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Editorial

DOCTRINE OF PRIORITY OF ESTATE AND ITS APPLICATION TO SPECIFIC STATUTORY LAND TRANSACTIONS IN NIGERIA

By

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ABSTRACT

The priority rule of "*qui prior est temporal portier jure*" which literarily means "*he who is first in time is stronger in Law*" (otherwise known as the "*Temporal Order Rule*") has limited application to competition among land instruments under the doctrine of estate. The doctrine of estate relates to title to or interest in land and the general requirement of the law, is that, every instrument relating to land must be registered. One of the consequences of such registration is to preserve priority among competing land instruments, since the rule is that, every registered instrument affecting land takes effect against other instruments affecting the same land from the date of its registration. This means, the order of creation of the instruments i.e "*Temporal Order Rule*" has been circumvented by the requirement of registration of instruments affecting land. This paper therefore, examines the doctrine of priority of estate and its application to specific statutory land transactions in Nigeria. The paper further discusses the exceptions to the general rule of priority on land dispositions and consider if in appropriate circumstances, the order of registration will not give way for the order of creation. The paper finds, among others that the "*Temporal Order Rule*" as it is literarily understood have been circumvented by the order of registration. The paper also finds, that the undue importance attached to land instrument registration is for the economic benefit of Government at the expense of justice and fairness. Consequently, the paper recommends that the rule of priority relating to land instruments be amended to reflect that priority of competing instruments affecting land should be determined by the date of creation of the instruments particularly when it is backed by possession rather than the date of registration or as the overall interest of justice requires in every circumstance.

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1.0. INTRODUCTION:

It is not uncommon to discover that different instruments created in respect of the same estate may be in competition as to which of the instruments will take priority over the other when determining the interests of the holders of the different instruments in respect of the given estate. The basic rule in relation to statutory instruments on land is that, priority of instruments affecting a given estate rank according to the date of registration⁴⁹⁸. This implies that a registered instrument takes priority over an earlier unregistered instrument which was created before the subsequent registered instrument. However, where one of the competing land instruments is registered, then the rule of "*first in time is stronger in law*" applies. Generally, priority of competing instruments affecting estate in land is determined by the provision of statutes. This is because, apart from the common law provision, particularly under the Statute of Fraud⁴⁹⁹ which prescribe that every dealings in land must be in writing or at least a memorandum thereof should be reduced into writing⁵⁰⁰, specific statutory provisions in addition provides that such instruments must also be registered. Generally registration of instruments affecting land is provided for by statutes in all the states of Nigeria, including the Federal Capital Territory⁵⁰¹. This paper examines the various statutory provisions requiring registration of land instruments in Nigeria and the priority among competing land instruments. The paper further examines, whether the "*Temporal Order Rule*" of priority which literarily means "*first in time is stronger in law*" has not been circumvented by the requirement of registration for documents affecting land. The paper draws attention to the fact that that there is the urgent need to amend the statutory requirement relating to instrument affecting land to provide that in appropriate circumstances, unregistered land instruments which is backed up by actual possession should take priority over subsequent registered instrument without evidence of possession. The paper further examines the requirement of registration as provided by statutes and apply such provisions to specific statutory land transaction like mortgage, leases, registered land etc, in Nigeria.

1.1 BASIC RULES OF PRIORITY OF INTERESTS:

Different parties may claim an interest in property by mistake or fraud with the claims being inconsistent with each other. For example, the party creating or transferring an interest may have a valid title, but intentionally or negligently creates several interests wholly or partially inconsistent with each other. A court resolves the dispute by adjudicating the priorities of the interests⁵⁰².

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⁴⁹⁸ James, R.W. *Modern Land Law in Nigeria*, University of Ife Press, Ile-Ife, Nigeria (1973) pp. 258-259; Elias, T.O., *Nigeria Land Law* (4th ed.) Sweet & Maxwell, London (1911) p.341, Eimunjeze, F.O, *Real Property Law and Practice in Nigeria*. Malt House Press Ltd. (2014) p.140, section 5, Registration of Titles Law, cap L4 Laws of Lagos State 2003, Section 15, Land Instrument Registration Law, 2003.

⁴⁹⁹ Statute of Fraud 1677.

⁵⁰⁰ Section 4, Statute of Fraud 1677, see also, section 67(1), *Property and Conveyancing Law* 1959, (Some states created out of the old western region of Nigeria now have their separate laws with similar provisions to this section of the 1959 law) section 5, 6 and 7, *Registration of Title Law*, cap.L4, Laws of Lagos State 2003.

⁵⁰¹ *Ibid*.

