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Analysis of the Rising Profile of Equitable Interests and their Application to Transfer of Interests in Land under Nigeria Land Law

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Abstract. Equitable interests in property are generally viewed as of lower value, particularly when they are in competition with legal interests. Generally, equitable interests are considered as minor interests, largely unwritten and if written have failed to comply with all the necessary requirements and therefore are vulnerable and may be lost upon sale of the land to a new purchaser. However, the above view of equitable interests has undergone tremendous changes. Given the contributions of equity in validating most transactions which would have been otherwise invalid by strict application of the law, equitable rights have advanced almost to the status of legal rights. This paper discusses the distinction between equitable interests and legal interests in property and analyses the modern enhanced status of equitable interests. This paper also examines the application of the enhanced status of equitable interests to transfer of interests in land in Nigeria. Given the enhanced status of equitable interests in property and its application to property transactions in Nigeria as demonstrated in this paper, it can be asserted that equitable interests in property have transcended the minor interests they were in the traditional view as they have now almost attained the status of legal estates. Thus, the dichotomy between legal interests and equitable interests has lost much significance. The paper therefore recommends that some statutory provisions which exclude equitable interests from the definition of "conveyance" should be amended to include equitable interests as instruments that validly convey interests in land in Nigeria.

1. Introduction

Property is capable of sustaining a wide range of interests and rights. Traditionally, property rights were distinguished from personal rights. Property rights arose in relation to land and personal rights in relation to every other "thing" not being land. An interest in property is a comprehensive term to describe any right, claim or privilege that an individual has toward real or personal property. It is all or part of a legal or equitable claim to or right in property. In other words, while interest in property could be referred to as right, claim or title, such interest can either be "legal" or "equitable".

The distinction between legal interests and equitable interests in property has been of tremendous concern to legal studies since the medieval period when the common law began to develop. The attempts by the Lord Chancellors and later by equity courts to remedy the hardships occasioned by the strict application of legal rules culminated in the growth of equity that led to an open confrontation between common law and equity. This led to the enactment of the Judicature Acts of 1873 and 1875. The Acts fused the administration of the two systems, providing *inter alia,* that in all cases where the rules of common law and the rules of equity were in conflict, the rules of Equity were to prevail. Many scholars have noted that the Acts may have fused the two systems; they have not fused the rules and principles of law and equity. In other words, the Judicature Acts notwithstanding there exists a clear distinction between legal rights and equitable rights.

Property law in Nigeria is governed by customary law, statutory law, case law, common law and equity. Customary law refers to the various customary laws that have governed Nigerian communities since the pre-colonial era. Common law was bequeathed to Nigeria by the British colonial authorities who introduced the common law of England and the doctrines of equity as sources of law in the country. Common law and equity have remained sources of law in the country in the post-colonial era and have greatly influenced land law in the country. Equitable rights and interests are proprietary rights in real property introduced into Nigeria under the doctrines of equity.

The problem associated with equitable interests generally is the quantum of value to be attached to them in a competition with legal interests in a given property. Generally, equitable interests are viewed as minor interests, largely unwritten or if written, have failed to comply with all the necessary requirements and therefore are vulnerable and may be lost upon sale of the land to a new purchaser. For this reason, equitable interests are generally omitted from the definitions of "conveyance" in property laws in Nigeria. The paper argues that notwithstanding the traditional view of equitable interests, equitable interests have grown beyond mere rights in *personam* as they are now as powerful as legal rights in certain circumstances. In achieving this objective, the paper discusses the distinction between equitable interests and legal interests in property and analyses the modern enhanced status of equitable interests. The paper also examines the application of the enhanced status of equitable interests to transfer of interests in land in Nigeria. The paper ends with the conclusions and recommendation of the research.

2. Distinguishing Equitable Interests from Legal Interests

A legal right or interest can be defined as the right or title in property conferred on an individual by law. It is always derivable from a legal instrument which must have been created according to laid down formalities. It is a right historically recognized by common law court.

