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Providing Answers to Some Controversies Arising from the Use of Powers of Attorney in Real Property Transactions in Nigeria

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Abstract

In real property transactions, powers of attorney are routinely granted to enable the donee to undertake a variety of transactions on behalf of the donor, but, it ought not be used to directly confer, transfer, alienate, limit, or otherwise charge title in a real property. As simple and clear as these basic principles appear, so many controversies usually arise in their practical application to given circumstances, mainly because some of the procedures and judicial pronouncements relating to use of powers of attorney, especially in real property transactions, are oftentimes either grossly misunderstood, misinterpreted, or misrepresented. This paper is an attempt to analyze and clarify major principles and pronouncements surrounding the proper use of a power of attorney. It aims to project them in line with established practice, extant law and rules, so as to minimize or eliminate these controversies and thereby promote clarity and a better understanding of these among practitioners, stakeholders and the general public. Vigorous efforts are made in the paper to provide workable answers to questions relating specifically to misuse or abuse of powers of attorney for transfer of title to land, revocability and irrevocability of powers of attorney, formalities of powers of attorney, whether a donee of a power of attorney is entitled, in exercise of the power under the instrument, to convey title in the property to himself, among other issues.

Key Words: Power of attorney, sale of land,

Introduction: Power of Attorney as an instrument of transfer of title from the donor to the Donee?

Power of Attorney does not satisfy the ingredients of a good root of title, and as such is not a good title document. Put differently, it cannot be used to establish a valid title to property. A root of title is the foundation upon which a person`s title to land is built; the bases of the person`s title; the point at which the title can properly commence.[1] The term

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[1]Re Re Cox & Neve`s Contract (1891) 2 Ch 109 at 118. In: Dadem, YY., *Property law practice In Nigeria* (4th ed., Jos University Press, 2018) 237; See also Akinduro v Alaya (2007) All FWLR Pt 381) 1653.

"good root of title" is used to refer to a document that may be tendered in court or otherwise produced to prove title or ownership of title to land. To qualify as a good root of title, a document must clearly describe the property to which it relates; must convey both the legal and equitable interest in the same property; must precisely describe the holder or owner of the title in question; must not be subject to any higher interest; and must have nothing on the face of it to cast any suspicion or doubt on its authenticity.[2]

A Power of attorney is disqualified as a good root of title because, being no more than an instrument of delegation of authority, it is subject to a higher authority or interest --- the interest of the donor or grantor of the power. Besides, Power of Attorney does not transfer or confer any (legal or equitable) interest on the Donee (receiver of the Power) in respect of the property concerned; it is merely an instrument of delegation of power/authority, that is, a formal legal instrument (usually but not necessarily under seal) by which one person, called the Donor/Principal, appoints another person, called the Donee/Attorney, to act on behalf of the Donor generally or for specific purposes. In *UDE v, NWARA*, Nnaemeka-Agu, JSC, explained:[3]

A Power of Attorney merely warrants and authorizes the donee to do certain acts in the stead of the donor and is not an instrument which confers, transfers, limits, charges, or alienates any title to the donee, rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party. So, even if it authorizes the donee to do any of these acts to any person including himself, the mere issuance of such powers is not per se an alienation or parting with possession so far as it is categorized as a document of delegation; it is only after, by virtue of the power of attorney the donee leases or conveys the property the subject of the power to any person, including himself, then there is an alienation.'

And, confirming this position, the same court in *Amadi v. Nsirim*[4] stated:

> In regard to exhibit F, the law is that a power of attorney transfers no interest from the donor to the donee. Mr Cornelius Ike Nwanne has no legal right to the property to entitle him to sell as his own even when the power authorizes him to sell. It is not an instrument which confers, transfers, limits, charges, or alienates any title to the done; rather, it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party....See Ude v. Clement Nwara (1993) 2 NWLR (Pt 278) 638…

[2]See 63 Conveyancing Act, 1881, and section 88, Property & Conveyancing Law, 1959. See also OGUNLEYE v. ONI (1990) 2 NWLR (pt 135) 745, 752, 774 – 786; OLOJUNDE v. ADEYOJU (2000) SC 118, 135-136, OZUNGWE v. GBISI (1985) 2 NWLR (pt 8) 528, 540

[3] (supra) at page 664-665

[4] (2004) 17 NWLR (PT. 901) 111. See also Chime v. Chime (2001) 3 NWLR (PT. 701) 527 at 549.

Note however that a Power of Attorney may be used, indeed is often (mis)used to afford a purchaser who is yet to perfect his title to the property, but who has registered an irrevocable Power of Attorney in respect of the property, some measure of protection especially against subsequent transactions on the land. This is because registration of a Power of Attorney in respect of any piece of property may constitute sufficient constructive notice to the whole world;[5] this notice is capable of defeating any plea of bona fide purchaser for value without notice. Hence, there is a rampant, lazy, practice among conveyancers and property law practitioners, to register a Power of Attorney in favour of a purchaser of land, to enable the purchaser to have dealings on the property, pending perfection of his title. In such situations, the purchaser is authorised by the vendor vide the power of attorney to do all that the vendor himself may lawfully do in respect of the property. However, this does not mean that the vendor has by the power of attorney transferred his title in the property to the purchaser; the purchaser`s interest in the property emanates from the Deed of Assignment (or other instrument of conveyance), which is yet not perfected, but which nevertheless transfers some interest, albeit equitable, to the purchaser. The power of attorney in this instance is at best deemed to be coupled with an interest or with a grant, with the result that the Power of Attorney is, and remains, irrevocable.[6] It could therefore be concluded that Power of Attorney, standing alone, is incapable of transferring any interest in land to the donee.[7] To this end, it must be pointed out without any delay that this author disagrees with any view suggesting that the recent decision of the Supreme Court of Nigeria in the case of ***Ibrahim*** *&* *Ors* ***v. Obaje,***[8] has altered the traditional role of a power of attorney as an instrument of delegation of authority. While this author agrees with the judgment in Ibrahim v Obaje, the author believes that what the case has done is nothing more than to provide a strong support to the principle that, although power of attorney is an instrument of delegation of authority, yet, where evidence exists to the effect that there is a collateral agreement between the parties, for transfer of title, which agreement is independent of the power of attorney, and pursuant to which the power of attorney is then created/given, the donor of the power will not be permitted to deny the true intention of the parties, only because the only written document available is a power of attorney. As the Supreme Court rightly observed in Ibrahim v. Obaje, *"the intention of parties must be given due consideration in [such] private contractual agreements. This is paramount and a contrary intention should not be forced upon the parties";* the parties had *"bonded themselves in an irrevocable agreement".* What happened in that case was that a power of attorney was