⁵⁰² See Jegede, M.I, *Principles of Equity*, Ethiope Publishing Corporation, Benin (1981) p.43

Apart from few statutory and other exceptions, the basic rule on priority both at law and in equity is that priority is determined by the order in which the competing interests are created: *Qui prior est tempore, potior est jure*- this means he who is first in time is stronger in law.⁵⁰³

This implies that where there are two or more competing interests, one legal and the other equitable, if they are both meritorious in the sense that neither of them is blame worthy or guilty of inequitable conduct, the former (legal interest) will prevail. In that case, there is equal equity and the law prevails.⁵⁰⁴

This brings into play the equitable maxim that where there is equal equity, the law shall prevail. In *Ajose vs. Harworth*⁵⁰⁵, the plaintiff, who had earlier on obtained an equitable interest in the property in dispute, brought this action asking for a declaration that the property belonged to him as against the defendant who had subsequently obtained the legal estate in the property. The Judge rightly found that the defendant's conscience was clear and that there was nothing in the conduct of the defendant, which made his claim, in the transaction, less meritorious than that of the plaintiff, since the equities were equal, the claim of the defendant who had subsequently acquired the legal estate was held to prevail over that of the plaintiff whose claim was equitable.

A better illustration of this maxim is provided by Ikpo.⁵⁰⁶ Thus Ahmed, a beneficiary of a trust property, has equitable interest and Zulu, a bonafide purchaser of the trust property for value without notice, has legal interest. Normally the legal interest of Zulu will take priority and override the equitable interest of Ahmed because there is equal equity. But if Zulu had notice of the trust or there were circumstances that ought to have put him on inquiry, then his priority will be defeated. In a similar case, the Nigerian Court of Appeal held that a subsequent legal estate cannot be over-reached by a prior equitable interest, when the purchaser of subsequent legal estate purchases bonafide and for value without notice of the prior equitable interest.⁵⁰⁷

Again the issue of priority of interests can be determined by applying the other maxim in equity that provides that where the equities are equal, the first in time prevails. That is to say, where the competing interests are equitable, then the equities are said to be equal and the first in time prevails. In other words, the time of acquisition of interest in a given property becomes the deciding factor as to which one takes priority or prevails. In that regard, equitable interests, rank in the order of their creation. Thus in *Cave vs. Cave*⁵⁰⁸, a trustee, in breach of trust, purchased land with trust fund and the conveyance was made in his brother's name. However, the equitable right of the beneficiary under the trust attached to the land. The brother made a legal mortgage to X and later an equitable mortgage in favour of Z, neither X nor Z had notice of the beneficiary's right under the trust. As between the equitable interest

⁵⁰³ Generally on the *Temporal Order Rule of Priority*, See Hambury, G., *The Field of Modern Equity* (1920) 45 LQR 196; Megarry, R., and Baker, P. V., *Snell's Principles of Equity* (27th ed.) Sweet and Maxwell, London, (1973) p.10; Maudsley, R. H., *Hambury and Maudsley Modern Equity* (10th ed.) Stevens and Sons, London, (1976), pp. 3-30. See also Kodilinye, G., *An Introduction to Equity in Nigeria*, Daybis Ltd., Nigeria, Ibadan, (2001), pp.1-6, Ikpo C., *Issues and Principles in Equity*, Dimathis Objective Press Ltd., Lagos, (2003), pp. 23-24.

⁵⁰⁴ Ikpo, C., *Issues and Principles in Equity*, Dimathis Objective Press Ltd., Lagos (2003) p.30

⁵⁰⁵ (1925) 6 N.L.R.98, Also *Pilcher vs. Rawling* (1871-72) 7 Ch. App. Cases p. 256

⁵⁰⁶ *op. cit.* p.26

⁵⁰⁷ *John A. Osagie vs. Allhaji S.O. Oyeyinka & Lor.* (1985) 3NWLR p.52 at 54; see also *Barclays Bank of Nig. vs. Ali* (1978) 6-7 SC p.99; *Ballamy vs. Sabine* (1857) 26 L.J. (N.S.) Equity Reports p.787

⁵⁰⁸ (1942) 8 WACA p.198

z. the former prevailed being earlier in time. But as between the beneficiaries right and x claim, the latter prevail in accordance with the maxim that where the equities are equal, the law prevails.

Also in *Assaf vs. Fuwa*⁵⁰⁹, where each of the rival claimants had only an equitable interest, the judicial committee of the Privy Council upheld the *Temporal Order of Priority*.

