



EBONYI STATE UNIVERSITY LAW JOURNAL

Volume 9 No. 1, 2018

ISSN: 0794 - 926X

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A Publication of the Faculty of Law, Ebonyi State University, Abakaliki, Nigeria

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When Equitable Interest in Land under Native Law and Custom will Defeat Legal Estate: A Commentary on the Supreme Court Decision in *Etajata v. Ologbo* (2007) 11 MJSC 176-214.

Solomon O. Afolabi*

Abstract

Interest is a comprehensive term to describe any right, claim or privilege that an individual has toward real or personal property. Generally, interest in land can be either equitable or legal interest depending on the circumstances of their creation. A legal right or interest in land can be defined as the right or title in land conferred on an individual by law. It is always derivable from a legal instrument, which must have been created according to laid down formalities. Equitable interest in land on the other hand, is simply a right or interest in land conferred by equity. They are specie of rights over land not conferred through legal instrumentalities. Equitable interests operate to protect a party damned by a strict application of legal rules, particularly when there is a failure to comply with legal formalities. While it is the general belief that legal interests in land are generally superior to equitable interests on the same land, there are however, circumstances when equitable interest in land will defeat a legal estate on the same land. This paper therefore, examines the circumstances when equitable interest in land under Native Law and Custom will defeat a legal estate. In analyzing those circumstances, the paper did a commentary on the Supreme Court decision in the case of *Etajata v. Ologbo* (2007). The paper found among other things, that once an equitable interest has been created in land coupled with possession, it cannot be overridden by a legal estate. The paper recommends that equitable interest under Native Law and Custom coupled with possession should be accorded same legal status as a legal estate in land.

1. Introduction

The term 'interest' has been defined in the Black's Law Dictionary¹ as "legal share in something, all or part of a legal or equitable claim to or right in property".² The definition indicates that an interest could be a share, claim, right or title to a thing. It could either be legal or equitable in nature. Interest is a comprehensive term to describe any right, claim or privilege that an individual has toward real or personal property. It is an intangible property in a thing.

A legal interest is a right in or over land recognized by law having fulfilled the requirements of law. For example, in England under the Law of Property Act 2002, only interest owned in terms equivalent to a fee simple absolute qualify as legal interest. In Nigeria, a right of

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¹ Bryan, A.G., *Blacks Law Dictionary* (5th ed.) Western Group, St. Paul Minn, London (1999) p. 815.

² *Ibid* at p. 816.

occupancy either in form of statutory right of occupancy or customary right of occupancy in land is recognized as legal interests under the Land Use Act.³ This means the highest interest in a thing such as fee simple, seisin, allodia, radical title and right of occupancy. A legal interest can also be a right or interest in land or property that is governed by common law or legislation rather than the practices of equity.

Equitable interests are rights in property originally recognized by the Court of Chancery as distinct from legal interests recognized in the common law courts. They arose in cases where it was against the principles of equity for a person to enforce a legal right.⁴ Originally, equitable rights (e.g. a trust or the equity of redemption under a mortgage) were enforceable against the person with a legal right over property in question. Later however, those who were given the property by the holder of the legal interests took it subject to the holder of the equitable interests; later still, anyone who bought property knowing about the existence of equitable interests was bound by them. Therefore, everyone took property subject to equitable interests, except those who bought it without knowledge of the existing equitable interests.⁵

Generally, there is the tendency to treat legal interest in land as being more superior to equitable interest on the same land. However, if land is held under native law and custom, any transaction in such land, like an outright sale of such land, can by no stretch of imagination be treated as inferior to other mode of sale such as by way of legal conveyance or other written contracts. In other words, once the subsequent buyer of land held under native law and custom has been put in possession after the purchase, and he continued to be in possession, any subsequent legal estate created in respect of the same land with proof of the existing equitable interest suffices. It means the owner of the legal estate had constructive if not actual notice of the already existing equitable interest, in which case he is not a *bonafide* buyer and as such his legal estate will be defeated by the already existing equitable interest on the land. It is in this regard that this paper reviews the decision of the Supreme Court in *Etajatav. Ologbo*,⁶ which is in all fours with the above position.

