World Journal of Multidisciplinary Research
worldmultidisciplinaryjournal.com
Online ISSN: 3107-8966
Received: 08-12-2025, Accepted: 17-01-2026, Published: 04-02-2026
Volume 2, Issue 1, 2026, Page No. 1-5

An analysis of alienation of property In Nigerian Law

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Abstract
Property alienation constitutes a fundamental aspect of ownership rights in Nigerian jurisprudence, encompassing the transfer of interests through various mechanisms including sales, gifts, mortgages, leases, and testamentary dispositions. This article provides a comprehensive examination of the legal framework governing such transfers, analyzing the interplay between statutory provisions, customary law, and judicial pronouncements that collectively define the parameters within which property rights may be transferred in Nigeria. The research explores how historical developments, particularly colonial interventions and post-independence legislative reforms, have shaped contemporary alienation practices. Central to this analysis is the Land Use Act of 1978, which fundamentally restructured property ownership and introduced requirements that significantly impact the freedom to alienate property. The study examines various forms of alienation across different legal regimes, considering both formal statutory procedures and persistent customary practices. Through analysis of relevant case law and legislative provisions, the article illuminates the complexities inherent in Nigeria's dualistic property system and considers the practical implications for property transactions. The research reveals how courts have interpreted alienation provisions and balanced competing interests in property disputes. This analysis contributes to understanding the Nigerian property law landscape and the legal requirements that govern the transfer of property rights across different contexts and communities throughout the federation.

Keywords: Property Law, Alienation, Deeds, Land Use Act.

Introduction

The concept of alienation of property occupies a foundational position within the architectural framework of Nigerian property jurisprudence, representing not merely a transactional mechanism but a fundamental incident of ownership that has evolved through centuries of customary practice, colonial imposition, and post-independence legislative reform.

At its essence, alienation connotes the voluntary or involuntary transfer of property rights from one person to another, encompassing a spectrum of dispositions including sales, Deeds, Power of Attorney, gifts, mortgages, leases, and testamentary devolutions. The Nigerian legal landscape governing property alienation is characterized by a fascinating dualism, where statutory provisions coexist, and occasionally collide, with deeply entrenched customary law principles that continue to govern substantial portions of land transactions, particularly in rural communities where ancestral connections to land retain profound socio-cultural significance. Deeds in itself by their very nature are written instrument signed, sealed and delivered by one person to another to convey lands, tenements or hereditaments. [1] Series of statutes have given allusions to the ingenuity of Deeds, for example the Property and Conveyancing Law [2] provides that all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

To get a vivid picture of what alienation in the Nigerian context truly means, requires an appreciation of the historical trajectory that has shaped contemporary property law. The colonial encounter fundamentally disrupted indigenous land tenure systems, introducing concepts of individual ownership and absolute title that were often antithetical to communal land holding traditions. The Land Use Act of 1978, which represents perhaps the most comprehensive and controversial intervention in Nigerian property law, sought to rationalize and centralize land administration by vesting all land in each state in the Governor, thereby creating a system where individuals hold rights of occupancy rather than absolute ownership. This legislative framework has profound implications for alienation, as it circumscribes the freedom with which property holders can dispose of their interests, requiring gubernatorial consent for certain categories of transactions and creating bureaucratic impediments that have, in practice, driven many property transactions into the informal sector where customary law continues to hold sway despite statutory prohibitions.

The theoretical foundations of alienation are deeply rooted in the bundle of rights theory articulated by Wesley Newcomb Hohfeld and adopted within common law jurisdictions, of which Nigeria is one by virtue of its colonial inheritance. Property ownership confers upon the holder a constellation of rights including the right to possess, use, exclude others, and crucially, the right to alienate. This last incident is considered so fundamental that any substantial restriction upon it is viewed as striking at the very heart of ownership itself. [3]

In the seminal English case of *Manchester Airport Plc v. Dutton,* [4] the court emphasised that the right to alienate property is an essential attribute of ownership, a principle that has been consistently affirmed in Nigerian jurisprudence. The Supreme Court of Nigeria in *Ojukwu v. Military Governor of Lagos State,* [5] observed that the essence of property lies in the owner's capacity to deal with it according to their wishes, including the right to transfer it to another, subject only to lawful restrictions imposed in the public interest.