An equitable interest on the other hand, is simply a right or interest in property conferred by equity. They are specie of rights over property not known to common law. They were recognized and enforced by the court of chancery administering equitable jurisdiction. Equitable interest operates to protect a party damnified by a strict application of legal rules, particularly when there is a failure to comply with legal formalities. When the application of legal rules will work hardship or lead to absurdities, equity will intervene to prevent injustice from being done to either of the parties.

The general distinction is that a legal estate or interest is valid against all the world (it is usually expressed as right *in rem*) and any person who subsequently acquires a legal or equitable interest in the same property takes his interest subject to the prior legal interest whether he has notice of that interest or not. A legal estate in property is enforceable against the whole world. An equitable interest in property is enforceable against the whole world except a purchaser for value of the legal estate in the property in question, provided that, when the purchaser acquired the legal estate, he had no notice either actual, constructive or imputed of the equitable interest. An equitable interest is said to be a right in *personam*, that is, enforceable only against specified persons.

3. The Modern Status of Equitable Interests in Property

Under the common law, certain formalities had to be observed in order to create or transfer legal interest in property and when these formalities are not completed no legal interest vests in the purchaser. It is in all these areas of imperfection in the legal formalities that equity came in and filled the gap in the law. However, the traditional view was that an equitable interest was never as strong as a legal interest because an equitable owner never had absolutely indefeasible title. This position was fortified by the maxim "Equity acts in *personam*" which underlies the fabric of early equity jurisdiction as equitable rights are only enforceable against the conscience of specified persons. This meant that equitable rights and interests are in *personam* and that equitable decrees bind the person to obedience on pains of imprisonment but the decree does not operate on the subject matter of the dispute.

However, the above traditional view of equitable interests has undergone tremendous changes. Given the contributions of equity in validating most transactions which would have been otherwise invalid by strict application of the law, equitable rights have advanced almost to the status of legal rights. For this reason, Hanbury, one of the leading equity scholars writing in the early part of the last century argued that the traditional status of equitable rights has changed and that “Equitable rights and interests must … be regarded as hybrids, standing midway between *iura* in *personam* and *iura* in *rem*”. More recently, another learned scholar, Jill Martin expressed the view that the status of equitable interests in property have advanced further than their traditional status. She argues that for example, “equitable interests under trusts are equitable proprietary interest corresponding to legal estates, and the beneficiary can properly be regarded as the owner of the beneficial interest and the ownership is a right in *rem*”.

The modern view of equitable interests is fortified by other developments in the role of equitable interests in property transactions. For example, equitable interests have evolved to the extent that they can now defeat the purchaser of legal estate in certain circumstances. In addition, equity interests have evolved new rights in property hitherto unknown to common law. The next section hereunder will demonstrate that the courts in Nigeria have accepted this enhanced status of equitable interests.

4. Application of the Enhanced Status of Equitable Interests in Property Transactions in Nigeria

The growing profile of equitable interests is discernable from the decisions of Nigerian courts relating to property interests especially regarding the role equitable interests have played in validating transactions which are otherwise imperfect because they fail to comply with required legal formalities and in the creation of new rights in properties. In addition, this growing profile is noticeable in the judicial decisions relating to transfers of interests in land under native law and custom and in obtaining Governor’s consent to alienation of interests in land under the Land Use Act.

5. Validation of Transactions that have Incomplete Legal Formalities

Equitable interests have made possible the enforcement of certain transactions in land which would have been otherwise invalid because they fail to comply with legal formalities. These categories of transaction are enforceable on the basis that “equity treats as done that which ought to be done”. Where this happens equity will decree specific performance for the enforcement of the terms of the contract. Accordingly, it was held in *Eriosho v. Owokoniran & Ors* that a sale of land which is imperfect because the legal formalities have not been complied with may give rise to an equitable interest in the property if there is evidence that the purchaser buys the land and goes into possession. This decision affirmed the rule in *Walsh v. Lonsdale* that states that where a lease has not been made under a deed as required by law, equity will enforce the written agreement for the lease as if the agreement had been under deed. Recently, in *Opara v. Dowel Schlumberger (Nig) Ltd*., the Supreme Court again affirmed the principles of *Walsh v. Lonsdale* by holding that an agreement for a lease is as good as a legal lease though the agreement confers only an equitable interest in the property. However, the equitable interest which the intended lessee has under an agreement for a lease does not exist *in vacuo*, but arises because the lessee has an equitable right to specific performance of the agreement. In such a case, that which is agreed to be done and ought to be done is treated as having been done and carrying with it in equity the attendant rights.