2. Nature of Land Transactions under Native Law and Custom

The basic rule under native law and custom is that land belongs to the villages, communities or families with the chief or headman of the community or family as the "manager" or "trustee" holding the land for the use of the whole village, community or family.⁷ It follows that apart from land, there are species of property recognized under customary law, which are

³ Sections 5&6 of the Land Use Act, Cap.L5, *Laws of Federation of Nigeria*, 2004.

⁴ See Megarry, R., and Baker, P. V., *Snell's Principles of Equity* (27th ed.) Sweet and Maxwell, London (1973), p.105, Maudsley, R. H, *Hanbury and Maudsley Modern Equity* (10th ed.) Stevens and Sons, London (1976), pp. 3-30, and Megarry, R., and Wade, H.W.R., *The Law of Real Property*, (4th ed.) Stevens and Sons, London (1975) pp. 110-128. 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, and Jegede, M.I., *Principles of Equity*, Ethiope Publishing Corporation, Benin, (1981) reprint (2007) p.52.

⁵ [http://www.lawwiki.org/lawwiki/legalinterest\(landandproperty\)](http://www.lawwiki.org/lawwiki/legalinterest(landandproperty)) Accessed on 21/10/2010 at 4.05pm.
(2007) 11 MJSC 176-214.

⁷ *AmoduTijani v. Secretary Southern Province of Nigeria* (1921) AC p. 399.

meant for the use and enjoyment of the whole village, community or family. The ownership of such property is vested in the community, village or family as a whole, individual having the right of use only.

It is the major policy under customary land tenure that land was not alienable to an outsider because it was believed to be a sacred providence that must be preserved and protected at all times.⁸ The common slogan under customary law was that "we come from the ground and we have to go back to the ground and it is altogether out of place for anyone to think of selling the ground."⁹

Where an individual member of the family has been allotted part of the family land, he had the right to use the land for his subsistence living but could not alienate the land to another person without the consent of the family head and other principal members of the family. The individual allottee of family land or property could not alienate or part with possession without the consent of the family.

A sale of land under customary law is valid only where the persons vested with the power of consent to sell concur in the sale. In the case of family property for example, sale of land must be with the concurrence of the head of the family and the principal members. A sale of land by the head of the family without the concurrence of principal members is voidable¹⁰ while any sale by principal members without the concurrence of the head of the family is void *ab initio*.¹¹

Unlike under the English law, where it is required that transactions relating to transfer of interest in land must be evidenced in writing, this is not so under native law and custom. The requirement of writing is unknown to customary transactions in land. It is obvious that in the case of a transaction governed by customary law there can be no requirement of a formal deed of conveyance since the requirement of deed is the invention of English lawyers.

In *Alake v. Awawu*,¹² the plaintiff claimed an account of rent and *mesne* profits in respect of certain properties. The defendant claimed that one of the properties had been given to him by the mother of both plaintiff and defendant. The plaintiff's argument that any such gift was invalid under section 4 of the Statute of Fraud which provided that any transaction in land should be supported by a note or memorandum in writing failed before the Supreme Court. This is because the parties to the transaction being natives are bound by customary law, which does not require any writing in transaction relating to land.

Also, the Court of Appeal, in the case of *Adenuga Odu Swoniku v. Mojidi Orotiosakin & 3 Ors*¹³ had this to say:

⁸ Abubakar, M. M., *The Land Use Act Policies*, JPCL, ABU Zaria, Vol. No.1.(2006) p. 72.

⁹ Nwabueze, B.O., *Nigerian Land Law*, Nwanife Publishers Ltd, Lagos(1972) p. 319.

¹⁰ See *Esan v. Faro* (1947) 12 WACA p. 135.

¹¹ See *Ekpandu v. Erika* (1959) 4 FSC p.79.

¹² (1932) All NLR 39.

¹³ (1986) 3NWLR (Pt.30) pg.591 at 598. See similar conclusion in *Cole v. Folami* (1956), FSC 60 and *Ogunbambi v. Aboaba* 13 WACA 222.

There is no law that requires the Head of the family under native law and custom to "join in" meaning "execute" a conveyance of family land as neither a "receipt" nor a "conveyance" as such is known to native law and custom.¹⁴

A sale of land under customary law is validly concluded when payment of purchase price coupled with actual delivery of property has been made, there is concurrence of the vendor and the land is handed over in the presence of witnesses and usually accompanied with a ceremony.

