use of Power of Attorney as an instrument of delegation and not one that may be used to alienate interest in land. That is to say, it is safer to maintain that the position of the Courts in the case of *Ude v Nwara*, and the position of the Courts in the case of *Savannah Bank v Ajilo* has not changed. The fact that the Supreme Court sought to distinguish the decision in *Ibrahim v Obaje* from that of *Ude v Nwara*, shows that when an issue is presented to the Court concerning the use of a Power of Attorney the Court may maintain the position in *Ude v Nwara*. Moreso, a Power of Attorney is not known to be used as an instrument of alienation of an interest in land in any jurisdiction in the world. The default means of transferring the un-expired residue in a leasehold land remains a Deed of Assignment. There are two stages in a land transaction, the contract stage where the selling of the land takes place, and the conveyance stage where the seller is disposed of the property through a Deed of Assignment.<sup>65</sup>

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<sup>64</sup> S. 57, Land Registration Law of Lagos State, 2015

<sup>65</sup>Everett, D. 'The Role of Deeds in Property Transactions- Contractual and Dispositive Acts.' *Bond Law Review* Vol. 1 No. 1 (1989)



In addition to the above, a cardinal principle of delegation of power is aptly captured in the maxim *delegatus non-potest delegare*.<sup>66</sup> Therefore an agent cannot sub-delegate his powers; thus, if interest is transferred by one person to another by the instrumentality of a Power of Attorney, the donee cannot transfer interest to a third party by another Power of Attorney, it can only be done by the proper instrument traditionally used to consummate such a transaction. Therefore, if A alienates interest in land to B using a Power of Attorney, B cannot transfer that interest to C by another Power of Attorney because of the prohibition on sub-delegation. Therefore, B will have to execute a Deed of Assignment or any other instrument duly recognized to alienate such interest. We, therefore, maintain that it is not a sound practice of the law to use a Power of Attorney to transfer interest in land, and the Supreme Court might have only decided the case of *Ibrahim v Obaje* as an exception and to protect the proprietary interest of the donee in the property, even if the interest is an equitable one.

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<sup>66</sup>Gordon, H.I. 'The Power of An Agent to Delegate His Authority.' (1892) Historical Theses and Dissertation Collection. Paper 169. <http://scholarship.law.cornell.edu> Accessed 23 April 2023