It is clear from the above that equitable interests were created through the act of part performance of one of the parties to the transaction thereby making it inequitable for the party who had benefited from the act of part performance to resile from the contract on the account that the transaction failed to comply with legal formalities.

6. Creation of New Rights in Property

Equitable interests have brought about the creation of certain rights in property which have no legal equivalents. Such rights include estate contract, equitable mortgage, and mortgagor's equity of redemption.

6.1 Estate Contract

An estate contract arises where there is a valid contract to convey a plot of land; the purchaser is at once considered as having an equitable interest in the property and it does not matter that the date for completion, when the purchaser may pay the purchase price and take possession, has not yet arrived, Equity, treating that as done which ought to be done, will decree specific performance for the enforcement of the terms of the contract. A contract of sale of land or interest in land is a standard contract which contains not just the basic requirements of the parties, property, the price and the nature of the interest to be granted, but goes further to include detailed terms of what the parties have agreed to such as the capacity in which the parties are contracting, payment of deposit, payment of the balance of the purchase price, interest on balance, date and place of completion insurance of the property and other terms which the parties may agree upon. It has been held that a contract of sale of land create an equitable interest in the land. In *Kachala v. Banki*, the appellant had purchased a house in Maiduguri Borno State, but for some reasons, he was frustrated from registering the property. Judgment was later obtained against the appellant in a matter unrelated to the purchase of the house and the house was attached and sold to satisfy the judgment debt which the respondents bought. The Court of Appeal held that the equitable interest in the property still resided with the appellant and the subsequent sale of the property had not divested him of this equitable interest.

6.2 Equitable Mortgage

An equitable mortgage is an agreement to create a legal mortgage. It is a contract which operates as security and is enforceable under the equitable jurisdiction of the courts. It is treated in equity as an express or implied agreement to create a legal mortgage, which is supported by valuable consideration and for which specific performance may be decreed. This is in accordance with the maxim that "equity regards as done that which ought to be done", for it is treated as a present, immediately existing security in equity. An equitable mortgage is express when created by an agreement, usually a written memorandum, in which the mortgagor undertakes to execute a legal mortgage whenever called upon to do so by the mortgagee. It is implied, when it is constituted by a deposit of tile deeds with the intention to create a security (whether or not accompanied by a written memorandum). In this case, equity implies an agreement to give and the right of the mortgagee to call for a legal mortgage. It can be safely concluded that the act of depositing the mortgagor's title deeds constitute an act of part performance of an agreement which remove the transaction from the provision of the statute of fraud.

6.3 Equity of Redemption

The legal estate in the mortgaged property remains in the mortgagor at all times during the subsistence of the mortgage. Under the common law, the mortgagor's right to redeem the mortgaged property is lost once he is unable to pay on the contractual date for payment. However, equity gives a right of redemption even after the contractual date for payment had passed. This equity of redemption arises as soon as the date to redeem the mortgage has passed. Equity of redemption has been defined as:

the right of the mortgagor to recover the security by discharging his obligations under the mortgage although the time fixed by the contract for the performance of those obligation has passed, and even though under the express terms of his agreement, the security may be stated to be the absolute property of the mortgagee.

This right to redeem is so inseparable an incident of mortgage that it cannot be taken away by an express agreement of the parties that the mortgage is not to be redeemable or that the right is to be confined to a particular time or a particular description of persons. Ogundare JSC in *Ejikeme v. Okonkwo* stated that: "this right continues unless and until the mortgagor's title is extinguished or his interest is destroyed by the sale either under the process of court or of a power in the mortgage incident to the security". The equity of redemption is also transferable.