It has been held that payment of money and delivery of possession in sale of land under customary law must be contemporaneous to show the clear intention of the parties. The purchaser must take physical possession and remain in possession henceforth.

Although we have seen that a customary disposition need not be evidenced in writing, this does not mean that the transaction cannot be reduced to writing. It is often done and can even be said to be the order of the day. It becomes necessary, therefore, to determine its implication.

In the first place, it must be firmly stated that the fact that a transaction is reduced to writing cannot be taken as evidence of an intention to be governed by English law. The suggestion to the contrary by Jibowu, Ag. C.J.F., in *Cole v. Folami*¹⁵ is erroneous. In that case, the learned judge held that, as the giving and taking of receipts were unknown to customary law, the transaction before him could not be judged from the standpoint of customary law. It is well known that customary law itself insists on publicity in any dealing, particularly in dealing in land. The significance of this requirement is that, should the grantor at a future date deny the grant or that the grant be of a different character to the one claimed by the grantee, and vice versa, the witness would be able to contradict him. That being the case, it is submitted that the memorandum in writing does nothing more except that, unlike human memory, it is more reliable. It is common knowledge that memory becomes dim with the passage of time; by the time an issue comes up for litigation important witnesses might be dead and, even when alive, might not be willing to tell the truth. A document, on the other hand, if properly kept, avoids these hazards. It speaks for itself. It is natural, therefore, that the parties to a transaction are anxious to take advantage of the opportunity afforded by writing; and the court would not encourage them to do so, if it were to hold that, since writing was unknown to our forebears, it will not suffice. The implication of the reduction of their agreements to writing is that customary law was not contemplated. In any case, the opinion of Jibowu, Ag. C.J.F., is incompatible with the recent decision of the Supreme Court in *Djukpan v.*

¹⁴ *Registered Trustees M.H.C. v. Adeagbo* (1992) 2 NWLR (Pt. 226) p. 690. See also *Odufuye v. Fatoke* (1977) NSCC Vol. II p.141; *Egonu v. Egonu* (1978) 11/12 SC. p.111; *Taiwo v. Ogunsanya* (1967 NMLR p.375). In *Griffin v. Talabi* (1948) 12 WACA p. 371, the West African Court of Appeal (WACA) held that there was no sale under native law and custom in that the respondent having paid the purchase price in 1926, did not enter into possession at any time even though he claimed that he was taken to the land by the vendor.

¹⁵ (1956) FSC p.60 at 62.

*Orovuyoube*¹⁶ where the court held customary law to be applicable despite the fact that the transaction was reduced to writing.

Secondly, what has been said cannot be interpreted to mean that a party can rely on a document as operating to transfer an interest in land by itself and in the same breath contend that customary law applies. The reduction into writing cannot displace the requirement for a formal transfer of title in the presence of witnesses. The document can only serve as a memorandum of the transaction or as a receipt for money paid. It is of evidential value only. Therefore, if it is to be of any benefit to the holder, it must identify the property in full: the date of the formal transfer and the witnesses before whom it was effected must be recited, and it would seem that the witnesses should subscribe their signatures or marks to the document.¹⁷

3. Competition between Equitable Interest and Legal Interest in Land under Native Law and Custom

We have seen above that in order to make a valid disposition of land under native law and custom, the transaction needs not be evidenced in writing. Even where parties chose to reduce customary disposition into writing, it has been held that the grantee's title is conferred by virtue of the transfer ceremony not by virtue of the instrument.¹⁸

In other words even where parties reduce customary dealings into writing, the written customary document does not amount to an "instrument" that require registration as laid down in *Coker v. Ogunye*¹⁹ where it was held that only those instruments which actually are the very means by which the right or interest in land is conferred, transferred, charged or extinguished in favour of another party are within the ambit of the Act and have to be registered. If on the other hand, the right or title or interest is not conferred by the document, but was conferred by other act of the parties or by other means and could exist without the document, so that the document becomes an appendage to that other act, such a document is not within the ambit of the Act.²⁰

In essence, it is clear from the above that the requirement of registration of instruments is unknown under customary transaction in land. To this extent, the act of registration cannot be used to determine priority of interests among rival claimants under customary disposition. The question therefore is, what is the acceptable rule for determining priority under native law and custom in Nigeria.