1.2 EXCEPTIONS TO THE TEMPORAL ORDER RULE:

There are recognized exceptions to the Temporal Order Rule. These exceptions are discussed below

1.2.1 Bonafide Purchaser:

The Temporal Order Rule of priority "*Qui prior est tempore portior est jure*" which means first in time is stronger in law, is sometimes circumvented or reversed where there is a subsequent bonafide purchaser for value of the legal estate without notice of the prior equitable interest. A bonafide purchaser is a person who has purchased an asset for the stated value with an honest belief that the seller had the rights to make such a sale. A bonafide purchaser is unaware of any fact which would cause a reasonable person to doubt the right of the seller to have sold it in good faith. This is relevant in the situation of a seller without good title to an item who sells the item to a bonafide purchaser and the true owner later shows up to claim title. In this situation, the bonafide purchaser will be able to keep the asset and the real owner will have to look to the fraudulent seller for reimbursement.

A bonafide purchaser referred to more completely as a bonafide purchaser for value without notice is a term used in the law of real property and personal property to refer to an innocent party who purchases property without notice of any other party's claim to the title of that property.⁵¹⁰ A bonafide purchaser must purchase for value, meaning that he or she must pay for the property rather than simply be the beneficiary of a gift. Even when a party, fraudulently conveys property to a bonafide purchaser (for example, by selling to the bonafide purchaser property that has already been conveyed to someone else), that bonafide purchaser will, depending on the laws of the relevant jurisdiction, take good (valid) title to the property despite the competing claims of the other party, so long as the bonafide purchaser register the transaction pursuant to local property law. However, parties with claim to ownership in the property will have a cause of action (a right to sue) against the party who made the fraudulent conveyance⁵¹¹.

In view of the foregoing, it is therefore submitted that where the doctrine of a bonafide purchaser is successfully pleaded, it reverse the Temporal Order Rule of priority, thereby making a subsequent bonafide purchaser to take priority over an already existing equitable interest on the same property.

1.2.2 Notice:

Notice in this regard, refers to knowledge of the existence of a set of facts regarding a particular transaction. The questions often arise as to how a purchaser will acquire notice of all facts relating to the transaction. In resolving this issue, the courts have come up with the

⁵⁰⁹ (1954) 13 WACA p.232

⁵¹⁰ Ames, J.B., *Purchaser For Value Without Notice* (1887) 1 Harvard, Law Review, p.1 at 2; see generally Jegede, M.I., *op cit* pp. 57-58; Ikpo, C. *Issues and Principles in Equity*. Dimathis Objective Press Ltd Lagos. (2003) p. 48 See also Ogunmakin, J. O. *Equity and Trusts in Nigeria*, University of Ife Press Ltd, Ile-Ife, Nigeria (1986) p. 109.

⁵¹¹ *Ibid* at p.110

position that a purchaser is deemed to have notice of all the facts which, if he had made proper investigation would have revealed. Thus a purchaser cannot avoid notice of equitable interest by refusing to make the necessary investigation. Where a purchaser has notice of the existence of a document, he is deemed to have had notice of its contents. Where the owner of an equitable estate is in possession, the possession constitutes notice of his interest to any purchaser of the legal estate⁵¹².

For a purchaser to be held to have notice in equity, such notice may be actual notice or constructive notice or imputed notice⁵¹³.

1.2.3 Fraud:

A person whose nature of interest in a transaction should have afforded him priority over claimants in respect of the same transaction, may lose the priority to other inferior claimants as a result of fraudulent dealings on his part. This is because equity abhors fraud in all its ramifications. Any party who is guilty of fraud or any conduct which equity considers inequitable may have his priority postponed to the adverse party⁵¹⁴.

In *Northern Counties of England Fire Insurance Company vs. Whipp*⁵¹⁵ Fry LJ stated that the court will postpone the prior legal estate to a subsequent equitable estate where the owner of the legal estate had assisted in or connived at the fraud which has led to the creation of the subsequent equitable estate without notice of the prior legal estate. In the *Northern Counties case*,⁵¹⁶ the manager of the company, A, had mortgaged his free hold estate to the company and handed over the title deeds to the Co. the deeds were kept in a safe of the company. The safe had only one lock having duplicate keys, one of which was entrusted to A, in his capacity as manager. The manager later took the title deeds out of the safe without the mortgage and handed them over to B and at the same time executed a mortgage for money advanced to him by B who had no notice of the company's security. The court noted that though there was great carelessness in the way the Co had dealt with their securities the carelessness was no evidence of any fraud as to postpone their prior legal estate to the subsequent equitable estate of B.

1.2.4 Negligence:

Gross negligence may deprive a prior legal purchaser of his priority to a subsequent equitable purchaser of the same property. This refers to the failure on the part of the prior legal purchaser to do that which a reasonable and prudent person would have done in the circumstance.