Statutory Framework

Within the Nigerian statutory framework, the alienation of property is governed by a complex interplay of federal and state legislation. The Property and Conveyancing Law, which exists in various iterations across different states, provides the procedural mechanisms for effectuating transfers of real property. The Property and Conveyancing Law (PCL) [6], for instance, prescribes that all conveyances of land or any interest therein must be by deed, executed and attested in accordance with statutory formalities. This requirement of formality serves multiple purposes: it creates reliable documentary evidence of the transaction, protects against fraud, and provides certainty in property dealings.

The courts have consistently held that failure to comply with these formal requirements renders a purported alienation ineffective to pass legal title, though equity may in certain circumstances recognize such transactions as creating beneficial interests. The Land Use Act (LUA) [7], which applies uniformly across all states of the federation, represents a watershed moment in Nigerian property law and has fundamentally altered the landscape of property alienation. The Act vests all land within a state in the Governor of that state, to be held in trust for the people. Thus, it stated that -

Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation is hereby vested in the Governor of that State, and such land shall be held in trust and administered for the use and common benefits of all Nigerians in accordance with the provisions of this Act. [8]

Now this vesting provision effectively transformed all existing interests in land into statutory rights of occupancy, requiring holders to obtain certificates of occupancy as evidence of their rights. For alienation purposes, the Act creates a bifurcated system distinguishing between urban and non-urban land.

The Act also mandates that the holder of a statutory right of occupancy who wishes to alienate their interest must first obtain the consent of the Governor. [9] This consent requirement has proven to be one of the most contentious aspects of the Act, spawning extensive litigation and creating significant practical difficulties in property transactions. The Supreme Court in *Savannah Bank of Nigeria Ltd v Ajilo* [10] held that any purported alienation without the requisite gubernatorial consent is void and of no effect whatsoever, a position that has been consistently maintained despite criticism from legal scholars who argue that the provision operates harshly and encourages non-compliance.

The process of obtaining consent under Section 22 is administratively cumbersome, typically requiring the payment of substantial fees and enduring bureaucratic delays that can extend for months or even years. It is for this, that the Act attempts to address this by providing that where the Governor fails to communicate a decision on a consent application within three months, consent shall be deemed to have been granted. [11]

However, this deemed consent provision has proven largely ineffective in practice, as state governments have developed various administrative strategies to circumvent its operation, including the practice of issuing acknowledgment letters that interrupt the running of the three-month period.

Customary Law and Communal Property

Customary law continues to play a vital role in property alienation, particularly in areas where statutory regulation has not fully penetrated or where communities maintain strong attachments to traditional land tenure systems. [12] Under customary law, land is typically held communally by families or extended kinship groups, with individual members enjoying usufructuary rights that permit use and cultivation but not unfettered alienation. The principle of communal ownership means that significant alienations require the consent of family heads, elders, or other recognized authorities within the customary governance structure. In *Idundun v. Okumagba* [13] the Supreme Court held that family land cannot be validly alienated by a single member without the consent of the principal members of the family, and any purported alienation in violation of this principle is void. This requirement of collective consent serves important functions within customary systems, preserving family patrimony and preventing improvident dispositions that might impoverish future generations.

The intersection between statutory and customary law in the realm of alienation creates considerable complexity and occasional conflict. The LUA purports to extinguish customary land rights, converting them into statutory rights of occupancy, yet customary practices persist, particularly in rural areas where the Act's enforcement mechanisms are weak. This persistence creates a legal twilight zone where transactions may be valid under customary law but ineffective under statute, or vice versa.

The courts have grappled with this tension, generally holding that where statutory and customary law conflict, statute must prevail. However, in recognition of the practical realities of land administration, courts have sometimes shown willingness to give effect to customary transactions where denial would work manifest injustice. In *Lawal v Younan* [14] the court demonstrated this pragmatic approach by enforcing a customary land transaction despite technical non-compliance with statutory formalities, reasoning that the transaction had been completed in accordance with local custom and the parties had acted in good faith.