¹⁶ (1967) N.M.L.R. 287 see also *Folarin v. Durojaiye* (1988) NWLR (Pt. 70) p.151 and *Ezenwa v. Okoro & Ors* (2008) 3 NWLR p.610 at 618.

¹⁷ As the courts always insist on the best evidence, if the witnesses are still available at the time the issue is litigated they ought to be called so that they can be cross-examined.

¹⁸ See *Djukpan v. Orovuyoube* (1967), FSC p.66.

¹⁹ (1939) 15 NLR p.57.

²⁰ See also *Akingbade v. Elemosho* (1964) All NLR 154; *Dr. Joseph Okoye v. Dumez (Nig) Ltd & Anor.* (1985), NWLR (Pt. 4) p.783; *Agwnedu v. Onwunene* (1994), NWLR (Pt. 321) p. 375, in all these cases, the consensus is that once a document, shows simply, customary agreement over the sale of a piece of land it does not fall within the definition of an instrument for the purpose of the Land Instrument Registration Law.

In Nigeria, under native law and custom, there are specific rules for determining priority of interests in customary dispositions, which are at variances to the English Temporal Order Rule of priority. For example, while the Temporal Order Rule holds sway under the English rule, the same is not applicable in all cases under native law and custom.

A person who is first in time under native law and custom but fail to prove evidence of continuous occupation may lose priority to a subsequent buyer of the same land who was let into possession immediately after the purchase and who continued to remain in occupation.

It is not uncommon in a conveyance under native law and custom that the purchaser after making payment and obtaining receipt of payment for sale of land is unable to obtain possession of the said land from the vendor. In such circumstances, it has been held that no sale of land can validly take place under native law and custom until the purchaser has been in possession.²¹ Expatriating further on this proposition De Lestang, F.J. said;

In the olden days, the act of giving possession was done publicly and ceremoniously and this public act was the only evidence of the sale. With the advent of education, and the impact of European laws and customs, the practice arose and grew to issue receipts for such transactions. The necessity, however, of obtaining possession was never done away with, and it is not contested that to this day, for the transfer of ownership of land to be effective under native law and custom, it is necessary that the purchaser should obtain possession.²²

In other words, a purchase receipt under native law does not confer any right on the recipient purchaser and the purchaser in addition to the purchase receipt must obtain possession for him to have an effective transfer of ownership. It means that, if land is sold to a party without the execution of a formal deed of conveyance, his interest was an equitable interest, but if it is coupled with possession, it cannot be overridden by a legal estate.²³

On the contrary, the position under the English law appears restrictive. In *Folarin v. Durojaiye*,²⁴ it was held *inter alia* that:

where land is sold under English law or statute law, money is paid and receipts are issued, the purchaser can only acquire an equitable interest if he goes into possession.²⁵

This is to say that in order to transfer legal title under English law by purchase, there must be a valid sale, payment of money accompanied by acknowledgment of receipt and execution of deed of conveyance in favour of the purchaser.²⁶ This is in contradistinction with the position under native law and custom as execution of a formal deed is not required before a valid title

²¹ *Adelaja & Ors v. Alhaji Salo* (1957) ECNLR p.37; *Djukpan v. Orovuyoubé* (1967) FSC p.66; *Folarin v. Durojaiye* (1988) NWLR (Pt. 70) p.151 and *Ezenwa v. Okoro & Ors* (2008) 3 NWLR p.610 at 618.

²² *Ibid* p.39.

²³ *Etajata v. Ologbo Supra*; see generally *Orasanmi v. Idowu* (1959) 4 FSC p.40; *Soremekun v. Shodipo* (1959) LLR p.30; *Oshodi v. Balogun & Ors* 4 WACA p.1; *Suleimen & Ors v. Johnson* 13 WACA p.213.

²⁴ (1988) NWLR (Pt. 70) p.351.

²⁵ *Ibid.* see also *Ogunbambi v. Abowaba* (1951) 3 WACA p.22.