In *Oliver vs. Hinton*⁵¹⁷, the purchaser for value of the legal estate without notice of the prior equitable mortgage by deposit of the title deeds was postponed on the ground that his failure to ask for and obtain the title notice, amounted to gross negligence, sufficient to deprive him of the protection of the legal estate⁵¹⁸. Similarly, in *Akingbade vs. Elemosho*⁵¹⁹, a purchaser who was in a position to know the pre-existing equitable interest but who grossly neglected to find out the relevant facts had his priority postponed. Also in *Walker*

⁵¹² see *Ogunbambi vs. Abowab* (1951) 13 WACA p.222, *Orasanmi vs. Idowu* (1959) 4 FSC p40

⁵¹³ *Re-Aims Charity* (1901) 2 Ch.750

⁵¹⁴ *Ikpo, C., op.cit.* p. 32

⁵¹⁵ (1884) 26 Ch. D p.482

⁵¹⁶ *Ibid*

⁵¹⁷ (1899) 2 Ch. p.264 at 273

⁵¹⁸ *Ibid.* at p.273

⁵¹⁹ (1964). ALLNLR p.154

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*Linom*⁵²⁰, here the trustees failed to obtain the title deeds to the trust property, the prior interest of the beneficiaries under the trust was therefore, postponed to that of the subsequent equitable incumbrancer without notice. It has been argued however that mere delay on the part of the prior legal purchaser in doing what is expected of him on the transaction would not postpone his priority to a subsequent equitable purchaser. What is a mere delay is however a question of construction for the court.

1.2.5 Estoppel:

This rule provides that at certain special circumstances, a person would not be allowed to assert contrary to his earlier position. The rule has been applied in equity and serves as an exception to the Temporal Order Rule of priority. Therefore, where in a transaction, a purchaser of a legal estate whose interest is first in time, had lied about the earlier position to his own detriment, such person would lose his priority by operation of law of the subsequent equitable owner who can successfully plead the rule of estoppel⁵²¹. It is the expression in legal parlance that a person cannot "approbate and reprobate" at the same time.

1.2.6 Overreaching:

This is the process of transferring equitable or beneficial interests from the land to the purchase money or the proceeds of the sale of the property. A party to a transaction in property and having priority of interest in that property may have his priority defeated, where his interest in the property has been overreached. Overreaching is a process whereby a person elects to transfer his equitable or beneficial interest in property to the purchase money or proceeds of sale of the property. For instance, if a trust property is sold in breach of trust to a purchaser who has notice of the equitable interest of the beneficiaries under the trust, such beneficiaries may:-

- i. apply to set aside the transaction to enable them acquire their interest from such *malafide* purchaser, or
 - ii. to adopt the transaction and take the purchase money by suing the trustee.
- If the beneficiaries elect the option of adoption of the transaction their prior equitable interest is said to have been over reached. Thus, having taken the proceeds of the sale they cannot afterwards assert their equitable interest; the subsequent interest of the purchaser prevails

1.2.7 Registration:

The requirement of registration of instruments affecting land also constitute a circumvention of the "*Temporal Order Rule*" since priority of competing land instruments is not based on the date of their creation but rather on the date of registration of the instruments⁵²².

⁵²⁰ (1907) 2 Ch. p.264

⁵²¹ See *King vs. King* (1931) 2. Ch. p.294

⁵²² See *Amankera vs Zankley* (1963) IALLNLR 304, where the supreme court held that in determining priority of competing land instruments, what count is the date of registration and not the date of creation of the instruments.

See also Ikpo C. *op.cit.* p.34.

It will be observed that the circumstances envisaged by those exceptions are incompatible to the Temporal Order Rule, which clearly indicate that it is not in all cases whether under the English law or Nigeria law that the first in time prevails. The rule of "first in time is stronger in law" have been clearly circumvented by the exceptions to the rule analysed above.

1.3 APPLICATION OF THE TEMPORAL ORDER RULE TO SPECIFIC STATUTORY LAND TRANSACTIONS IN NIGERIA:

The basic rules have been fully explained above. It is necessary at this stage to now apply the basic rules to some specific transactions such as mortgage and dealings in land governed by statutes.

1.3.1 Mortgages:

It is not uncommon for a particular interest in land to be subject to more than one mortgage. Where there are two or more mortgages, secured on a property, the question arises as to the order in which the lenders are entitled to be repaid when the property has to be sold. The issue of priority is a concern where there are insufficient funds to repay all the lenders in full. Usually the lender who is first in priority will be entitled to recover the whole of its debt out of the sales proceeds, before the lender with lower priority receives anything but this is not always the case. If there are several mortgages of the same property, and its value is less than the amount due on the mortgages, the respective claim of the mortgages must be determined.

