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**TOPIC:**

**SIDELINING ORTHODOXY  
IN QUEST FOR REALITY:  
TOWARDS AN EFFICIENT  
LEGAL REGIME OF LAND  
TENURE IN NIGERIA**

By  
**PROFESSOR IMRAN OLUWOLE SMITH**



University of Lagos Press



# **SIDELINING ORTHODOXY IN QUEST FOR REALITY: TOWARDS AN EFFICIENT LEGAL REGIME OF LAND TENURE IN NIGERIA**

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An Inaugural Lecture Delivered at the University of Lagos  
On Wednesday, 18th June 2008

By

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## PREAMBLE

Vice-Chancellor Sir, I stand before you and my revered audience this afternoon not only to share my academic and professional experience spanning over a period of twenty-five years in the law and practice of land use and management in Nigeria, but also, and essentially too, to chart a new course for the land tenure system in Nigeria which is presently in an unfortunate state of quagmire.

I will undoubtedly discharge my responsibility in this regard with utmost authority premised on impressive credentials. Over a period of two and a half decades, Vice-Chancellor Sir, I have carried out intensive research in the area of law of real property, results of which abound in books and articles in learned journals. I have supervised to completion, various research projects up to Ph.D level in this area. I have assessed my peers at different times for the Chair in Property Law both within and outside this country. I have taught Land Law and Conveyancing regularly. I have rendered consultancy services in this area to different clientele including the University of Lagos. I have participated in the land tenure reform in this country and adjudicated over land disputes where useful recommendations were made to government. My interest has not withered or waned in the course of my academic and professional career in the area of Law of Real Property and I have not been known to be a "jack of all trades, with no expertise in one". My devotion to Property Law is total, my commitment in the area rugged, and my focus, clear cut. With the foregoing background in mind, my *locus standi* in the discharge of my obligation before the Vice-Chancellor and my audience this afternoon is established.

Vice-Chancellor Sir, I reckon that this is the 194th edition of the Inaugural Lecture Series of this great University; the 6th in the 2007/ 2008 academic session and the 11th to be delivered in the Faculty of Law of this University. It is the 3rd coming from my Department, the Department of Private and Property Law, the



first having been delivered by that erudite scholar and renowned authority in Equity and Trust, Professor M.I. Jegede, SAN and the second by the great icon of Property Law and the former Vice-Chancellor of this great University, Professor Jelili Adebisi Omotola CON, SAN of blessed memory. The latter gave me a solid foundation in Property Law, and nurtured my interest in it. Vice-Chancellor Sir, I remain absolutely indebted to the name of this great icon.

My inaugural lecture is remarkable in three material respects. First, it marks the golden jubilee of my existence on this worthy planet for which I give glory and thanks to the Almighty Allah (*Subhanahu wata'llah*) for sparing my life, in good health and endowing me with wisdom, knowledge and strong faith to be able to face challenges and overcome the turbulence of life. Second, it has come to address the challenges of the Nigerian land tenure system and the way forward in the years ahead. This coincides with the on-going movement towards a new state policy channeled towards reform in this area. Third, it comes as a succour to Conveyancers and Property Lawyers in Nigeria who for years, have been overwhelmed by unguarded thoughts. It is therefore meant to remove their nightmares, by sidelining orthodoxy in quest for reality.

## INTRODUCTION

Vice-Chancellor Sir, one of the challenges facing legal thought in the contemporary world is the need to depart from the *status quo* amidst changing circumstances and paradigm shifts. We cannot but agree with Roscoe Pound<sup>1</sup> that since society is forward looking, law as an instrument of social change must be progressive. In the words of this great jurist, "new values ought to be infused into the law for social advancement provided it does not hamper efficacy of the law, expressive of the people's general will and be such that will enhance the achievement of new aspirations"<sup>2</sup>. Failure to evaluate law in terms of the socio-cultural values of the society will result in disparity between law and practice.