7. Transfer of Interests in Land under Native Law and Custom

Equitable interests have been invoked with regard to alienation of land, purchasers of legal estate, and customary pledge in transfer of interests under customary law.

7.1 Alienation of Land

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 transaction in land. In *Alake v. Awawu,* the plaintiff claimed an account of rent and mesne profit 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 the 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, the parties to the transaction being natives were bound by customary law.

Also the Court of Appeal in *Sowoniku v. Orotiosakin & Others* held that "there is no law that require 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".

A sale of land under customary law is validly concluded when payment of purchase price coupled with actual delivery of the land 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. The purchaser must take physical possession and remain in continuous possession thereof. A person who is first in time under Native law and Custom but fail to proof 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.

7.2 Equitable Interests and Purchasers of Legal Estate

In order to make equitable interests effective, equity aimed at eliminating the purchaser of legal estate without notice which has been a menace to its existence. The fact that a purchaser had the legal estate conveyed to him is not sufficient to make his interest superior to the already existing equitable interest. Once an equitable interest is created in property and the equitable owner continue to be in possession of the property, the equitable interest cannot be defeated by subsequent legal interest even if obtained without notice of the equitable interest. The courts in Nigeria have applied these same principles to transfer of interests in land under native law and custom. The courts have held that if land is sold to a party under native law and custom 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. In the case of *Etajata v. Ologbo* the respondents, as plaintiff in the old Bendel State High Court filed the present suit against the defendants/appellant claiming in the main, orders of declaration that the sale of portions of family land at Ugbusi, Ughelli, be set side as the land was the family land of the plaintiffs, orders for account of proceeds of the land and injunction restraining further sales of the lands. PW 5 bought a piece of land measuring 200ft x 200ft from the defendants at the cost of N400.00. The document evidencing the transaction was tendered as receipt and admitted as Exhibit "D". The plaintiff succeeded with most of their claims. The High Court specifically ordered: "That the land in dispute called Ugbusi land as shown in Exhibit D is the property of the entire Omovwiare". The defendants then appealed to the Court of Appeal.

The appellate court, while dismissing the appeal, varied the above order of the trial court to wit: "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 (respondents' plan) less the area sold to PW 5….." On further appeal to the Supreme Court, the Court held that supposing that Exhibit "D" was admitted as receipt, it would only establish an acknowledgment of the payment of money in respect of the land by the plaintiffs but not in proof of title to the land as the nature of the title relied upon by the plaintiffs was that of sale under customary law and not by virtue of conveyance. That the general practice under native law is that the making and giving of receipts of purchase is unknown to native law and custom. In the present case, in order to show that Exhibit "D" was not admitted as receipt, the trial court admitted it as a document *simpliciter b*ecause a written agreement of sale of land, even though under native law and custom, is not the same with a purchase receipt as the two of them serve different purposes in such a transaction. The 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.

In essence, the decision in the case of *Etajiata v. Ologbo* enhanced the status of a person who has paid purchase price or rent and has remained in continuous possession in a transaction under native law and custom.

In view of the above decisions of the courts, one thing is clear, that under native law and custom an agreement for transfer of interest in land though not made in writing is enforceable once there is evidence of payment of purchase price, the purchaser has been let into possession and there is continuous possession which actions are equated to an act of part performance. In other words, equitable interest in land created under native law and custom is equivalent to act of part performance capable of being converted to specific performance.

7.3 Customary Pledge

There is the tendency to equate a customary pledge to a mortgage. However a customary pledge is not on all fores the same as a mortgage. A pledge is a form of security transaction known to customary law. According to Smith, a pledge is created where the owner occupier of land known as the pledgor, in order to secure an advance of money or money's worth, gives possession and use of the land to the creditor known as the pledgee until the debt is fully discharged. In other words, a pledge is a deposit of some personal property to a creditor as a security for some debt or engagement or the performance of some act. The pledgee only has the right to possession over the property until the debt is satisfied, while in mortgage, the mortgagee acquires ownership (interest is conveyed) and the borrower usually retain possession. A pledge is a possessory security as distinct from a proprietary security in mortgages, thus vesting in the pledgee a right to possession of land and enjoyment of the profits, while the radical title remain in the pledgor.