[5]See for instance section the the Property and Conveyancing Law, 1959 (Western Nigeria), s. 151.
[6]See LABABEDI Vs. ODULANA (1973) 4 CCHCJ 98; Section 8 (1) and 9(1) of CA, 1882; Section 143 (1) and 144(1) PCL, 1959: and UBA V. REGISTRAR OF TITLES (1990) 4 NWLR (PT 1444) 407 AT 419
[7]This position is further buttressed in the case of ACB v. IHEKWOABA (2004) FWLR (PT 194) 555 and EZEIGWE v. AWUDU (2008) ALL FWLR (PT 434) 1529.
[8](2017) LPELR-43749(SC)

prepared in addition to an undeniable agreement/understanding which (agreement) the court found existed between the parties wholly independent of the Power of attorney, and which (agreement) conclusively indicated that the named donor had actually intended to divest himself of title in favor of the named donee, for a valuable consideration furnished by the donee. In Ibrahim v. OBAJE, the following were obvious:

> the agreement between the parties was clearly a sale of land agreement; and the agreement for sale was independent of the power of attorney given.

Accordingly, looking at the facts and circumstances, whether or not the Power of attorney was given in the circumstances would have been immaterial; the court would still have reached the same conclusion, because it was clear beyond doubts, that the parties had clearly concluded an independent sale of land contract. Hence, the court found unjust the named donor's argument that the donee had got no title because the only available written instrument was titled "power of Attorney" instead of Deed of Assignment or sale of land agreement. My learned friend and fellow Law Teacher, Richard Newman,[9] had this to say in this regard:[10]

"I agree with the submission of Sylvester Udemezue on the import of a Power of Attorney. I notice in Anambra State, power of attorney is popular in land transactions but it is in addition to a duly signed Deed of Conveyance. A Power of Attorney is merely an instrument instructing somebody to do something on behalf of another. Until the power is exercised, the action that was contemplated in the Power of Attorney cannot be said to have been done. Thus, the document giving a person powers to act on behalf of the owner of a land cannot at the same be the document to show that the instructions of the donor has been carried out. In the case of Ibrahim v. Obaje, the Supreme Court, in trying to do substantial justice, merely relied on other evidence to give effect to the intention of the parties. It did not validate the use of Power of attorney to transfer title to land.[11]

When is a Power of Attorney Deemed Revoked?

There exist three major means of revocation of a Power of Attorney, to wit: Express Revocation, Implied Revocation, and Revocation by operation of Law

[9]Ph.D. Richard Newman is a lecturer at Faculty of Law, University of Nigeria, Enugu Campus, Nigeria.
[10]This comment was made on Legal practice Discourse Forum, a WhatsApp group on 15 August 2020.
[11]See also: Udemezue S, "Can A Power Of Attorney Be Used To Transfer Title (To Real Property) From The Donor To The Donee? (By Sylvester Udemezue)" (TheNigeriaLawyerAugust 6, 2019) <https://thenigerialawyer.com/can-a-power-of-attorney-be-used-to-transfer-title-to-real-property-from-the-donor-to-the-donee-by-sylvester-udemezue/> accessed May 17, 2021; this controversy is addressed in more details in an upcoming learned paper, by the same author, titled, *"In re Ibrahim v Obaje (2017): Has the Power of Attorney Become an Instrument of Transfer of Title to Land In Nigeria?"*

Express Revocation

Power of Attorney is a special form of agency; some rules of agency therefore apply. Accordingly, in keeping with the agency rule that he who hires reserves the right to fire, the Donor of a power of attorney reserves the right to remove the donee or to revoke the power. Note however that the mode of revocation must be either the same with, or higher than, the mode of creation of the power of attorney. Accordingly, if the creation or appointment (of the donee) is by deed, revocation or withdrawal of the power, in order to be valid and effective, must be by Deed.[12] Note that where the appointment is by word of mouth (orally), revocation in writing is effective, as this is higher than (superior to) the mode of appointment or creation. Same goes for revocation by Deed where appointment is by mere writing.

Implied Revocation

This is said to occur where the Donor who has successfully created a power of attorney in favour of a particular donee, thereafter goes ahead and deals with the subject matter of the Power of Attorney in a manner that now makes it impossible for the Donee to validly effect his authority or to effectively carry out his instructions under the power. In *Chime v. Chime*,[13] the court held that the fact that a donor gave a Power of Attorney does not mean that the Donor cannot himself do the act. Accordingly, if Mr Bola, after creating a Power of Attorney in favour of Miss Bimbo, for the purpose of selling Mr Bola`s blue-acre (a piece of land), still goes behind and personally sells off the same blue-acre, Mr Bola is said to have impliedly revoked the power of attorney, since with the sale by Mr. Bola, Mr Bola has rendered it legally impossible for Miss Bimbo to exercise the power given to Miss Bimbo under the Power of Attorney.