Forms of Alienation

Testamentary alienation, the disposition of property upon death through a will, is governed by the Wills Act (WA) [15] in southern Nigeria and the Wills Law in various northern states. Wills Act requires that all testamentary dispositions be in writing, signed by the testator, and attested by at least two witnesses who must be present simultaneously.

The formality requirements for wills are strictly construed, reflecting the gravity of testamentary dispositions and the need to protect against fraud and undue influence. In *Lawal v. Dosunmu* [16] the Supreme Court held that a document that does not comply with the statutory formalities cannot be admitted to probate as a valid will, regardless of how clearly it expresses the testator's intentions. This strict approach has been criticized for potentially frustrating genuine testamentary wishes, but it reflects the court's view that certainty and protection against fraud outweigh considerations of substantive intent when formal requirements are not met.

The freedom of testamentary alienation is not absolute in Nigerian law [17]. Customary law in many communities imposes restrictions on testamentary freedom, particularly regarding family land, which may be considered inalienable or subject to claims by family members regardless of testamentary provisions. Additionally, statute has imposed certain limitations through dependants' relief legislation, which permits courts to make provision for dependants from a deceased's estate where the will fails to make reasonable provision for them. The High Court of Lagos State in Adeyemi v Opeyori [18] exercised this jurisdiction to vary testamentary dispositions in favor of a widow who had been inadequately provided for, demonstrating that testamentary freedom is subject to overriding considerations of family welfare and social justice.

Inter *vivo*s alienation through gift requires careful analysis, as gifts of real property are subject to specific formalities distinct from those governing sales. The Property and Conveyancing Law [19] provides that voluntary conveyances made without valuable consideration are voidable at the instance of creditors if the donor becomes insolvent within five years of the gift. This provision reflects the law's concern with protecting creditors against improvident or fraudulent alienations that strip the debtor of assets.

Beyond this statutory provision, gifts must comply with general conveyancing formalities, requiring execution by deed and, where the LUA applies, gubernatorial consent. The evidential requirements for establishing a valid gift are stringent, requiring proof of donative intent, delivery, and acceptance. In the case of *Kodilinye v. Mbanefo Odu* [20] the court emphasized that gifts of land require unequivocal evidence of the donor's intention to make an immediate and irrevocable transfer, and that mere expressions of future intent are insufficient to constitute a completed gift.

Mortgages represent a specialized form of alienation where property is transferred as security for a debt, with the mortgagor retaining an equity of redemption permitting reclamation of the property upon satisfaction of the secured obligation. Nigerian law recognizes both legal and equitable mortgages, with different formalities and consequences attaching to each.

A legal mortgage requires execution by deed and, under the LUA, gubernatorial consent. The Act specifically addresses mortgages, providing that holders of statutory rights of occupancy may mortgage their interests with the Governor's consent [21]. Equitable mortgages can arise through deposit of title documents or through agreements that fail to satisfy the formalities for legal mortgages but which equity will recognize as creating mortgagee rights.

The distinction between legal and equitable mortgages has practical significance, as legal mortgagees enjoy priority over subsequent interests and possess superior remedies. In *Odutola v. Papersack (Nig) Ltd* [22] The Court of Appeal held that a legal mortgage created by deed and registered takes priority over an earlier equitable mortgage created by deposit of documents, applying the principle that where equities are equal, the law prevails.

Judicial Protection and Limitations

The doctrine of undue influence plays an important protective role in alienation transactions, particularly where relationships of trust and confidence exist between parties. Where a transaction appears improvident or calls for explanation, and a relationship of influence existed between the parties, equity will presume undue influence and require the transaction to be set aside unless the party benefiting from it can demonstrate that the transferor acted with full information and independent advice.

Usually, capacity to alienate property represents a fundamental prerequisite, with various categories of persons subject to restrictions. Minors lack capacity to alienate real property, though they may acquire interests which will be held for them until majority. Persons of unsound mind similarly lack capacity, and alienations by such persons are voidable.

