

CHAPTER TWENTY-NINE

AN EXAMINATION OF THE CONCEPTS OF OWNERSHIP AND POSSESSION UNDER THE NIGERIAN LAW

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Summary of the Chapter

This chapter examines the general nature of the concepts of ownership and possession under the Nigerian Laws. It further discusses the various types of both ownership and possession as classified under the Law. Also discussed is the legal relationship between ownership and possession as enunciated under both the statutory and judicial authorities in Nigeria.

Introduction

Ownership as a concept ordinarily involves all those rights, which arise between an owner of a demised property and the subject matter itself. On the other hand, possession is indeed ninety nine percent (99%) strong in proof of ownership. A person in possession is presumed to be the owner of the demised property until a better title of ownership is established. The concepts of ownership and possession are two terms generally used in relation to property, be it real or personal. In fact the two concepts are the foundation of property Law. Ownership is a multi referential word, which does not lend itself to an apt of precise definition and a fortiori, meaning possession is equally a chameleonic term, which adapt itself to the various contexts that is actual, constructive and adverse in which it can be used.

And what is more, the issue becomes more complex when it is appraised in the context of landlord and tenant relationship whether with regards to residential accommodation or a landed property.

The ownership entails the right to possess without any obstruction. A proprietary right to a thing where there is no challenge. While possession on the other hand, entails to be in a physical occupation of a property. Ownership is the power to use and dispose because an owner of a demised property under the law can exclude all other persons including a person in possession. It is indeed the power of management and alienation.

For instance, a tenant in an apartment or on a landed property has an exclusive possession of the same subject, however to the agreement to pay rent to the landowner who has an immediate reversionary interest of the property. Furthermore, ownership also entails someone who has possession whether immediate or absolute, direct or indirect and it must not be tied to anybody except the person who actually owns the property. Whether here is propriety right in respect of a given property depends on some incidents, which include right to use and right to dispose or alienate.

Possession on the other hand entails the direct physical relationship a person has in respect of a property. So one can be in possession of a land, even though, he is not the owner of same. It is not also necessary that, the owner of a landed property should be in physical possession. Thus exclusive possession of property may be a good evidence of ownership. Therefore, for there to be a possession, two elements must be considered, these elements of possession were enunciated in the case of *Nteogwuiya, V. Ikuru*.²

Definition of Ownership

Ownership entails an owner of a land or premises who has the right of possession. This right of possession may be immediate or otherwise.

² (1998) 10 NWLR (Pt. 529) 324

This right of possession must not be subject to the superior right of another. To amount to ownership in strict sense, the right claimed must be infinite and absolute.

A person does not cease to be the owner of property, even if he lets out that property to another person for a fixed term or period of time, this is because the owner of property still has a right of reversion (reversionary right), this will enable the owner to take over his property later. Also there are instances in which ownership has been defined in terms of power of alienation. Power to use, abuse or destroy and power of absolute disposition have been regarded as legal incidence of ownership, so once one can make disposition of land by sale, lease or mortgage, one may be held to be the owner of the property.

To this end therefore, it may not be wrong to describe ownership as the proprietary right or interest one has in property. Ownership can be acquired by gift, transfer, sale and through conveyance. It has also been described as collection of rights to use and enjoy property, including right to transmit it to others. The complete dominion title, or proprietary right in a thing or claim. The entire power to use and dispose a property in a manner one so desires, albeit as recognized by law is an absolute ownership³ Put differently, ownership of property could either be absolute or qualified. It is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject however to compliance with laws. The ownership is qualified when it is shared with one or more persons, when the time of enjoyment is deferred or limited or when the use is restricted.

Further, ownership has also been described as the right to the exclusive enjoyments of a thing.⁴ Strictly, it denotes the relation between a person and any right that is vested in him.⁵

³Henry D The Black's Law Dictionary (6th ed. West Publishing Co United States of America 1990)

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⁴As per Austin is Osborn's Concise Law Dictionary (9th ed. Sweet & Maxwell London 2006)

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⁵As per Salmoond Ibid 298

Though ownership could be absolute or restricted, however, it is of note at law that, there cannot be absolute ownership of land as it cannot be destroyed and because of the theory that all land is ultimately held in the Crown and individuals only have the right of Seisin which is formal legal hereditaments, when he has in the property an estate of freehold in possession.