Revocation by Operation of Law

Power of Attorney is said to be revoked by operation of law if the Donor suffers death, insanity, bankruptcy or other legal incapacity on incapacitation during the subsistence of the power.[14]

Other Vitiating Factors

Beside these three modes, it is important to note that, depending on the circumstances, a power of attorney could be invalidated or vitiated where mistake, fraud, duress or undue influence is established.[15]

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[12] See ADEGBOKUN Vs. AKINSANYA (1976) 8 CCHCJ 2163; OJUGBELE V. OLASOJI (1982) SC 71
[13] SUPRA
[14] See ABINA v.. FARHART (1938) 14 NLR 17; UBA v. REGISTRAR OF TITLES (1990) 4 NWLR (PT 1444) 407 AT 419
[15] See AGBO V. NWIKOLO (1973) 3 ESCLR.

How May a Power of Attorney be made Irrevocable? (The Concept of Irrevocability of Power of Attorney)[16]

Revocation of power of attorney by operation of law may lead to serious injustice against, or impose difficulties or hardships upon, the donee or upon an innocent third party with whom the donee transacts business pursuant to the donee`s powers under the power of attorney. Imagine that Mr Bola created a power of attorney in favour of Miss Bimbo on 26 October 2020, to advertise and sell off Mr Bola`s blue-acre. In pursuance of the power, Miss Bimbo went ahead, placed paid adverts in newspapers and magazines, and even online, printed out hand bills and flyers to the same effect; and engaged security guards to secure blue-acre. Thereafter, Mr Bakare agreed with Miss Bimbo to buy blue-acre. Prior to executing any agreement, Mr Bakare engaged and paid a lawyer to conduct preliminary investigations on blue-acre as well as to act as Mr Bakare`s solicitor for purposes of the transaction. Thereafter, a lawyer was paid by the parties (usually, it should be by Miss Bimbo) to prepare a formal Contract of Sale. Miss Bimbo and Mr Bakare then scheduled to execute the contract on 10 November 2020. To this end, all the parties traveled to the venue of the vendor`s law firm whereat the contract was to be executed on payment of some deposit. All the parties and their solicitors arrive the city on November 09, 2020, pay for and lodged in hotels. Unfortunately, at about 9.00pm on the same date (November 09, 2020), the Donee, Miss Bimbo was informed vide an email message, of the death earlier in the day, of Mr Bola. The power of attorney was thereby terminated/revoked by operation of law, and therefore at an end. Imagine the hardships foisted upon the parties in this scenario! It was in a bid to reduce such difficulties that some statutory exceptions have been devised to the concept of revocability of power of attorney, with a view to making power of attorney irrevocable in certain circumstances, and thereby safeguarding the interest of the donee and all third parties who might have cause to deal with the donee in such situations. These situations include:

Where a Power of Attorney is given for valuable consideration and also expressed to be irrevocable[17]

Where Power of Attorney is given for valuable consideration and in the instrument creating the power, the same power of attorney is also expressed to be irrevocable, then in favour of the purchaser, the following rules shall apply:

The power shall not be capable of being revoked by the donor, nor by the death, bankruptcy or other legal disability of the donor, except with the concurrence or consent of the Donee;[18]

[16] That is, Statutory Exceptions to Revocation of Power of Attorney by Operation of Law or Measures for Protection of Third Parties)

[17]For this purpose, see section 143, Property & Conveyancing Law, 1959; section 8, Conveyancing Act, 1882):

Any act done under such Power of Attorney shall be deemed to be as valid as if such act was done when such things[19] had not happened; and

Neither the donee nor the purchaser shall be adversely affected by notice of anything done by the donor without the donee`s consent, to revoke the power of attorney, nor by the death or other legal incapacity or incapacitation of the Donor.

Where a power of attorney is merely stated to be irrevocable for a fixed term not exceeding twelve months, whether or not it is given for valuable consideration[20]

Where a Power of Attorney is expressed to be irrevocable for a period fixed therein, not exceeding one year from the date of creation of the Power, whether or not the power is given for valuable consideration, then in favour of a purchaser, the following rules shall apply:

The Power may not be revoked by the donor (or by his death or other legal incapacity) within the period so fixed, except with the consent of the donee,

Any act done under such a power of attorney within the period so fixed shall be as valid as if such an act was done when such things had not happened; and

Neither the donee nor the purchaser shall be adversely affected by notice of anything done by the donor within the period so fixed without donee`s consent, nor by the death or other incapacity of the donor within the period so fixed

Further Statutory Protection in favour of the donee and innocent third parties

Some measure of statutory protection[21] is given to a *bona fide* purchaser for value without notice, whether or not the power of Attorney is given for valuable consideration and whether or not the Power is expressed to be irrevocable. By the combined effect of the aforesaid provisions, any payment made, or act done by any person pursuant to a power of attorney remains valid and effective notwithstanding that before the making of the payment or doing of the act, the Donor had died or otherwise become legally incapacitated, provided that:

The person making the payment or doing the act acted in good faith, and

The person making the payment or doing the act had no notice of the donor`s death or other legal incapacity at the time of making the payment or doing the act.