The rules of priority of mortgages are derived from the ordinary rules of law with special provisions that relate only to mortgages⁵²³. Therefore, where two or more mortgages have been created on one property, the priority of the successive mortgages is determined according to the dates of registration of the respective mortgages under the Land Instrument Registration Laws⁵²⁴. The confusion created by the above position of the law is that equitable mortgages which have not fulfilled the requirement of registration although had created an encumbrance can be defeated by a subsequent legal mortgage on the same property. This position may not be just in some circumstances. For example, Adeola approached bank 'A' for a loan of N500,000. The bank demanded for a collateral for the proposed loan. Adeola deposited the title documents of his house as collateral, an act which necessarily created an equitable mortgage on Adeola's house in favour of the bank. Assuming some months thereafter, while Adeola had not completed the repayment of the loan, he fraudulently retrieved the original title documents from the bank and took the same document to bank 'B' for a loan of N1,000,000 and bank 'B' eventually succeeded in creating a legal mortgage over Adeola's house. In this regard, the legal mortgage in favour of bank 'B' although satisfied the registration requirements for mortgages, should not confer priority on it over the equitable mortgage of bank 'A'. Consequently, as it has been demonstrated above, the rule

⁵²³ Section 116 *Property Laws, Kwara State of Nigeria* (Revised Edition) Law, Cap 90, 2006

⁵²⁴ Section 116 *Property Laws, Kwara State of Nigeria* (Revised Edition) Law, Cap 90, 2006. See also section 119 of *Property and Conveyancing Law, Cap 100, Laws of Western Nigeria, 1959*. Some states created out of the western region of Nigeria now have their separate laws with similar provisions to this section of the 1959 law. *Registration of Title Law, cap. L4, Laws of Lagos State 2003*

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that priority of competing mortgages over a property is determined according to the dates of registration of the respective mortgages may lead to injustice in some circumstance.

1.3.2 Registered Land:

It is the requirement of the law that every dealing in land must be supported by memorandum or note thereof signed by the party to be charged or his agent.⁵²⁵

It is the requirement of law that in addition to an instrument in land being made in writing or by deed, such instrument must also be registered at the appropriate land registry⁵²⁶. Registered dispositions in land include outright sale of interest in land, creation of a long lease and creation of a legal charge. In all the above situations, problem arises when there are multiple dispositions of interests in registered land.

The priority of legal charges is determined by the order of their registration. The order of creation is irrelevant. For example if a freehold owner P grants a mortgage by deed to Q, then immediately a further mortgage by deed to R. Both these mortgages take effect as minor i.e. equitable interests until they are registered. Suppose R register first by creating a legal charge. This constitute a registered disposition, Q's interest is therefore postponed to R, even though Q's mortgage was created first.

The conclusion deductible from the above example is that the execution of an instrument creating or conveying an interest in land does not by itself divest the grantor of his title to the land. The title remains outstanding in him until the instrument has been registered. If in the meantime the grantor executes another instrument in favour of a competing purchaser which is registered first, he (the subsequent grantee) has title to land⁵²⁷.

Generally, registration of instruments affecting land is provided for by statutes in all the state of Nigeria⁵²⁸. These various laws make provision for compulsory registration of all instruments affecting land. An instrument affecting land is defined as a document affecting land in Nigeria, whereby one party, that is the grantor confers, transfer, limits, charges, or extinguishes in favour of another party that is the grantee, any right or title to, or interest in land in Nigeria and include a certificate of purchase and a power of Attorney under which any instrument may be exercised, but does not include a will⁵²⁹.

To facilitate registration, every state land registration law establishes a land registry under a land registrar charged with the responsibilities of registering instruments affecting land in the state and to keep registered books and file in relation thereto. Most of the states in

⁵²⁵ Section 76. (1)(a) *Property Laws, Kwara State of Nigeria* (Revised Edition) Law, Cap 90, 2006, section 11 *Land Registration Law, Kaduna State*, Cap 85, Laws of Kaduna State of Nigeria, 1991; section 194 *Property and Conveyancing Law*, Cap 100. Laws of Western Nigeria, 1959. Some states created out of the old western region of Nigeria now have their separate laws with similar provisions to this section of the 1959 law.

⁵²⁶ Sections 6 & 7 *Land Registration Law of Kwara State*, Cap.83 Laws of kwara State of Nigeria, 1991, see also section 14 *Land Registration Law of Kaduna State* Cap. 85, Laws of Kaduna State of Nigeria, 1991, section 9(1) *Land Instrument Registration Law of Lagos State* Cap.166 Laws of Lagos State of Nigeria, 1994.

⁵²⁷ *Amankra vs Zankley* (1963) 1 ALLNLR 304. However the position in *Amankra vs. Zankley* (supra) was qualified in the case of *Qnashile v Barclays Bank* (1963), ALL N.L.R. p. 310 where it was held that a later instrument can by registration obtain priority over an earlier one only if it was obtained without fraud and without notice of the earlier unregistered instrument.