²⁶ *Erimosho v. Owokoniran* (1965) NMLR p.497.

could be passed under native law and custom. Under the native law and custom, the evidence of payment of purchase money plus entry into possession and continuous occupation are things required to pass valid title to land.²⁷ Under native law and custom therefore, once those three elements, that is, payment of purchase price, presence of witnesses and allowing the purchaser into possession exist, there is no need for a written agreement as evidence of land disposition, since documentary evidence is unknown to native law and custom.²⁸ In *Olubodun v. Lawal*,²⁹ the plaintiff tendered in evidence a letter written by their ancestor seeking to establish that he first settled on the land in dispute. The Supreme Court held that the trial court erred in admitting such a document in evidence.

In a conveyance under statute where the purchase receipt constitutes a registrable document and was duly registered, it creates an equitable interest over the property in favour of the purchaser and cannot be defeated by subsequent buyers except a bonafide purchaser of the legal estate for value without notice of the equitable interest.³⁰ However, the position under native law and custom is radically different as the doctrine of bonafide purchaser of the legal estate cannot defeat a prior equitable interest with possession in line with the Supreme Court decision in the case of *Etajata v. Ologbo*.³¹

4. Facts and Findings in the case of *Etajata v. Ologbo*

The facts of the case are as follows: the plaintiffs and the defendants before the High Court of the then old Bendel State were of the same family (Omovwiaré family of Igwekpokpo village in Ughelli Local Government Area). The plaintiffs claimed to sue for themselves and on behalf of the said family. The defendants were sued in their individual capacities. They denied that the plaintiffs were suing on behalf of Omovwiaré family as the plaintiffs did not seek or had the consent of the family.

The dispute was on land, which formed part of Ugbusi land situated and lying in Ughelli Local Government Area. The plaintiffs claimed that some portions of the said land were sold or leased by the defendants to various persons for which the sum of over N50,000 (Fifty Thousand Naira) was received by the defendants, and shared among themselves to the

²⁷ *Adesanya v. Aderonmu* (2000) FWLR, (pt.15) p. 2492.

²⁸ *Olubodun v. Lawal* (2003) All FWRL (pt. 438) p. 1468; *Odutola v. Sanya* (2008) All FWRL (pt.400) p.780

²⁹ (2008) All FWRL (pt. 438) p. 1468.

³⁰ In *Alhaja Juradat Animashaun v. G.A. Olojo* (1990) 6 NWLR (pt. 159) p. 11, the Supreme Court gave the meaning of a "bonafide purchaser of the legal estate for value without notice" as follows: 'Bonafide' is defined as "in good faith, honestly, without fraud, collusion, or participation in wrong doing. Purchaser of Value: 'Purchaser' in its technical sense does not necessarily imply purchaser for value. For 'value' are included to show that value must be given to earn the immunity from equitable claimants. Value means any consideration in money, money's worth (e.g. other lands, stocks and share or services marriage). See *Le Neve* (1747) 1 Ves Sen 64: Wh& T, ii 157 Willoughby v. Willoughby 1 TR. 763. Of a Legal estate: As courts of equity break in upon the common law, when necessity and conscience require it, still they allow superior force and strength to a legal title to estate. See *Wortley v. Brikhead* (1754) 2 VesSen 571 at 574 per Lord Hardwicke, LC. Without Notice: He must have no choice of the existence of equitable interest. He must have neither actual notice nor construction notice nor imputed notice. A person has actual notice of all facts of which he has (or has had) actual knowledge however that knowledge was acquired.

³¹ (2007) All FWLR pt.386, p.584.

exclusion of other members of Omovwiare family. The land, according to the plaintiffs contained plaintiffs and other members of that family's rubber plantation, fish ponds, plaintiffs' buildings, juju shrine, cassava plants, fish traps and many other crops. Plaintiffs and other members of Omovwiare family and their maternal ancestors, Imohkwe, had undisturbed enjoyment and possessions of the said land until 1977, when the defendants challenged the rights of the 1st plaintiff and EdiriEtajata rubber plantation to one Japan for building purposes. The land in dispute was founded by Imohkwe from time immemorial and was the first person to set foot on and to occupy the land when it was virgin forest. The Appellant claimed further that the said Imohkwe shared the Ugbusi land giving part to his daughter called Omovwiare and the remaining part to his other child called Itoto. Both plaintiffs and defendants are descendants of Omovwiare.