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[18] See also UBA V. REGISTAR OF TITLES; LABABEDI Vs. ODULANA (1973) 4 CCHCJ 98.

[19] i.e., death, bankruptcy or other legal disability, etc., of the donor

[20] see section 144, Property & Conveyancing Law, 1959; section 9, Conveyancing Act, 1882

[21]See section 71 of the Conveyancing Act (CA), 1882; section 142 (1) of the Property & Conveyancing Law (PCL), 1959, and section 56 of the Land Registration Law (LRL), 2015 (Lagos),

However, it should be noted that these provisions do not adversely affect the rights of any person interested in the money so paid; such a person shall have the like remedies against the payee as he would have had against the payer if the payment had not been made by him. The question left to be asked here is, *How then would the donee or the innocent third party establish that he (the donee or the third party) had acted in good faith and that he did not have any notice of such occurrence at the time of doing the act or making the payment?* The statute provides and answer; a statutory declaration by the person making the payment or doing the act, immediately before the payment or within three months of such payment or act shall be conclusive proof that the person had no such knowledge and of non-revocation of the Power before the payment or act.[22] It is respectfully suggested that the provisions of section 142 (2) Property and Conveyancing Law, 1959, which in my humble opinion, is quite commendable, could be complied with in any of two ways, namely:

> The affected donee and the third party could agree to insert a clause to this effect into the Deed of Assignment or other document of transfer; or
>
> The parties or either of them could depose to an affidavit to this effect. Such an affidavit (statutory declaration) must however be deposed/sworn to within the three month immediately succeeding the doing of the act or making of the payment.[23] It is further suggested that it would serve the interest of the donee and the third party better if such affidavit is executed either on the same date as that of doing the act or making the payment, or so soon after that date; delay could be dangerous in this respect.[24]

On Formalities for Execution of Power of Attorney.

Capacity of Parties to a Power of Attorney:

Parties to a power of attorney must be legal persons or persons with legal capacity.[25]

Must a power of attorney be in writing?

Although it is a form of agency (agency may be created orally or by conduct), yet a power of attorney, unlike an agency relationship, must be created in writing. Unless power of attorney is in writing, all the statutory and judicial provisions relating to attestation, signing, registration or sealing would be impossible to comply with since only a written document is capable of being signed, attested to or sealed, etc. Besides, powers

[22] See section 142 (2) of the PCL.
[23]PCL *Op Cit*, s. 142(2)
[24]equity aids the vigilant, not the indolent (expressed in Latin as vigilantibus et non dormientibus lex succurrit); also, delay defeats equity.
[25] See NBN LTD. V. KORBAN BROTHERS NIGERIA (1975) 1 FNR 11; Ude vs. Nwara (supra); Chime vs. Chime (supra)

conferred on the donee by virtue of any power of attorney are construed very strictly and exhaustively.[26] This being the case, power of Attorney needs to be in writing and the power/authority created should be set out expressly and exhaustively. In this way, there would be no ambiguity in relation to interpretation of the scope and limits of the powers so created. Note that a general or omnibus clause in a Power of Attorney will not be deemed to confer any additional powers on the donee beyond the powers expressly set out in the authority clause; the omnibus clause must be construed within the confines of the specific powers expressly set out in the authority clause/power clause contained in the power of attorney.[27] Besides, extrinsic evidence is not admissible to establish the fact that the Donee ought to have any additional power other than, or that the donor had intended to donate any more powers than those expressly set out in the instrument or which could be brought in by necessary implication.[28] In view of these strict rules of construction in relation to power of attorney as a peculiar form of agency, parties to a power of attorney or their solicitor(s) should, while drafting or creating a Power of attorney, ensure that:

4.2.1. That the Power of Attorney expressly confers on the Donee all powers necessary to achieve the object of the Power;

4.2.2. That the Power of Attorney is drafted/prepared in such a manner as to ensure that no difficulty or confusion is experienced when dealing with third parties.[29]

Must a Power of Attorney be by Deed?

Power of Attorney need not be by Deed. But, as suggested above, it must be in writing in order to qualify as an instrument as defined in relevant enactments,[30] which usually define "instrument" to include a power of attorney. Thus, Power of Attorney may take the form of a mere written document or a even letter, an email message, a WhatsApp message, etc. Besides, based on provisions of the Evidence Act, 2011[31] relating to admissibility of online, computer or ICT-generated evidence, in deserving circumstances, a power of Attorney may also take the form of a phone text/SMS message, an email, a WhatsApp message, a Facebook message or other similar written communication. But, where the instruction or authority the donee of a power of attorney would require the

[26] RE BRYANT [1893] AC, 170; ABINA VS. FARHART (supra)
[27] *Ibid*
[28] *Ibid*
[29] See JACOBS VS. MORRIS ([1902] 1 Ch. 816
[30] See for example section 2 of the (now repealed) Land Instrument Registration Law, Lagos (available at <file:///C:/Users/user/Documents/lirl.pdf> accessed February 20, 2021) which defines "instrument" as follows: *"instrument" means a document affecting land in the State** whereby one party (hereinafter called the grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to or ,interest in land in the State and a certificate of purchase and a power of attorney under which any instrument may be executed, but not a will".* This provision is similar to what is found in relevant statutes in the various states of Nigeria.
[31] Section 84; Available at <https://www.refworld.org/pdfid/54f86b844.pdf> accessed February 20, 2021.

donee to execute (sign)a Deed (containing a contract under seal), the power of attorney (authorizing the donee to so execute) must be created by Deed.[32]

Power of Attorney as a Deed Poll?