The LUA imposes specific capacity requirements, with Section 22 providing that consent to alienation may be withheld if the Governor is satisfied that the holder of the right of occupancy lacks capacity. [23] Corporate entities possess the capacity to alienate property subject to their constitutional documents and the provisions of the Companies and Allied Matters Act [24] which requires that transactions beyond the ordinary course of business receive approval from members through special resolution.

The registration of alienation transactions is governed by the Land Instruments Registration Law in southern states and by specific legislation in northern states. Registration serves the crucial function of providing publicity for property transactions, enabling prospective purchasers and creditors to ascertain existing interests in land.

Restrictions on alienation may be imposed by covenant, statute, or customary law, and the validity and enforceability of such restrictions raises complex questions. Restrictive covenants that prohibit or limit alienation are generally viewed with suspicion by courts, as they conflict with the fundamental principle that property should be freely alienable. However, reasonable restrictions that serve legitimate purposes are enforceable.

The test for reasonableness that was articulated in the case of *Rosher v. Rosher* [25] that was also adopted in Nigerian jurisprudence, examines whether the restriction is proportionate to the legitimate interest it seeks to protect. Covenants requiring consent before alienation are generally upheld provided consent cannot be unreasonably withheld. The LUA itself imposes the most significant statutory restriction through its consent requirement, demonstrating that public policy may justify substantial limitations on alienation freedom where justified by overriding societal interests.

The remedy of specific performance plays a vital role in property alienation disputes, reflecting the unique nature of real property and the inadequacy of damages as compensation for breach of contracts to transfer land. Section 58 of the High Court Law confers jurisdiction on courts to order specific performance of contracts, and Nigerian courts have consistently held that contracts for the sale of land will generally be specifically enforced unless some equitable defence applies. In the case of *Ibru v. Ibru* [26] the Supreme Court emphasized that specific performance is the normal remedy for breach of land sale contracts, with damages being awarded only where specific performance is impossible or inappropriate. The discretionary nature of specific performance means courts will refuse the remedy where the contract was obtained by misrepresentation, where the applicant has acted inequitably, or where enforcement would cause undue hardship.

Fraudulent alienations represent a serious problem in Nigerian property transactions, with competing interests in the same property arising from multiple purported alienations by unscrupulous vendors. The principle of *nemo* *dat quod non habet* (which means no one can give what he does not have) provides fundamental protection, ensuring that purchasers acquire no better title than their vendor possessed. However, this principle is subject to exceptions, including the doctrine of estoppel by representation and the protection afforded to bona fide purchasers for value without notice under registration statutes.

The role of consent in alienation deserves particular emphasis given its centrality to property transactions. Consent must be free, informed, and given by persons with capacity and authority. Where family property is involved, customary law requires collective consent from appropriate family representatives. The determination of who possesses authority to give consent on behalf of a family involves applying customary law, which varies between communities. Courts have developed principles for ascertaining this authority, generally looking for evidence of who has historically exercised control over family property and who is recognized within the community as having authority. In the case of *Kojo II v. Bonsie* [27] The Privy Council held that where custom is unclear, the court must examine the evidence to determine who possesses authority to alienate family property according to the practices of the particular community.

Challenges in Nigerian Property Alienation

Looking ahead, Nigerian property law faces significant challenges in the realm of alienation. The persistence of informal transactions outside the statutory framework undermines legal certainty and creates opportunities for fraud. The consent requirement under the LUA continues to generate controversy, with many commentators arguing that it should be abolished or substantially reformed to facilitate property transactions and economic development.

The Supreme Court in *Awojugbogbe Light Industries Ltd v Chinukwe* [28] recently reaffirmed the continuing validity of the consent requirement, but calls for legislative reform remain strong. Additionally, the integration of customary and statutory systems remains incomplete, creating legal pluralism that, while respecting cultural diversity, generates uncertainty and litigation.

The alienation of property in Nigerian law thus represents a fascinating confluence of indigenous customary practices, colonial legal inheritance, and post-independence legislative innovation. The system reflects ongoing tensions between individual autonomy and state control, between economic efficiency and social protection, and between respect for traditional communal values and embrace of modern individualistic property concepts.