The plaintiffs claimed also that in 1960, there was a dispute between members of Omovwiare family and Itoto family over the boundary between their respective portions of land. The dispute was settled on the 13th of August, 1960. After the settlement, the defendants told the plaintiffs and other family members that they, defendants as representatives of Omovwiare family would meet members of the Itoto family for the settlement terms to be put into writing and signed by the representatives of both families so as to avoid future boundary disputes. The defendants, according to the plaintiffs, instead of drawing up terms of settlement with the representatives of Itoto family, surreptitiously entered into an agreement dated the 1st day of April, 1961 with some members of Itoto family which agreement purported to transfer the title in the said land to the defendants exclusively. The defendants, plaintiffs further alleged, has since then kept the said agreement away from the plaintiffs and other members of Omovwiare family until in 1977 when the 1st plaintiffs and his mother tried to sell a portion of the said land to one Japan.

The defendants as per their further amended statement of defence, except where they made express admission, denied each and every allegation on facts contained in the further amended statement of claim filed by the plaintiffs. Defendants for instance denied emphatically that they sold or leased the said land for over N50,000.00 (Fifty Thousand Naira) to various persons. They denied the existence of Itoto family land. They also denied that Imohkwe, during his lifetime shared the aforesaid land into two between his son Itoto and daughter Omovwiare. They averred that all Imohkwe lands have since his death devolved according to ughelli/Urhobo native law and custom on the descendants of Imohkwe.

The matter proceeded to hearing at the end of which the trial Court granted partially, the plaintiffs' reliefs in the following terms:

- (i) That the land in dispute is the property of the entire Omovwiare family.
- (ii) Injunction restraining the defendants, their servants or agent from further sale of the land in dispute without the authority and consent of the members of the Omovwiare family, was granted.
- (iii) That the defendants were to account only for the sale to PW5.

The defendants were dissatisfied with the decision of the trial court and appealed to the Court of Appeal, Benin Division. The Court of Appeal dismissed the appeal and affirmed the trial court's judgment except for relief (1) which was varied to read:

it is hereby declared that the plaintiffs are entitled to a customary right of occupancy in respect of the land called Ugbusi land and shown on Exhibit C; less the area sold to PW 5. Johnson Ighonereho.

Still dissatisfied with the judgment of the Court of Appeal, the defendants further appealed to the Supreme Court. One of the issues formulated for determination which is relevant to this paper is "whether the document, Exhibit 'A' which did not comply with Sections 2 and 16 of Lands Instruments Registration Law Cap. 81 vol. 4 Laws of Bendel State of Nigeria 1976, is inadmissible, null and void and/or worthless for all purposes in the circumstances of this case". Exhibit "A" which is a document affecting land and required registration but was not registered. However, a review of the case had shown that despite the fact that the said Exhibit "A" was not registered, nevertheless, it could not be regarded as a worthless paper. Rather being an instrument relating to transfer of land, notwithstanding that it had not been registered, it however created an equitable interest in the land.

Consequently, the Supreme Court unanimously dismissed the appeal and upheld the decisions of the Court of Appeal. The Supreme Court held further:

that if a party received title to land under native law and custom and there is proof or evidence that money was paid for the land coupled with an entry into possession, it will be sufficient even to defeat the title of a subsequent purchaser of the legal estate if the possession is continuously maintained. In other words, if land is sold to a party without the execution of a formal deed of conveyance, his interest was no more than equitable. Even if it was an equitable interest, but it is coupled with possession, it cannot be overridden by a legal estate.³² Possession, it was said is 9/10 of the law (emphasis is mine).

From the analysis of the decision in Etajata's case, the following findings are relevant to this paper;

- (i) Where a purchaser of land or a lessee is in possession of land by virtue of a registrable instrument, which has not been registered and has paid the purchase money or the rent to the vendor or the lessor, the purchaser or the lessee, has acquired an equitable interest in the land which is as good as a legal estate.³³
- (ii) A registrable instrument, which has not been registered, is admissible to prove an equitable interest and to prove the payment of purchase money or rent.³⁴
- (iii) If land is held under Native Law and Custom, any such out and out sale of such land, can by no stretch of imagination be treated as inferior to other modes of sale such as by way of conveyance or other written contracts.³⁵

³²See also *Odutola v. Sanya* (2008) All FWRL (Pt.400) p.780.