Power of Attorney is usually a special instrument in the form of a Deed Poll, which in effect means that it is an instrument that is permitted to be executed by only one party, namely the donor. A Deed Poll is a term used to refer to an instrument that is made or executed or permitted to be executed by only one party, as opposed to an Indenture which is required to be executed by all the parties. The Black`s Law Dictionary gives further explanation on the distinction between an *"Indenture"* and *"Deed Poll"*:[33]

A deed to which two or more persons are parties, and in which these enter into reciprocal and corresponding grants or obligations towards each other; whereas a deed-poll is properly one in which only the party making it executes it, or binds himself by it as a deed, though the grantors or grantees therein may be several in number. 3 Washb. Real Prop. 311; Scott v. Mills, 10 N. Y. St. Rep. 35S; Bowen v. Beck, 94 X. Y. 89. 40 Am. Rep. 124; Hopewell Tp. v. Amwell Tp., 0 N. J. Law, 175.

Are there instances in which it may be desirable to have the donee to also execute the Power of Attorney?

Power of attorney is usually executed or permitted to be executed by only one party. However, instances may arise in which it may become desirable, even mandatory in some cases, for the other party (the donee) to also execute the power of attorney. Such instances include:

To prevent fraud and also to aid investigation into the property affected by the Power of Attorney: Where the Power of Attorney is signed by both parties and thereafter registered, the signature of the donee is now in the file at the lands registry. A third party transacting any business with the donee in respect of the affected property would be able to compare the donee`s signature in the registry with any document signed or purported to be signed by the donee pursuant to the power of attorney, in the course of the transaction.

Where the Power of Attorney imposes some obligations, or confers some benefits, on the donee: Where beside the powers created therein, a Power of Attorney also imposes some obligations, or confers some benefits, on the donee, there is need for the donee to also execute the Power of Attorney, in order for the obligations so created to be binding on him, or to enable him to be able to enforce any such benefits conferred on him in the

[32] See ABINA V. FARHAT (1938) 14 NLR, 17; POWELL v. LONDON & Provincial Bank [1893] 2 Ch. 555.

[33] "What Is INDENTURE? Definition of INDENTURE (Black's Law Dictionary)" (The Law DictionaryAugust 26, 2014) <http://thelawdictionary.org/indenture/> accessed April 8, 2021

same instrument. This is based on the legal doctrine of privity; a person is not bound by any document not executed by him, nor is a person entitled to enforce any benefits conferred on him by a document to which he is not a party.[34] Only parties to contracts should be able to sue to enforce their rights or claim damages as such.[35]

Execution of a Power of Attorney?

Signing or signature is a means of acknowledgment of authorship. Signing by the Donor is mandatory in the case of a Power of Attorney. The Evidence Act, 2011 provides:[36]

> For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

Section 93 (1) of the same Evidence Act, 2011 states:

> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

As stated in *Kwara Investment Co Ltd v. Garuba*,[37]"*… an unsigned or irregularly signed document is worthless and entitled to ascription of no weight at all in law. What is more, such a document binds no one.*"[38] Note that a person cannot incur any obligation under a document unless he signed it In Faro Bottling Co Ltd v Osuji,[39] the court held that where a document contains nothing to show that it was executed and signed, it must retain its status as a worthless document. It is no document evidencing any valid and existing agreement. A court ought to not attach any probative value to such a document. Note also that a person not being a party to a Deed[40] cannot ask that the same be set aside.[41] Moreover, the Property and Conveyancing Law, 1959,[42] provides that where an individual executes a Deed, he must sign or place a mark on it; sealing alone is not sufficient.

[34]See for example, Tweddle v Atkinson (1861) 1 B&S 393
[35]See *Price v Easton* [1833] 4 B & Ad 433.
[36]Section 83 (4) t
[37](2000) 10 N.W.L.R. (Pt. 764) 25/39 paragraph G (per M. A. OREDOLA, J.C.A)
[38]See also In Re Powe, Powe vs. Bardays Bank Ltd (1956) Ch 110.
[39] (2002) 1 NWLR (Pt 748) 311
[40] (i.e., who does not sign the Deed)
[41] Essi vs. Itsekiri Communal Land Trustees (1961) WNLR15.
[42] section 97

Execution by an Illiterate?

In the case of an illiterate he must sign or make a mark in the document in the presence of a Judge, Magistrate, Justice of the Peace, of a Notary Public or[43] a Commissioner for Oaths. Where the vendor of land is an illiterate he should execute the instrument before a Magistrate or Justice of the Peace (JP) who shall attest it,[44] i.e. there must be an *Illiterate Jurat* stating that the contents of the document were read and interpreted to him before he signed or made a mark on it. A similar practice is adopted in the case of a blind person. See *Akingbade vs. Olayinka*.**[45]** Where the donor of a power of attorney is a corporation or a corporate body, it is essential that the provisions of the PCL,[46] and other statutes relating to the affixing of the company seal and also to attestation thereof by the company`s *"clerk, secretary, or other permanent officer or his deputy, and a member of the Board of Directors, council or other governing body of the corporation"* are duly observed.[47]A deed shall be deemed to be duly executed by a corporation aggregate if the corporations`/corporate seal is duly affixed to the Deed in the presence of its clerk, secretary or other permanent officer and a member of its Board of Directors, Council, or other governing body and is attested by him.[48] However, it is important to take note of section 98 (3) PCL, 1959 which provides that where a person is authorized under a Power of Attorney to convey any interest in property in the name and on behalf of a company, he may as the attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness, and in the case of a Deed affix his own seal.