The developed world is attuned to the idea of change and within the context of law as an instrument of social dynamics, reforms are introduced to meet the new perspectives envisioned by the realities of our times. In the area of land tenure in particular, it is interesting to note that the English land tenure system which was received into the Nigerian legal system many decades ago has been transformed in the country of its origin, to meet the challenges posed by continuous changes in land use and management structure since the Norman conquest in 1066. Within the English system of land tenure, orthodox policies, rules and practices have given way to socio-economic realities of our time including the positive impact of globalisation<sup>3</sup>.

Unfortunately in Nigeria, the feudal system of land tenure, though dead in its country of origin, the relics of it still rule us from the grave with many anachronistic western-style laws still being

1. Pound, Roscoe: *Introduction to Jurisprudence*, OUP vol.3, 287 at 291.

2. *Ibid*

3. *The Land tenure system in England has been transformed over the years. For example, the need of the land market has resulted in the substitution of the concept of Strict settlement with that of Trust for sale, and modification in the application of the concept of adverse possession under the Land Registration Act 2002, in line with modern trend.*



retained, in most cases, to the prejudice of the socio-economic realities and demeaning to the modern concept of land tenure.

This Lecture is divided into four parts. The first part explains the nature and features of land tenure, the positive effects of land tenure reform and the determining factors for tenure efficiency. The second part identifies the legal regime of land tenure as evolving within the socio-economic realities of Nigeria, and discusses the evolutionary process and the evolving paradigms. The third part unfolds the unsatisfactory state of our land tenure legal regime. The quest for an efficient legal framework of land tenure in Nigeria is the thrust of the fourth part. The conclusion enunciates the symbiotic formula for an efficient legal framework to enure.

## I. THE CONCEPT OF LAND TENURE

Land tenure is the mirror of human relationship with land. It connotes the nature, manner and extent of landholding, including the control, use and management of land, which features are dictated by legal construction of land rights in modern times<sup>4</sup>. The system of land tenure in any part of the world is dictated by a variety of historical, socio-cultural and economic factors which vary from one system to another<sup>5</sup>. The legal framework designed to regulate a system of land tenure must essentially take cognisance of these credentials for efficiency, social emancipation and economic development.

The concept of land tenure is however susceptible to developmental changes<sup>6</sup>, amenable to changing patterns of

4. For discussion of the legal construction of land rights in modern times, See Smith, I.O.: *Practical Approach to Law of Real Property in Nigeria*, 2nd ed. (2007) Ecowatch Publications (Nig) 38-39.
5. The influence of Roman law on the concepts of ownership and possession in English law is significant; the political economy of the defunct Soviet Union impacted on her conception of property relations; the social and political influences from without impacted on the plural land tenure system in Nigeria, etc.
6. Land tenure evolves with changes in the socio-economic system of every jurisdiction.

production<sup>7</sup> and responsive to societal needs at different times and ages<sup>8</sup>. Law as an instrument of social dynamics is the conduit through which changes are brought about in contemporary tenure systems, but normative rules devoid of socio-cultural credentials and economic realities of the *situs* portend grave dangers for the efficacy and effective sustenance of any land tenure system.

Major socio-economic, religious or political revolution<sup>9</sup> may no doubt transform the parameters of a system of land tenure inevitably resulting in a multiple system<sup>10</sup>, or a transformation of the existing tenure<sup>11</sup> with staggering consequences on access to land, or on the regime of control and management of the tenure. The efficiency of its operation depends on the establishment of a regulatory framework which takes cognisance of major characteristics of the components of the surviving system of land tenure with a view to harnessing the individual features in the direction of effective land use and management<sup>12</sup>. Attempt at harmonisation must make way for the ascertainment, recognition and preservation of basic principles underlining the socio-economic determinants of the system of tenure.