This complex legal landscape requires not merely doctrinal knowledge but appreciation of the historical, cultural, and economic forces that have shaped, and continue to shape, how Nigerians transfer and acquire property rights.

As Nigeria continues its development trajectory, the legal framework governing alienation will undoubtedly evolve, hopefully toward greater clarity, efficiency, and accessibility while maintaining appropriate protections for vulnerable parties and respect for cultural diversity. The challenge for lawmakers, judges, and legal practitioners is to navigate this evolution in ways that facilitate economic development and respect property rights while ensuring that the fundamental human needs for security, shelter, and economic opportunity that property serves are protected and advanced for all Nigerians.

Conclusion

The examination of property alienation in Nigerian law reveals a legal framework characterized by remarkable complexity, historical depth, and continuing evolution. From the theoretical foundations rooted in common law principles to the practical realities of customary land transactions, the Nigerian approach to property alienation reflects the nation's unique position at the intersection of indigenous tradition and imported legal doctrine. The Land Use Act of 1978 stands as the most significant legislative intervention in this sphere, fundamentally restructuring the relationship between citizens and land by converting absolute ownership into state-mediated rights of occupancy. While this transformation was intended to promote rational land administration and equitable distribution, its practical implementation has generated substantial difficulties, particularly through the gubernatorial consent requirement which has proven administratively burdensome and has inadvertently encouraged informal transactions that operate outside statutory regulation.

The persistence of customary law alongside statutory provisions demonstrates the resilience of traditional property concepts and the continuing importance of communal values in Nigerian society. This legal pluralism, while reflecting cultural diversity and respecting indigenous practices, creates inevitable tensions when customary and statutory norms conflict. Courts have sought to navigate these tensions through pragmatic interpretation that acknowledges both the supremacy of statute and the equitable claims arising from good faith reliance on customary practices. The various forms of alienation whether through sale, gift, mortgage, or testamentary disposition each carry distinct legal requirements and protections, reflecting the law's attempt to balance the freedom to alienate property against competing interests in protecting vulnerable parties, preserving family patrimony, and maintaining transactional certainty.

Judicial doctrines protecting against undue influence, fraud, and lack of capacity serve vital protective functions, ensuring that alienation occurs through genuinely consensual processes involving parties with full understanding and proper authority. The registration system, though imperfect in implementation, provides an essential mechanism for publicizing property interests and establishing priority among competing claims. The remedy of specific performance acknowledges the unique nature of real property and the inadequacy of monetary compensation for its loss, though courts retain discretion to refuse enforcement where equitable considerations demand.

Looking forward, the challenges facing Nigerian property alienation law are substantial but not insurmountable. The bureaucratic obstacles surrounding gubernatorial consent require urgent attention, as delays and corruption in the consent process undermine the LUA's objectives and drive transactions underground. Greater integration between customary and statutory systems is needed, perhaps through explicit recognition of customary practices within statutory frameworks rather than through nominal extinguishment that proves ineffective in practice. Enhanced land registration infrastructure, particularly in rural areas where informal transactions predominate, would improve certainty and reduce fraudulent multiple alienations. Legal education initiatives targeting both legal professionals and laypeople could improve understanding of formal requirements and reduce reliance on invalid transactions that later spawn litigation.

The generality of the law of property alienation must serve the fundamental human needs for security, economic opportunity, and shelter that property ownership facilitates. A legal framework that is excessively formalistic, bureaucratically cumbersome, or disconnected from social reality fails these objectives regardless of its theoretical elegance. The Nigerian system, with its dual heritage and plural legal sources, possesses both distinctive challenges and unique opportunities. The challenge for contemporary lawmakers and judges is to craft approaches that respect Nigeria's legal and cultural diversity while promoting efficiency, certainty, and accessibility in property transactions. Such reforms must balance competing interests thoughtfully, protecting vulnerable parties without unduly restricting property owners' legitimate freedom to dispose of their assets as they see fit. As Nigeria continues developing economically and socially, a robust, efficient, and equitable system for property alienation will prove essential to national progress, facilitating investment, enabling commerce, and securing the property rights upon which individual prosperity and collective development ultimately depend.

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