Thus in the case of *Fagimwa v. Adibi*¹ ownership is defined as consisting the totality of or the bundle of the right of the owner over and above every other person on a thing. It connotes a complete and total right over property. The property begins with the owner and also ends with him. Unless he transfers his ownership of the property to a third party, he remains the allodia owner. Ownership can also be viewed as the right, which a landlord retains after parting with the actual possession to his tenant. But an owner does not cease to be an owner because he has granted his land to a tenant for an indefinite period. For at law, the grantor has a right of reversion, which is exercisable upon abandonment by the tenant of his holding or the occurrence of misconduct on the tenant's part as may warrant a forfeiture of his holding by the landlord.

Ownership is the greatest right or collection of rights, which a person can have over or in a thing. There are different kinds of rights, which construe ownership namely: -

- a. Corporeal: - the ownership of a thing or chose in possession such as a wrist watch or a fountain pen.
- b. Incorporeal: -ownership of a thing only, for example, the right to recover a debt of One Hundred Naira (N100) from another person by an action at law, or the ownership of a chose in action. A share certificate is a chose in action, and ownership of it is of certain rights, the right to dividend as and when declared, the right to vote at meetings et cetera.
- c. Sole ownership: - where a person is the sole owner of Blackacre
- d. Co-ownership: - where Mr. "A" and Mr. "B" are

¹(2004) 14 NWLR (Pt. 903) 544 @ 549

simultaneously owners of Blackacre as joint tenants or tenants in common

- e. Legal or equitable ownership: - a grant giving Mr. "X" the free simple absolute in possession of Blackacre constitutes him the legal owner.

Definition of Possession

Possession entails physical detention, coupled with the intention to hold the thing detained as one's own. It is prima facie, evidence of ownership.⁷ It can also be viewed as the detention and control, or the manual or ideal custody of anything, which may be the subject of property for one's use and enjoyment. In the case of *Buraimoh v. Bamgbose*⁸ Nnaemeka Agu J.S.C (as he then was) defined possession as effective physical control or occupation of land as well as exclusive control or possession, *animus possidendi*.

Furthermore, in the case of *Aminu v. Ogunyibi*⁹ the Supreme Court defined possession to mean the occupation of the land, a physical control of the land either personally or through an agent. Also, it can be viewed as occupation of property by way of control and the owner of property can be in possession of his property. A person who is not the owner of a property can also be in possession of property. This occupation needs not be physical, the intention to control and exclude others are also ingredients of possession.

Therefore, in the case of *Adekunle v. Ayinke*¹⁰ the Court held that the acts of possession may also be taken as acts of ownership if the circumstances are such that the person in possession ought to be regarded as owner but more is needed than it is required to support a claim for trespass. Acts of possession and enjoyments of land may be evidence of ownership. It is not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity.

⁷ Roger B. Osborn's Concise Law Dictionary (9th ed Sweet & Maxwell, London 2006) 256

⁸ (1989) 3 NWLR (Pt. 109) 52 at 66

⁹ (2004) 10 NWLR (Pt. 882) 457

¹⁰ SC 18/67 of the 17th January 1967

Also, the acts of long undisturbed possession and enjoyment of land may be a prima facie evidence of ownership of the particular piece of quantity of land with reference to which such acts are done. Such acts of long possession are however in a claim of declaration of title.

Possession has been defined as one of the vaguest of all vague terms. So its meaning varies from one subject matter to the other. Thus in *Tower & Co Ltd v Gray*¹¹ Lord Parker C.Y said "for my part, I approach this case on the basis that the meaning of possession depends on the content in which it is used."

From the above case, it appears that possession is a device of confidence and policy only. It is therefore clear that possession has more than a meaning. However, possession is the direct physical relationship between a person and a given property. Therefore, the relationship matters. A person in possession may be in actual physical possession and may not be in actual physical possession of the property. What then are the acts or ingredients to power in order to establish possession? It should be noted that it is a question to be determined on the circumstances of each case. That is, cultivation or erection of a building on a piece of land may be evidence of possession, but one needs not in some situations proof erection or cultivation to prove possession. In *Wuta Ofeji v. Danquah*¹² the demarcation of land with pegs on all the four corners of a piece of land was held to be sufficient act of possession.

Before a person can be said to be in possession, there must be possession – *animus possidendi*, that is the intention to possess. Similarly, legal possession may exist without de facto possession, that is, mere possession and the later may not always amount to possession in law. In other words, a person may be in possession of land, when in actual fact, he is not that in physical control or occupation of that land and the mere fact that one is in control or occupation of land may not mean one is in possession of the land in law.