⁵²⁸ Sections 6 & 7 *Land Registration Law of Kwara State*, Cap.83 Laws of Kwara State of Nigeria, 1991; see also section 14 *Land Registration Law of Kaduna State* Cap. 85, Laws of Kaduna State of Nigeria, 1991; section 9(1) *Land Instrument Registration Law of Lagos State* Cap.166 Laws of Lagos State of Nigeria, 1994

⁵²⁹ See for example section 2 *Land Registration Law of Kwara State* Cap.83 Laws of Kwara Stat of Nigeria, 1991; see further, *Coker vs. Oguneye* (1939) NLR p.25; *Elegbede vs. Salvage* (1951) 20 NLR p.9, and *Ogunbambi vs. Abowab* (1951) 13 WACA 252.

Nigeria have adopted modern methods include computerization of the whole process in addition to the use of Geographic Information system and Land Information system. These methods have helped to enhance the process/system of registration and also give a well defined, detailed measurement and design efficiency⁵³⁰.

It has been argued by some commentators that what is required to be registered under the various state land registration laws is the instruments affecting land and not the interest in land. Thus, they argued that the position intended by the laws is to keep an intending purchaser informed of the previous transaction affecting the land he intends to buy⁵³¹. However it is submitted that the essence of registration of instrument affecting land is not only to provide notice but to create a charge in respect of the nature of interest contained in the registered instrument⁵³². Failure to register a document or instrument affecting land which requires registration render such document void⁵³³ or inadmissible in evidence where such instrument is tendered to prove title⁵³⁴.

Most importantly, where an instrument affecting land is not registered it loses priority against subsequent instrument affecting the same land from the date of its registration⁵³⁵. In this regard, priority of instruments affecting land is determined not by the date of their creation but the date of their registration⁵³⁶.

Very recently, the Supreme Court of Nigeria in the case of *Isamotu A. Ashiru v. Adetun Olukoya*,⁵³⁷ had to determine priority of interest between two registered title deeds in respect of the same land. The Respondent herein was the Plaintiff at the Ibadan High Court while the Appellant was Defendant. As between these two parties a dispute arose when the Defendant sought to commence building on the land and found the Plaintiff's agent and Lessee in possession. A fracas ensued with the result that both parties (who are referred to as Plaintiff and Defendant simpliciter respectively) ended up at the Police Station.

Following that incident, the plaintiff instituted this suit. In her Amended Statement of Claim, the Plaintiff claimed for declaration of title to land as follows:

A declaration that the Plaintiff is the person entitled to a grant to statutory Right of Occupancy to the piece of land situate at Sumbare Layout Ijebu Road, Oyo State of Nigeria and covered by instruments (1) dated 13th day of February, 1978 registered and numbered 53 at Page 53 in Volume 235 of the Lands Registry in the office at Ibadan. (2) Dated the 17th day of September 1969 and registered as number 33 in Volume 1153 of the Lands Registry in the office at Ibadan.

⁵³⁰ Muhammed Bashir Nuhu, *Enhancing Land Titling and Registration in Nigeria*, <http://www.fig.net/pub/fig2009/papers/ts02a/ts02a-nuhu-3247-pdf> accessed on 03/04/2012

⁵³¹ Jepede, M.L., *op.cit.* p. 69; Olawoye C.O., *Title to Land in Nigeria*, Evans Brothers Ltd., Lagos (1974) P. 66, section 40 of Land Instrument Registration Law of Lagos State cap.166 laws of Lagos State of Nigeria 1994.

⁵³² See *Ikangbade vs. Elemosho* (1964), ALLNLR p.154 where the Supreme Court held that a purchaser who neglects to make a thorough search of the register is fixed with notice of rights contained in the instruments registered under the Land Registration Act 1924. In other words, a diligent purchaser who conduct a search of the Land Registry will not only discover the instrument affecting land registered but also the nature of interest contained in the instrument. See also *Ashimi vs. Oke* (1967) S.C.p.62; *Folashade vs. Duroshola* (1961), All NRL p.87.

⁵³³ section 13(1) Land Instrument Registration Law of Lagos State Cap.166 Laws of Lagos State of Nigeria, 1994.

⁵³⁴ Sections 6 & 7 *Land Registration Law of Kwara State*, Cap.83 Laws of kwara State of Nigeria, 1991; see also section 14 *Land Registration Law of Kaduna State* Cap. 85, Laws of Kaduna State of Nigeria, 1991; section 9(1) *Land Instrument Registration Law of Lagos State* cap.166 Laws of Lagos State of Nigeria, 1994 *Registration of Title Law*, cap.L4, Laws of Lagos State 2003

⁵³⁵ *Fakoya vs. St. Paul's Church, Shagamu* (1966), All NLR p.78.