³³See *Tijani v. Akinwumi* (1990) 1 NWLR (Pt. 125) 237.

³⁴See *Savage v. Sarrough* (1937) 12w NLR 14; *Oni v. Arimuro* (1973) 3 SC 163; *Bucknor-Maclean v. Inlaks* (1980) 8-11 S.C 1; *Obijuru v. Ozims* (1985) 4 SC 142.

³⁵See *Oshodi v. Balogun & Ors.* 4 WACA 1; *Suleiman & anor. v. Johnson* 12 WACA 213; *Aboyade Cole v. Folami* (1956-1960) NSCC 59; *Akingbade v. Elemosho* (1964) 1 All NLR 154; *Ayinla v. Sijuwola* 1984 5 SC 44.

- (iv) If a party received title to land under Native Law and Custom and there is proof or evidence that money was paid for the land coupled with an entry into possession, it will be sufficient even to defeat the title of a subsequent purchaser of the legal estate, if the possession is continuously maintained. In other words, if land is sold to a party, without the execution of a formal Deed of Conveyance, his interest, was no more than equitable. Therefore, even if it was an equitable interest, but if it is coupled with possession, it cannot be overridden by a legal estate.³⁶
- (v) The general practice under native law is that the making and giving of receipts of purchase is unknown to native law and custom.³⁷

In view of the above findings, it is submitted that it is not in all situation where there is competition between equitable interest and legal interest in land that legal interest will prevail. In appropriate cases, where land is held under native law and custom, unless a subsequent legal estate on the same land is a *bonafide* purchaser without notice of the existing equitable interest, such legal interest cannot defeat the existing equitable interest on the land. In other words, priority of transactions in land held under native law and custom is not only determined by evidence of payment of price, but goes further to be complemented by the presence of witnesses, letting into possession and evidence of continuous uninterrupted possession. Therefore, in cases of equitable interests, once a valid equitable interest was created by way of a registered purchase receipt and the equitable incumbrancer enter into possession and he is in continuous possession, he takes priority over the subsequent legal estate created in respect of the same property.³⁸

5. Conclusion

This paper discussed the circumstance when equitable interest in land held under native law and custom can defeat legal estate. In particular, the paper reviewed the facts and the findings in the case of *Etajata vs. Ologbo*.³⁹ Based on the analysis of the findings in *Etajata's case*, it is evidently clear that once an equitable owner has been put in possession and continued to be in possession, unless the subsequent purchaser of the legal estate of the same land is able to prove that he is a *bonafide* purchaser of the legal estate of the disputed land without notice of the prior equitable interest, the prior equitable owner will defeat the subsequent legal estate. In conclusion, it is not in all situations where there is competition between equitable interest and legal interests that legal interest shall override equitable interest. In appropriate cases where equitable interest is created in land held under native law and custom and such equitable encumbrance is coupled with possession, such equitable interest is as good as legal estate. Therefore, the dichotomy between legal interests and equitable interests is gradually losing relevance in transactions in land under native law and custom in Nigeria. Consequently, it is recommended that equitable interest in land held under native law and custom coupled with continuous possession should be accorded same legal status as a legal estate in land.

³⁶ See *Orasanmi v. Idowu* (1959) 4 FSC 40; *Soremekun v. Shodipo* (1959) LLR 30; *Oshodi v. Balogun & Ors.* 4 WACA 1; *Suleiman & Ors. v. Johnson* 13 WACA 213.

³⁷ See *Aboyade Cole v. S.R. Folami* (1956) SCNLR page 180; *Clay Ind. Nig. Ltd. v. Aina* (1997) 8 NWLR (Pt. 516) 208; *Odusoga v. Ricketts* (1997) 7 NWLR (Pt. 511) 1.

³⁸ *Ibid.*

³⁹ *Etajata v. Ologbo* (supra).