Given that land is the primary source of income, security and status for millions of families, it is not surprising that decisively improving their relationship to the land can serve a number of developmental purposes<sup>13</sup>. Effective land reform can lead to

7. The transformation from the agrarian to industrial economy for example, will impact on land use and management.
8. See footnotes 6 and 7 above.
9. For example in Nigeria, the introduction of the English system of land tenure is traceable to contact with the colonialists, while the introduction and development of the Islamic concepts of land tenure is traceable to the Fulani jihad of the early 19th century.
10. The development explained in footnote 9 above gave birth to a plural system of land tenure in Nigeria.
11. The usual method of tenure transformation in modern times is by legislation, e.g. the Nigerian Land Use Act Cap L5 LFN 2004.
12. The process of accomplishing this is through the symbiotic formula discussed in the concluding part of this lecture.
13. Prosterman and Hanstad: *Land Reform: A Revised Agenda for the 21st Century*, RDI Reports on Foreign Aid and Development, Washington July, 2000; 2.



increased level of production; enhanced source of income; reduction of poverty level through the provision of basic needs of life such as food, shelter and employment; reduced urbanisation; reduced social unrest and instability; better environmental stewardship; industrial growth; enhanced capital investment; and improved access to credit<sup>14</sup>. All these can only be accomplished under an efficient legal framework which assures security of tenure and provides a good mechanism for effective land titling, sustainable land use and management, efficacy of transfer and devolution of land rights, and a viable system of adjudication of disputes.

## II. THE EVOLUTIONARY PROCESS

The basic features of the existing legal regime of land tenure can best be appreciated from the historical credentials.

The divergence in the system of landholding between Northern and Southern Nigeria on the eve of the operation of the Land Use Act was a product of parallel evolutionary process culminating in the emergence of major land policies of dualism<sup>15</sup>, paternalism<sup>16</sup> and to a limited extent, transformation<sup>17</sup>.

In the colonial Southern Nigeria, there was a consistent application of traditional and received land tenures, with the colonial government restricting its involvement to mere administrative controls through the promulgation of benign laws with the purpose of actually protecting the ownership of native communities<sup>18</sup>. For

14. *Ibid*

15. Dualism relates to the concurrent application of traditional as well as received land tenures. See Park, A.E.W: "A Dual System of Land Tenure: The Experience of Southern Nigeria" (1965) JAL vol.9 1; Olawoye, C.O: *Title to land in Nigeria* (1974) Evans Brothers, Chap. 2.

16. This is state control through legislation. This policy which is also referred to as the "Northern Nigeria Land Policy" was first recommended in the Report of the Northern Nigeria Lands Committee in 1908.

17. This policy was first recommended in the Report of the East African Royal Commission on Land and Population, Cmd. 9475.

18. E. Essien: "Land Policy and Security in Nigeria" In: Smith, I.O. ed. *Secured Credit in a Global Economy: Challenges and Prospects*, (2003) Department of Private and Property Law, University of Lagos, 47.

social reasons<sup>19</sup>, direct control and management of land tenure by the colonial government in the South was not possible, and the dual system of land tenure operated side by side before the enactment of the Land Use Act in 1978.

However, in the colonial North where the system of indirect rule thrived politically, the pre-existing social and political conditions paved way for the operation of the policy of paternalism. The institution of the Fulani dynasty after the Usman Dan Fodio jihad in the early 19th Century culminated in the control and management of lands by the Emirs in accordance with Islamic tenets<sup>20</sup>, and upon conquest by the British in the early 20th Century, the ultimate rights in the land held by the Fulani dynasty were transferred to the British Crown<sup>21</sup>. Pieces of land legislation were introduced between 1902 and 1916<sup>22</sup> which consequently metamorphosed into the Land Tenure Law enacted in Northern Nigeria in 1962<sup>23</sup>.

Individual landholding sought to be protected by a system of registration was the thrust of the policy of transformation which developed very early in Lagos<sup>24</sup>. The reason underlining this policy was the conception of security of title following registration and thereby obviating the need to resort to litigation with the attendant stress and cost<sup>25</sup>.

19. As Lugard F.D pointed out, "so jealously [were] the rights of ownership guarded by some tribes that a stranger occupying tribal land would not be allowed to effect any improvements (including the planting of trees and permanent crops) which might give him a claim to the ownership of the land beyond the term of his own life". See Lugard, F.D: *Political Memoranda, No. 10 Lands*, para38.