⁵³⁶ *Amankra vs. Zankley* (1963), ALLNLR p.304 (2006) SC p.356

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2. N5, 000.00 being Special and General damages for trespass committed on the said piece of land sometimes between July and August 1984 by the Defendant, his servants and agents.
3. Injunction to restrain the Defendant his servants and or agents or anybody claiming through or in trust for him from further entry and or committing further acts of trespass on the said land

In response, the Defendant filed a statement of defence and counter-claimed, also laying claim to the land in dispute. In proof of her title to the land, the Plaintiff led documentary evidence of conveyances duly registered conveying the land to her predecessor in title. In addition, she relied on acts of ownership on the land over a long period of time.

On the other hand, the Defendant gave traditional historical evidence of his to support his case. It is pertinent however to point out that there is no dispute as to the identity of the land

After considering the evidence adduced by both parties, it was held that the documents of title produced in evidence by the Plaintiff were registered prior to the Defendants' documents of title and as such the Plaintiff had a priority in interest. (emphasis mine)

On appeal, the Supreme Court, dismissed the defendant appeal and affirmed the decision of both the Court Appeal and the High Court respectively.

In another related case, of *Ayinla vs. Sijuwola*,⁵³⁸ the Supreme Court held inter alia, as follows:

Then there are the competing conveyances Exhibits "A" and "C". Both were duly registered. Exhibit "A", which was executed on 26th September 1959, was registered on 19th October 1959 while Exhibit "C" executed on 9th April 1969 was registered on 16th April 1969. Clearly between these two registered conveyances that of the Respondent was first in time and took priority although the act of registration does not confer a better title. In fact registration of instruments is not concerned with the validity or authenticity of such instruments. Once the deed is registrable it will be accepted for registration even if its terms are inconsistent with a deed in relation to the same land registered earlier. Although I agree with Chief Sowemimo that registration is notice to the whole world⁵³⁹ the earlier registration by the Respondent would have given notice to the Appellant, if only he made a diligent search, that the land had been previously dealt with. Section 16(1) of the Land Instruments Registration Law Cap. 64 of the Laws of Lagos State, to which both the learned trial Judge (indirectly) and the Court of Appeal made reference provides as follows: "Subject

⁵³⁸(1983) NSCC p.301 at 311

See *Omosanya vs. Anifowashe* (1959) 4 FSC p.94 at 98, where it was held that registration of an equitable interest in whatever form as not notice to the whole world and as such does not bind a subsequent purchaser for value of the legal estate see *Ogunro vs. Ogunro* (1965) FSC p.20

to the provisions of this law, and in particular of subsection (2) of this section every instrument registered under this law shall so far as it affects any land, take effect, as against other instruments affecting the same land, from the date of its registration as hereafter defined in the proper office as specified in Section 3, and every instrument registered before the commencement of this law shall be deemed to have taken effect from the date provided by the law in force at the time of its registration.⁵⁴⁰

In a similar case, of *Amankara vs. Zankley*,⁵⁴¹ the plaintiff brought an action for declaration of title in respect of a disputed land. The same vendor gave conveyances of the land in dispute to two persons, the plaintiff and the defendant. The plaintiff claimed that the land was conveyed to him 29th August, 1957, by deed, which was delivered for registration on 16th September, 1957. The defendant claimed that the same vendor had earlier conveyed, by deed dated 16th May, 1957, the same land to him and that the deed was duly registered on the 17th March, 1960. The contention of the plaintiff, which was upheld at the lower court, was that the defendant had lost priority by virtue of section 16 the Land Registration Act. On the contrary, the defendant argued that as the vendor had conveyed the legal estate in the dispute to him in May 1957, he the vendor had divested himself on the legal estate and that the purported conveyance of the legal estate to the plaintiff in August 1957 was of no effect on the principle of *nemo dat quod non habet*.

Bairamian, J.S.C., delivering the judgment of the court expressed the view

"that when two persons claim the transfer of a legal estate, he who did not register his conveyance cannot plead it or give it in evidence. If they both registered their deed, each takes effect as against the other from the date of registration, which means that the one executed earlier loses its priority if it was registered later. What counts is the date and hour of registration. In the end, the plaintiff who had the earlier effective instrument of transfer in accordance

⁵⁴⁰ See also the case of *Amankara vs. Zankley* supra p.304

⁵⁴¹ *Id.*

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with the provisions of the Act was preferred”.