The elements constituting possession was stated by Oputa J.S.C (as he then was) in *Overseas Construction Ltd. v. Creek Enterprises Ltd v. Creek Enterprises Ltd*¹³ to the effect that: -

¹¹ (1996) 2 Q. B 351 (at 361)

¹² (1961) 3 ALL NLR 596

¹³ (1985) 3 NWLR (Pt. 13) 407 @ 420

“legal possession must have to elements namely;

1. The de facto control: - the factum of possession
2. The animus domini: - the intent to exclude others, sometimes called animus *possidendi*. These two elements must co-exist to amount to legal possession.”

Types of Ownership

The definition of Ownership as defined by the learned author of the Osborn's Concise Law Dictionary further grouped ownership into three classes namely: -

- a. Absolute Ownership,
- b. Restricted Ownership, and
- c. Beneficial Ownership.

Each of the classifications will now be discussed in turn.

- a. Absolute Ownership: - this is the right of free, as well as exclusive enjoyment, including the right of using, altering, disposing of or destroying the particular thing owned.
- b. Restricted Ownership: - this is Ownership limited to some extent, as for example, where there are several joint owners or a life tenancy. This is linked to co-ownership and joint tenancy whereby such property or thing is jointly owned by a group of people.
- c. Beneficial Ownership: - this is the right to the enjoyment of a thing as contrasted with the legal or normal ownership.

Not only this, ownership can also be qualified that is, the kind of ownership that is shared with one or more persons when the time of enjoyment is deferred or limited or when the use is restricted.

Types of Possession

From the several definitions and description of possession that have been given earlier, it is to be noted that the law recognizes two types of possession namely: -

- a. Actual Possession, and
- b. Constructive Possession

Each of the classifications will now be discussed in turn:

- a. Actual Possession: - A person who knowingly has direct physical control of or over a thing, at a given time is then in actual possession of it.
- b. Constructive Possession: - A person, who although not in actual possession of it, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing either directly or through another persons(s) is then in constructive possession of it.

Further, the law also recognizes that possession may be sole or joint and/ or derivative possession, that is, the kind of possession of one who is in the lawful occupation or custody of the property, but under a right derived from another as for example, a tenant, a bailee, a licensee.

The Relationship Between Ownership And Possession Under The Law

Flowing from the aforementioned several definitions, it is manifestly clear that the two terms ownership and possession are inter related. Opinions have been held that possession is prima facie evidence of ownership, and that possession can ripen to ownership by efflux ion of time. This issue arose in the case of *Atufe, v. Oghomienor*,¹³ the Court of Appeal held that, possession no matter how long, couldn't found a claim in title against the true owner.

¹³ (2004) 13 NWLR (Pt. 890) 327 @ 335

This decision therefore lays to rest the controversy to the effect that possession may give a presumption of ownership, but it does not do more and cannot stand when another proves a good title. Thus in landlord and tenant relationship, ownership is vested in the landlord while possession is vested in the tenant.

It should be noted that, under the Landlord and Tenant Law, the relationship between a landlord and tenant is basically contractual, defining the relationship between landlord (the owner, or one having rights derived from the owner), and the tenant who pays rent in return for the use and occupation of the premises for a period of time. The tenant hold possession of the premises in subordination to the rights of his landlord and the landlord has a reverse in the property so that at the end of the term he receives the property back in good condition, reasonable wear and tear excluded. It is evident that when a landlord grants a periodic tenancy to a tenant, there is a transfer of possession since the law recognizes the tenant's right to oust the landlord and the world at large from the premises.

It is also pertinent to observe that a tenant cannot be in possession while the landlord is out of possession. The Court in the case of *Abioye v. Yakubu*¹⁵ laid down the above principle of law. Also in the case of *Dunu v. Oludejo*¹⁶ the Court of Appeal of Nigeria held that an allegation of ownership in an action for trespass only put possession in issue and so that Plaintiff is only required in that instances to prove possession in order to succeed [that is constructive possession]. This is absolutely in consonance with the maxim *nemo dat quod non - habet* meaning that no one gives what he does not possess.

¹⁵ (1991) 5 NWLR (Pt. 190) 130 at 225

¹⁶ (2004) 17 NWLR (Pt. 903) 621

It is also important to note further that, possession and ownership are two important concepts under the Property Law and to a large extent could be referred to as Siamese- twins as the existence of ownership presumes ownership and at times can assume the degree of ownership, thus, in the case of *Ezukunft v. Ukachukwu*¹⁷ the Supreme Court held that: - "Proof of title to land may be doneby.....land possession."