20. Ruxton, F.H, *Maliki Law*. (1916)Oxford, OUP. 49

21. Lugard, F.D op. cit. at para. 7.

22. In 1902, the Public Lands Proclamation Ordinance was introduced, followed in 1910 by the Lands and Native Rights Proclamation Ordinance, and in 1916, by the Native Rights Ordinance.

23. See Cap 59 Laws of Northern Nigeria, 1963.

24. See James, R.W: *Nigerian Land Use Act: Policies and Principles* (1987) Unife Press Ltd, 10.

25. The application of this policy of transformation however engendered problems of multitudinal dimensions culminating in judicial intervention. See Smith, I.O. op. cit. at 33-34.



In places where Crown lands existed before independence, there evolved pockets of state land which together with acquired land under different land acquisition statute, became subject to the regime of State land Laws. Parcels of land vested in the Federal Government consequent upon historical antecedents<sup>26</sup>, remained subject to the control and management of the Federal authorities, although Federal presence in the former Federal Capital Territory of Lagos later generated controversy after state creation in 1967.

The idea of a new Federal Capital Territory (the FCT) was conceived for Nigeria in 1976 resulting in the enactment of the Federal Capital Territory Act<sup>27</sup> absolutely abrogating the pre-existing tenure, customary or otherwise<sup>28</sup> and vesting title over the territory absolutely in the Federal Government of Nigeria<sup>29</sup>. The powers of control and management of land in the FCT was vested in the President of the Federal Republic of Nigeria to be exercised through the Minister of the Federal Capital Territory. This was replicated by the subsequent Constitutions of the Federal Republic of Nigeria<sup>30</sup>. Thus, as far as the FCT was concerned, the land policy of the government was that of control, management and administration of land within that territory for purposes of building and planning a befitting Federal Capital. Unlike the Land Use Act, the FCT Act made no pretensions about its expropriation mission<sup>31</sup> with its unshaken legitimacy going by its objectives which is in the overall interest of the corporate entity of Nigeria<sup>32</sup>. The objectives behind the establishment of the FCT are laudable no doubt, but the legal framework for actualising

26. For details of these historical antecedents, see Smith, I.O.: "Title to Land in the Former Federal Capital Territory of Lagos: Matters Arising". *Journal of Private and Property Law* vol. 25, 1 at 14-15.

27. No. 6 of 1976 as amended. See Cap F6 LFN 2004.

28. That is the effect of s.1 (1) of the FCT Act.

29. *Ibid*.

30. Constitution of the Federal Republic of Nigeria 1979, Cap 62 LFN 1990; s. 261, Constitution of the Federal Republic of Nigeria, Cap C23 1999 LFN 2004; s. 297

31. Section 1 (1) of the FCT Act vested the ownership of land in the FCT in the government of the Federation absolutely.

32. Smith, I.O.: *Practical Approach to Law of Real Property in Nigeria*, op. cit 723 fn 1.

government land policy in fulfilling these objectives is grossly inefficient. Amongst other legal problems, the controversial status of the FCT, lack of comprehensive Acts of the National Assembly to deal with different facets of land use, control and administration of land within the Federal Capital, and the ambiguous provisions of the Constitution on the appropriate court to resolve land disputes therein, have put the whole land policy of the FCT in a delicate state of quagmire. Events that unfolded in recent times exposed the fraudulent conversion of land titles in the FCT by the past administration at the expense of development under the guise of revocation for public purpose and title revalidation<sup>33</sup>.