In another more recent case, of *Auta vs. Ibe*,⁵⁴² the respondent's customary right of occupancy in respect of the land in dispute Exhibit “F”, was issued by the Jalingo Local Government on the 31st October, 1981. Between the years 1981 and 1984, he commenced and completed the erection of a house thereon. On the other hand, the appellant's customary rights of occupancy, Exhibits “A” and “B”, were issued by the same Jalingo Local Government on the 5th January, 1983 and 20th February, 1985 respectively. Accordingly, the court held that the Jalingo Local Government having lawfully granted the piece or parcel of land in dispute to the Respondent in 1981 was left with nothing to grant to the Appellant subsequently in 1983 or 1985 during the subsistence of the Respondent's grant. It is clear from the above facts that even if Exhibit “A” and “B” were to relate to the land in dispute, the Respondent's title to the land must, in law, take priority over that of the Appellant. Iguh, J.S.C. re-stated this basic principle of law thus:

*Besides, it is settled law and in accordance with common sense that after a party has effectively divested himself of his interest in land or other res, no right naturally vests in him to deal with such land or res any further for, nemo dat quod non habet, meaning that no one can give that which he does not have.*⁵⁴³

In summary, the principle of *first creation in time, is stronger in law*, is not always the rule. It will not be the rule if there is requirement of registration in which case the first to register is the person whose interest will prevail.⁵⁴⁴

1.3.3 Unregistered Land:

In spite of the requirement that transactions relating to interest in land must be registered, it is however discovered that a huge number of transaction in land are unregistered. Apart from the advantages that registration confer on an instrument affecting land, a registered instrument essentially create a legal interest or estate in the affected land. On the other hand, the interest of a holder of an unregistered land is merely equitable. Therefore, to determine priority of interests among competing unregistered land, the maxim that readily comes to mind is “where the equities are equal, the first in time prevails”. In effect, the applicable rule here is the order of creation as opposed to order of registration. The only circumstance where the subsequent equitable interest may take priority over a prior equitable interest is where the equities are no longer equal. This occur where the subsequent equitable interest does not have knowledge of the existence of the earlier equitable interest; where the earlier equitable interest was acquired by fraud or the owner of the earlier equitable interest stood by while the subsequent equitable interest is being created.

1.3.4 Registered Dispositions and Unregistered Disposition:

⁵⁴² (2003) NWLR Vol. 13 (pt 837) p.247

⁵⁴³ See *Okafor Egbuche vs. Idigo* (1934) NLR p.140; *Adams Akeyo & ors vs. Chief Suenu & ors* (1925) 6 NLR p.87; *Sanyaolu vs. Coker* (1983) 1 SCNLR p.168 or (1983) 3 SC 124 at 163-164; *Ugo vs. Pbiokwe* (1989) 1 NWLR (Pt. 99) p.566

⁵⁴⁴ See section 13, Land Registration Act of England, 2002; section 15 Registration of Land Instrument Law, Cap.166 Laws of Lagos State of Nigeria, 1994; section 16 Land Registration Law of Kwara State, Cap.83 Laws of Kwara State 1991, section 16 Land Registration Law of Kaduna State, Cap.85, Laws of Kaduna State of Nigeria, 1991

to effect his instrument registration by the fourth month, got to the Lands Registry at the fourth month, only to discover the existence of a second legal interest over the same property and that it was registered within the third month of the creation of the first legal interest? It is evident from the above illustrations, that the operation of the rule of law attaching priority to the date of registration of registered land instrument may not be fair in the circumstances. Land Instrument Registration Laws is more for the economic benefit of government at the expense of justice and fairness.

1.5 CONCLUSION AND RECOMMENDATION:

Having examined the English Temporal Rule of priority and its applications to mortgages, registered and unregistered lands, it is clear that the said rule may not always hold sway in all circumstances. Specifically, it has been demonstrated that the general rule guiding priority of competing instruments affecting land is that their priority is dependent not on their date of creation as envisaged under "*Temporal Order Rule*" but on their respective dates of registration. Even at that, it has been shown that a registered land instrument may not necessarily defeat an unregistered equitable land instrument if the registered legal instrument was obtained by fraud. In the same vein, a holder of an unregistered instruments in land backed up by actual possession may take priority over a holder of a subsequent land instrument without proof of possession. The exceptions to the *Temporal Order Rule* considered clearly indicate that the rule itself cannot stand in all situations.

Consequently, the paper recommends that the rule of priority relating to Land Instruments Registration Laws be amended to reflect that priority should be determined by the dates of creation of the instruments rather than the date of registration or as the interest of justice requires in every circumstance. In this regard, evidence of actual possession by an unregistered title holder whose interest in the disputed land was first to be created should take priority over the interest of a subsequent registered title holder but who is yet to take actual possession. By implication, this recommendation is to the effect that where land instruments are required to be registered, a prior unregistered land instrument backed up by actual possession should take priority over a subsequent registered instrument without prove of possession.