Execution of Power of Attorney in Lagos State[49]

Every document, including a power of attorney, shall be executed by all parties, and shall be deemed to have been executed in any of the following instances:
If signed by a natural person,

In the case of a corporation aggregate, if sealed with the seal of a corporation and attested to by its clerk, secretary, director or other officer,

In the case of a corporation sole, if signed and the official seal affixed,

In the case of a corporation not required by law to have a common seal, if signed by persons so authorized by law or the statute of the corporation or, in the absence of any such express provision, by two or more persons duly appointed for that purpose by the corporation,

[43] in Lagos
[44]section 8(1) Land Instrument Registration Act, Cap 99. This is not applicable in the PCL States.
[45] (1979) 1FNR 130.
[46] section 98 (1)
[47] See also Article II Table A of Part 1 of the Companies & Allied Matters Act, Cap C20, LFN, 2004.
[48] Section 163 (1) of the Evidence Act, 2011 (Nigeria).
[49] see sections 75, 76 (1) and 77, Land Registration Law (LRL), 2015, Lagos,

Documents required by this law to be stamped but which are not so stamped shall not be accepted for registration unless otherwise exempted under this law from such stamping, and

For purposes of registration, a document includes all certificates and matters endorsed on or attached to it.

Requirement of Attestation

Just like in other instruments relating to real property, attestation is not a sine-qua-non in a power of attorney; hence, a power of attorney is valid and effective whether or not it is attested to. Note the exceptions:

Power of Attorney for Use in a Foreign Country: a power of attorney executed in Nigerian and intended for use in a foreign country should be attested to by a Notary Public, for easy acceptance in the country of use. This is because a Notary Public has credit all over the world. But the fact that such is not attested to by a Notary Public does not render the Power void,

Presumption of Due Execution of Power of Attorney: a power of attorney attested to by a Court, Judge, Notary public or Magistrate is presumed to be duly executed.[50] Compliance with section 150 of the Evidence Act, 2011 is only one of the ways of proving due execution of a Power of Attorney; it is not the only way. Besides, the section deals with proof of execution and authentication and not with validity of the document. Thus, the fact that a power of attorney is not executed before any such persons does not conclusively affect the validity of the Power of Attorney.[51]

Power of Attorney Executed by Illiterates, Blind Persons or A Foreigner Who Does Not Understand The English Language: In any of these instances, the Power of attorney must contain a jurat, and must be attested by a judge, Notary Public, Magistrate. We already discussed this above. Failure to observe these formalities invalidates the power of attorney. Note the effect of franking on absence of a jurat in a document executed by illiterates or blind persons; it is discussed below,

Power of Attorney Executed by Corporate Bodies: As earlier discussed, such Power of Attorney must be attested to by clerk, secretary, or other permanent officer or his deputy, and a member of the Board of Directors, council or other governing body of the corporation.[52] The same rule applies to power of attorney executed by public corporations, bodies and institutions established by law and given the contractual

[50] see section 150 Evidence Act, 2011; Ayiwoh v. Akorede (1951) 20 NLR, 4
[51] see MELWANI v. FIVE STAR LTD (2002) 2 NWLR (PT 753) 217 at 274
[52] See section 163 (1), Evidence Act, 2011 and section 98 (3) PCL, 1959.

capacity.[53]Failure to observe these formalities renders execution of such power of attorney irregular

Mandatory Attestation by Magistrate, Justice of the Peace (JP), Judge, Notary Public or Commissioner for Oaths in Lagos State:**[54]** The following rules apply in Lagos:

Any document executed outside Nigeria shall not be registered unless it has attached to it a certificate showing that it was attested to by a Nigerian or foreign Judge, Magistrate, JP or a Notary Public

Where a grantor is an illiterate or blind person, the document of transfer must be attested to by a judge, magistrate, JP, Notary Public or Commissioner for Oaths. The same thing applies to document to which a blind person is a party.

Requirement of Sealing

Sealing or requirement for sealing is unnecessary where the Power of Attorney is not one under seal or by Deed. Where it is by Deed, the general requirement as to sealing would apply. At present, the practice of sealing is not of much importance, especially with respect to natural persons. The law is that any indication of an attempt at sealing will be accepted for the purpose of due execution of a power of attorney under seal. In *Stromdale & Ball vs. Burden,***[55]** Dankwest, LJ, said that "*if a party signs a document bearing wax or wafer or other indication of a seal, with the intention of executing the document as a Deed, that is sufficient adoption as recognition of the seal to amount to due execution as a Deed."*[56]Section 80, Registration of Titles Act (RTA), provides that "An instrument which is expressed to be made or to *operate as a Deed shall be deemed to be a Deed, and shall operate accordingly, but shall not on that account be required to be sealed."*When any document purporting to be and stamped as a Deed appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered, though no impression of a seal appears thereon.[57] Note however that the above provision does not apply to companies, which, as we have discussed, are required to affix its corporate seal.[58] Sealing by a corporation must be done in strict conformity with the articles of association or the constitution of the corporation; where it is not provided.[59]In Containers Nigeria Ltd vs. Niglasco Nig Ltd,**[60]**Balogun J. considered whether it is

[53] examples: Corporate Affairs Commission, University of Lagos, Enugu State Property Development Corporation, Nigerian National Petroleum Corporation (NNPC), etc.
[54] s. 76 (2) & (3), Land Registration Law, 2015, Lagos
[55] (1952) 1 AER, 59, 62, 1ER, 223, 230.
[56]See also *First National Securities Ltd vs. Jones*(1978) 2 WLR, 415
[57]section 159 of the Evidence Act (EA)
[58] by section 74 of the CAMA, Cap C20, LFN, 2004, now replaced by the CAMA, 2020, signed into law on August 07, 2020.
[59] in conformity with Article II Table A of Part 1 of CAMA, 1990
[60] (1979) 4 CCHCJ, 290 at 315.

appropriate for a company to commit itself under hand or under seal, and held that if a common seal is going to be affixed, it must be done strictly in accordance with its articles of association , else it would be void and of no effect. Note that a Deed need to be in writing before the requirement of signing could arise. Note also that a Deed left blank in some material particulars as to name of parties or property will be void for uncertainty.