The relevance of equitable interest in customary pledge is the redeemability of the pledged land however how long it might have been in the possession of the pledgee. In *Leragun v. Funlayo*, a pledged land which ensured for 30years was held to be redeemable. The right of the pledgor to recover possession of the land remains with him and is never extinguished hence the popular saying in customary parlance; "once a pledge, always a pledge". The pledgor's right to redemption cannot be clogged either by demanding any amount in excess of the sum for which the land was originally pledged or by planting heavy economic trees on the pledged land or using any other means to postpone or defeat the pledgor's right to redeem. In essence, equity of redemption which is a creation of equitable interest is also available to redeem customary pledges just like in mortgages even after the contractual date of repayment had passed.

7.4 Requirement of Consent to Alienate under the Land Use Act

Another area where equitable interest has come handy to play a significant role in whittling down the hardship of the provision of the law regarding transfer of interest in land in Nigeria is the provision requiring Governor's consent to alienate. By the provision of section 1 of the Land Use Act (hereby referred to as the Act), all land comprised in the territory of each state of Nigeria is vested in Governor of the state. Section 5 of the Act gives the Governor the power to grant statutory right of occupancy and Section 6 of the Act gives similar power to the Local Government in respect of customary right of occupancy over land not in urban areas of the state.

The requirement of Governor's consent (or Local Government as the case may be) to alienation of rights of occupancy (whether statutory or customary) is the subject matter of sections 21, 22 and 23 of the Act. The provision of these sections of the Act stipulates that it is unlawful to alienate any right of occupancy either by way of assignment, mortgage and transfer without the consent of the Governor. There is no doubt that the requirement of Governor's consent is central to most commercial transactions over land in Nigeria. Most financial institutions normally require collateral before loan facility is disbursed and in most cases prefer securitization in land or landed property. Before the enactment of the Act, it was quite convenient to obtain loans from banks and other financial institution for business and other developmental purposes by depositing title deeds in the understanding that the financier could dispose the bare land or developed land in the event of the borrower's inability to pay up the loans. Such transactions are virtually or practically difficult since the inception of the Act because of the consent requirement. The implication of the provision for consent is that every subsequent transaction on right of occupancy either by way of transfer, mortgage, assignment or lease without the requisite consent is void and illegal. The initial inclination of the court was to apply the literal words of the provision of the Act regarding Governor's consent. Among such cases the one that was prominent and got to the Supreme Court is *Savannah Bank v. Ajilo* where Mr. Ammel Ajilo had mortgaged his property in favour of Savannah Bank to secure a loan. On default in repayment of the loan, the bank sought to exercise its statutory power of sale. Mr. Ajilo sought a declaratory order of the court that a deed of mortgage was null and void and of no legal effect, the consent of the Governor not having been first sought and obtained in accordance with section 22 of the Land Use Act. He relied on section 26 of the Act to submit that the mortgage transaction and the mortgaged deed were void. The trial court granted the said relief and subsequently upheld by the Court of Appeal. On further appeal to the Supreme Court, the Apex court unanimously affirmed the decision of the appellate court and accordingly held that the mortgage transaction was invalid for want of Governor's consent as required under Section 22 and 26 of the Act.

That was the position of the Supreme Court believing its hands to be tied by the provisions of the Act notwithstanding the injustice the strict application of the provision of the Act might have caused particularly in stifling commercial transactions. It is worrisome that the Supreme Court became powerless against the provision of the Act. One would have expected that the court would follow its own reasoning in *Oil Field Supply Centre Ltd v. Joseph Lloyd John* where Eso, JSC observed as follows:

it is the appellant who should have applied for a permit for him and failed to, before he helped them found the company that now intends to meet him with illegality perpetuated by same company. Certainly equity will not allow the company to benefit from their own illegality.