The Court went further to state that: -

By virtue of Section 146 of the Evidence Act Cap 112, Laws of the Federation of Nigeria, 1990, when the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirm that he is not the owner. Thus, where a customary tenancy is in possession of his holding during good behavior and until it is forfeited for misbehavior there is presumption of ownership in his favour"

In fact, it has been said by the Court in the case of *Beatrice A. Kupoluyi v. Salu Ibrahim Ajose – Ogun*¹⁸ that an actual and effective possession alone is enough to maintain an action in trespass against all [the whole world except a person with better title or better right to be in possession of the same; that the mere fact that one is in possession does not confer a valid right or title which can defeat the possession of the land in dispute by any other person, hence the main issue for determination must depend on the priority of possession by either party.

Against the backdrop of the above analysis, it is to be seen that, it is only a person in possession that can alienate and/ or give out a particular property by way of any forms of conveyance. This is to say that if a person is not in ownership of a property, or if he is not the owner of such property, he does not have any title to it, as such, he does not have the right to alienate such a property. This is as contained in the already cited maxim *Nemo dat quod non-habet*, meaning No one can give what he does not have.

¹⁷ (2004) 17 NWLR (Pt. 902) 227

¹⁸ (1979) 10-12 CCHCJ 227

The term ownership is used in relation to title. It is merely contrasted with possession and means little or more than title, or at most, a title with no obvious better title outstanding. The owner of a property is a person who has something better than mere possession. The average occupier has something analogous to a possessory title, which he, however, enjoys in perpetuity and which gives him powers of users and disposition scarcely distinguishable from those of an absolute free holder, except that he cannot alienate his holding so as to divest himself and his family of the right to ultimate title.

Similarly, possession is very important in English Law. Since the fact of possession of land entitles a person to retain the land against anyone in the world except someone who has a better title. Exclusive possession is the right in the grantee of land to obtain and retain possession as against third parties including the grantor – a right in rem. Where a landowner grants another possession of land, the grantee was either a licensee or a tenant. It may also be determined by direct relationship of a person to a thing that is settled that physical presence on the land not necessary.

Both concepts are very similar and are often cause confusion particularly to both the laymen and the learned people alike. However, it should be noted that, it is possible for one to be the owner of a piece of land and also be in possession of that land [usually a landlord or a landowner] and one may be in possession of the land and not be the owner of such land [this is usually a tenant or a grantee]

To this end, the following standards clearly distinguish ownership from possession: -

- a. The right of possession
- b. The right of unlimited user and management
- c. The right of absolute power of destruction or committing waste upon the land

- d. The right of absolute disposition
- e. Absence of time or duration
- f. Incidents of residuality

Note that, the above mentioned standards are vested in the owner of such property but where the possession of same has been given out, such rights could no longer be exercised. It is also pertinent to point out here that, the two concepts though similar to each other both in usage and definition, however, they differ with regards to the fact that possession cannot be regarded as ownership, because it is just an incident of ownership; it is one of the enjoyments or entitlements of an owner to be in possession of his property. Also, the owner of a property has the residual and the reversionary right in the property in question, while the possessor has a lesser interest. This invariably says that the possessor has no power of alienation of the property. Not only this, the ownership of a property is of indeterminable duration, he holds in free hold [fee simple] as provide for under the Land Use Act, the owner holds in perpetuity, but a possessor may be on leasehold if the person in possession is not the owner

In the case of landlords and tenants, where a person is occupying another premises, or is in possession of another's property with the consent of the land owner and there is agreement as to how much he should pay, he is regarded as a tenant or a licensee, he pays the license fee as agreed by the parties. Where however, a person is in possession of premises with the consent of the landowner, but the parties failed to agreed as to much is to be paid by the occupier of the premises, the land owner is entitled to recover from the occupier, what is known as compensation for the occupier's use and occupation of the land.

Conclusion

From the foregoing, it is save to conclude that possession is one of the incidents of ownership, which is to the effect that, one who is in possession may be presumed to be the owner of a demised property.

In fact this principle of Law was laid down in the case of *Udeze v. Chidebe*¹⁹ to this end, for a possession to have the attribute of ownership, it must be exclusive. It must not be mere occupation. Also, there can be no ownership without possession and there cannot be absolute possession without ownership. The owner of land can be in possession to a tenant. However, it is possible for a person to have both the ownership and possession. But not possible for a tenant who may have actual possession to have the ownership simultaneously since the title and property interest and right reside in the owner.

It is evidently clear from the foregoing that, notwithstanding the difference between the two concepts, they are more or less similar in usage; and apart from the ordinary usage where the concepts could be used in different circumstances, many legal propositions and judicial pronouncements are evident that the concepts are just like Siamese – Twins that cannot be separated, especially with regards to property.

Recommendation

- There should be a clearer law on ownership and possession especially on land and chattels especially as relates to judicial and statutory interpretation.

¹⁹ (1996) 1 NWLR (Pt. 325) 141