Requirement of Stamp/Stamping

Power of Attorney attracts a fixed stamp duty under the Stamp Duties Act and the Stamp Duties Law of each State in Nigeria. See for example the Schedule to the Stamp Duties Law of Lagos

Requirement of Registration

Whether or not a power of attorney is registrable depends on whether it qualifies as an instrument[61] under the relevant Land (Instrument) Registration Law applicable to the State where it is used.[62]In some jurisdictions,[63] as a measure to prevent fraud, the Lands Registry may require a letter of consent from the Donor as a pre-condition for accepting a Power of Attorney for registration. Note that where Power of Attorney is registrable, non-registration renders it inadmissible as evidence in court.[64] In Lagos State, Power of Attorney authorizing any person to deal with any land, sublease or mortgage must be delivered to the Registrar for registration. Similarly, an irrevocable power of Attorney must be duly registered in the registry.[65]

Requirement of Governor`s Consent

Governor`s consent (in the case of a Statutory Right of occupancy) or Local Government Chairman`s approval (in the case of a Customary Right of occupancy) is mandatory for transactions involving alienation of legal interests in land.[66]However, a Power of attorney does not transfer any interest in land, neither the consent of the Governor, nor the approval of the Local Government is required.[67]As an exception, in Lagos State,[68]the Governor's consent and registration are mandatory in the case of an irrevocable Power of Attorney relating to any land in Lagos State, and in such a case, the Land Registrar shall not accept such a Power of Attorney for registration unless the consent of the Governor has been obtained in respect of the same. A document of transfer[69] executed by an Attorney shall not be accepted for registration unless there is an irrevocable power of

[61]*Op Cit (n. 26)*
[62] see Uzoechi vs. Alinnor (2002) 2 NWLR(PT 753) 217 at 274.
[63] such as in the FCT, Abuja
[64] Ojugbele vs. Olasoji (1982) SC 71.
[65]See sections 56, 57 and 94 of the Land Registration Law (LRL), 2015 (Lagos).
[66] See sections 21, 22 and 26 of the Land use Act, 1978. See also section 7 (b) (iii) of the State Land Law of Lagos.
[67]See AMADI v. NSIRIM (supra); UDE v. NWARA (supra).
[68]under the LRL, 2015,
[69] such as Deed of Assignment, Deed of Legal Mortgage or Deed of Sublease, etc

attorney authorizing such attorney to execute the said document and the power of attorney has been duly registered or filed in the registry.[70]

Requirement of Franking

The term "Franking" is used to refer to the endorsement on a document, of the name and address of the legal practitioner who prepared the Deed. A lawyer acting in his capacity as a legal practitioner shall not sign or file a legal document unless there is affixed on any such document a seal and stamp approved by the Nigerian Bar Association.[71] Franking is useful for the following reasons:

- Franking obviates the need for inclusion of an *illiterate jurat* where an illiterate or blind person is a party to the document. If a document is franked by a legal practitioner, it is not invalidated by absence of the illiterate jurat,
- Deeds which are not duly franked may not be accepted for registration,
- Franking is evidence that the affected instrument or document was actually prepared by a Legal Practitioner, in satisfaction of the provision of law that if any person other than a legal practitioner prepares for or in expectation of reward any instrument relating to immovable property, or relating to or with a view to the grant of probate or letters of administration, or relating to or with a view to proceedings in any court of record in Nigeria, he shall be guilty of an offence.[72]
- Franking could be useful in tracing the lawyer who prepared the particular document so franked, since the contact details of the lawyer are contained in the document as part of franking.

[70] see section 56, 57, and 94, LRL, 2015.

[71] Rule 10 of the Rules of Professional Conduct (RPC), 2007. This author is of the respectful opinion that the purported amendment of the RPC in 2020 by the Hon Attorney-General and Minister for Justice of the Federal Republic of Nigeria, could not be said to be valid. See: (1) Udemezue S, "HAS THE RPC 2007 BEEN AMENDED? TWELVE QUESTIONS ARISING AND TWELVE ANSWERS THAT WORK" (LAW AND JUSTICENovember 15, 2020) <https://www.lawandjustice.ng/2020/11/has-rpc-2007-been-amended-twelve.html> accessed May 17, 2021; (2) Udemezue S, "The Bar Council Has Exclusive Powers to Issue & Amend Rules of Professional Conduct for Lawyers in Nigeria – By Sylvester Udemezue - Newswire Law and Events" (Newswire Law and Events - Law and Events MagazineSeptember 24, 2020) <https://newswirelawandevents.com/the-bar-council-has-exclusive-powers-to-issue-amend-rules-of-professional-conduct-for-lawyers-in-nigeria-by-sylvester-udemezue/> accessed May 17, 2021; (3) Udemezue S, "Making And Amendment Of The RPC For Lawyers In Nigeria: Questions Arising, Answers That Work" (TheNigeriaLawyerNovember 16, 2020) <https://thenigerialawyer.com/making-and-amendment-of-the-rpc-for-lawyers-in-nigeria-questions-arising-answers-that-work/> accessed May 17, 2021; (4) Udemezue S, "2020 Amendment To RPC 2007: Where Mr. Kayode Ajulo Missed IT -By Sylvester Udemezue " (BarristerNG.comSeptember 18, 2020) <https://barristerng.com/2020-amendment-to-rpc-2007-where-mr-kayode-ajulo-missed-it-by-sylvester-udemezue/> accessed May 17, 2021

[72] section 22 (d) of the Legal Practitioners Act, Cap L11, LFN, 2004. See also sections 4 and 5 of the Land Instrument Preparation Law (LIPL), Ogun State

Can the donee of a power of attorney, in exercise of the power doted to him, validly convey the title in the property to himself?