This was the rationale the Court of Appeal applied in the case of *Adedeji v. National Bank of Nig. Ltd*. which case was similar to the case of *Ajilo*. But here, the Court of Appeal came to a different conclusion, reasoned that it was the defendant who defaulted in his obligation to obtain consent. The position of the court became more clearer in the case of *Okunneye v. FBN Plc*. In that case the issue was the applicability of section 22 and 26 of the Land Use Act to a transaction that involved the deposit of title deeds with the bank (equitable mortgage) to obtain overdraft. Uwaifo, J.C.A (as he then was) held:

under the Land Use Act, the best a holder can have is a right of occupancy. To alienate that right under section 22, it has to be done either by assignment, mortgage, or transfer of possession, sublease, or otherwise… It has been held that where a statute requires the consent of a specified authority before property can be alienated by way of sale, sublease, assignment, mortgage or otherwise, this does not include an agreement to sell or lease, which therefore does not need such consent.

However, the Supreme Court soon realized the magnitude of injustice that its decision in *Savannah Bank v. Ajilo* could perpetrate and at the earliest opportunity redeemed its position. In *Awojugbagbe Light Ind. Ltd. v. Chinukwe* where Onu J.S.C. affirmed the decision on *Okunneye v. FBN Plc.* and held inter-alia "…although section 22 of the Act prohibits the alienation of a right of occupancy without the consent of the Governor first had and obtained, it does not prohibit agreement so to do preparation for the purpose of effecting such alienation".

Flowing from the above authorities, it is clear that an agreement for sale of land subject to Governor's consent will not be an illegal transaction. It is therefore submitted that the Court of Appeal and the Supreme Court in the cases just cited above have realized the significant role of equitable interest in property transaction and thus held that the absence of Governor's consent may not invalidate an agreement for sale of land which is an equitable interest. It is the benefit of equitable interest in agreement for sale of land as demonstrated in the decisions in *Okunneye v. FBN Plc* and *Awojugbagbe Light Ind. Ltd. v. Chinukwe* which now enable people dealing in land to freely transfer their interest in land through the instrument of an agreement subject to Governor's consent without contravening the provisions of section 22 and 23 of the Land Use Act.

8. Conclusion

This paper examined the enhanced status of equitable interests in property. While the traditional position was that equitable interests are minor interest and mere rights *in personam* which are only enforceable against specified persons. The modern approach consider equitable interests more than mere acts *in personam* and that they have advanced to rights *in rem* in certain circumstances.

The paper had highlighted the application of the enhanced status of equitable interests to specific property transactions by the courts in Nigeria. These are in the areas of validation of transactions that have incomplete legal formalities; creation of new rights in property which include contract for sale, equitable mortgage, and equity of redemption; and transfer of interests in land under native law and custom. Under the latter head, the paper discussed the role of equitable interests in the sale and alienation of land; elimination of the purchaser of legal estate; and customary pledge. The paper also demonstrated how equity is being invoked in the matter of consent to alienation of land under the Land Use Act.

The paper finds that a contract for sale of land coupled with part performance can defeat the claim of a purchaser of legal estate who had no notice of the equitable interest. The paper also finds that in land transactions governed by Native law and Custom where the requirement of writing has not been met but there is evidence of purchase, purchase price paid, purchaser is let into possession and there is continuous possession, although the interest created might be equitable in nature, the equitable interest created thereby is as good as legal interests and such equitable interests cannot be defeated by subsequent legal interests. The paper further finds that where consent to alienate was not obtained which would have been fatal to the transaction under the Land Use Act; the courts have elevated such agreement to alienate to an equitable interest that is valid and enforceable.

Given the enhanced status of equitable interests in property and its application to property transactions in Nigeria as demonstrated in this paper, it can be asserted that equitable interests in property have transcended the minor interests they were in the traditional view as they have now almost attained the status of legal estates.

Thus, the dichotomy between legal interests and equitable interests has lost much significance.

The paper therefore recommends that some statutory provisions which exclude equitable interests from the definition of "conveyance" should be amended to include equitable interests as instruments that validly convey interests in land in Nigeria.

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