Our earlier discussions[73]have confirmed that where a Power of Attorney empowers the donee to, on behalf of the donor, alienate an interest in any particular parcel of land, the donee in such a case is entitled to execute an instrument, say a Deed[74]transferring an interest to himself -- that is, the donee of the power. A simple illustration will help:

Mr. Bola has just created a Power of Attorney in favour of Miss Bimbo, for the purpose of sale of Mr. Bola`s blue-acre located at 12, Lokoja Street, Obalende, Lagos for N200 million. Miss Bimbo has two options in the circumstances. The first is to advertise the property to the public, find a buyer, any third party, and sell off blue-acre to the third party for N200 million, and thereafter remit the money to Mr. Bola. The second option is for Miss Bimbo to decide to purchase blue-acre for herself, in which case she may execute a Deed of Assignment in favour of herself assigning all of Mr. Bola`s interests in blue-acre to herself (the donee), provided she (Miss Bimbo) has paid the purchase price of N200 million to Mr. Bola (the assignor in that instance).

Are there things an Attorney may not be able to do in Pursuance of a Power Of Attorney?

There are certain things the donee of a power of attorney may not be able to do in exercise of his powers under the instrument. They include:

- Change a principal's will,[75]
- Break his fiduciary duty to act in the principal's best interest,[76]
- Make decisions on behalf of the principal after the principal`s death,[77] unless the power remains irrevocable after the principal`s death.
- Change or transfer Power of Attorney to someone else. The principle is *delegatus no potest delegare,*
- An attorney cannot choose who takes over the donor`s duties, unless the principal named a co-attorney or an alternate agent in the same POA document or is still competent to appoint someone else to act on the donor`s behalf. Note however that an attorney has the right to decline their appointment at any time.

[73]on page 1 above, relating to the cases of Ude v. Nwara (supra) and Amadi v. Nsirim (supra)
[74]of Assignment/Lease/Mortgage/Gift
[75] "Reasons Why You Should Designate a Power of Attorney (POA)..." (First Green October 25, 2019) <https://helmersomerslaw.com/reasons-why-you-should-designate-a-power-of-attorney-poa/> accessed April 8, 2021
[76]*Ibid.*
[77]*Ibid.*

- Defend criminal cases on behalf of the donor. In criminal proceeding, the personal/physical appearance of the defendant is a legal sine-qua-non, and may not be dispensed with save in some named instances. Creation of POA cannot give rise to one of the exceptions.

Power of Attorney Provisions Peculiar to Lagos State

Under the Land Registration Law, 2015,[78] (applicable to only Lagos State), a power of attorney authorizing any person to deal with any land, sublease or mortgage must be delivered to the Registrar for registration.[79] Notice of revocation of any such registered Power of Attorney (especially by death or incapacity)[80]must be given to the Registrar, otherwise the Power of Attorney shall be deemed to be subsisting and, as such, no disposition in purported exercise of such power of Attorney to a person who was ignorant of such revocation shall be adversely affected by reason only that such power has been revoked. In other words, revocation of a power of attorney shall not adversely affect any acts/steps taken in good faith pursuant thereto if as of the date of taking the action/step, the donee was/is not aware of the event constituting such revocation.[81]The aforesaid shall not apply where there is an irrevocability clause; where there is an irrevocability clause, or the Power is coupled with an interest or with a grant, death or other incapacity of the donor (even if the donee is aware of the donor`s death) has no adverse effect on the power donated to the donee.[82] There is penalty of a fine for noncompliance with provisions of section 56 relating to power of attorney. Finally, A document of transfer of interest in land, such as a Deed of Assignment, Deed of Legal Mortgage or Deed of Sublease, etc., executed by an attorney pursuant to a Power of attorney, shall not be accepted for registration unless there is an irrevocable power of attorney authorizing such attorney to execute the said document and the power of attorney has been duly registered or filed in the registry.[83]

Conclusion

There are so many other issues that need further analysis and elucidation in regard to use of power of attorney in Nigeria, and considering the pride of place power of attorney occupies in property law practice transactions and conveyancing in Nigeria, this author considers this discussion a continuing discussion, that ought to be continued.

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[78]Available at: <https://easyreadlegal.com/wp-content/uploads/2019/02/soft-copy-of-land-registration-law-lrl-2015-lagos-state-1.pdf> accessed May 17, 2021.
[79]Land Registration Law, 2015, Lagos, s.56.
[80]*Op Cit*., section 56 (3) & (5),
[81]*Op Cit*, s. 56(6)
[82]See also LABABEDI Vs. ODULANA (supra); Section 8 (1) and 9(1) of Coveyancing Act, 1882; Section 143 (1) and 144(1) PCL, 1959: and UBA V. REGISTRAR OF TITLES (supra). See also s. 57 LRL.
[83]LRL, s.94