The foregoing pattern was in place before the Land Use Act (the Act) enacted on 29th March 1978 introduced a policy of harmonisation through the 'trusteeship' concept<sup>34</sup>, or what has been described curiously as a policy of nationalisation<sup>35</sup>. The structure of the pre-existing multiple system of land tenure was preserved but streamlined and dovetailed into a *sui generis* system of right of occupancy<sup>36</sup>. It should be pointed out at this juncture that the Land Use Act was conceived, structured and imposed absolutely by government without taking cognisance of the peculiarities of the pre-existing tenure. The so-called preservation of the pre-existing tenure by the Act<sup>37</sup> is no more than paying lip service to their recognition while undermining the real essence and purpose of the product of history, and decades of social evolution. The Land Tenure system in the North generally regarded as the 'precursor' of the Act and subsequently preserved by it subject to its provisions, is nothing but a by-product of colonial hegemony being largely a re-enactment of the 1916 Ordinance, without probing into the workability and social consequences for

33. As at the time of preparing this inaugural lecture, one of the Senate Committees is investigating the scandals revolving around land allocation in the FCT, Abuja.

34. See the Land Use Act Cap L5 LFN 2004; s.1.

35. See e.g. Justice Umezulike, I.A: "The Land Use Act, more than two decades after, and Problems of adaptive strategies of implementation". 2<sup>nd</sup> Annual lecture, Igbinedion University, Okada- Nigeria, March 24 2004; 23-33.

36. See ss.34 ad 36 of the Act.

37. *Ibid*



the land rights of affected indigenous communities. The problem of illegitimacy of the Land Use Act like the kindred problem of the Constitution under which it took cover<sup>38</sup>, continues to stare government in the face. Its enactment has generated mixed reactions from the Nigerian populace, its operation embroiled in controversy, and the interpretation of its provisions, a torment to the judiciary<sup>39</sup>.

The evolutionary process of land tenure in Nigeria is paradigmatic. First, the tenacity with which customary tenure applied to the land relations of rural dwellers, rural farmers, intestates and their inheritors cannot be overemphasised. Land was regarded at customary law not necessarily as a commodity of commercial value, but essentially as a social artifact, and an intrinsic part of many belief systems. Early attempts to replace customary systems with modern systems of land tenure failed, and it is generally recognised in modern times that land policies and laws must build on local concepts and practices rather than the stereotyped western-style model. This entails, among other things, legally recognising local land rights, which are the entitlements through which most people gain access to rural land. In its latest Policy Research Report on land tenure for instance, the World Bank argued that "in customary systems, legal recognition of existing rights and institutions, subject to minimum conditions, is generally more effective than premature attempts at establishing formalised structures"<sup>40</sup>. This paradigm informs recent innovations in land policies across the African continent<sup>41</sup> including the preservation and protection of customary land rights.

38. See The Constitution of the Federal Republic of Nigeria, 1999; s. 315 (6).

39. See Preface to the book, *Land Use Act: Twenty-five Years After*, Smith, I.O. ed. (2003) Department of Private and Property Law, University of Lagos; vii.

40. Deininger, In: *Land law and Reform: Achieving Development policy objectives*; World Bank (2006) .

41. In Uganda, while the Land Reform Decree of 1975 made customary title holders tenants at the will of the state, the 1995 Constitution and the 1998 Land Act, as amended, protect customary land rights. Customary rights are equally protected under Mozambique's Land Act 1997, and the Tanzanian Land Act and Village Land Act 1999.

Second, contacts with foreign culture with the attendant tenurial transplant, culminated in the processes of individualisation and commercialisation of land relations with positive impact on customary record of land transactions, titling and reservation of customary land rights under the Registration of Titles Law<sup>42</sup>. The parallel system of tenure provided a platform for private ownership concept to thrive on the corridors of development. Following demographic growth, urbanisation, monetisation of the economy, livelihood diversification, greater integration in the global economy, and cultural change, it became obvious that customary tenure was incapable of meeting the global demand of viable land market in which land is treated as a commodity or security. Secured title and a functioning land market have been linked to furthering economic development and overcoming poverty in many developing nations. The popular view is that one of the answers to the problems of poverty in developing countries is to give legal title to property, and recognise possessory claims in terms of western property rights<sup>43</sup>.

Third, a uniform system of tenure which the Land Tenure Law<sup>44</sup> sought to bring about in Northern Nigeria could be attained, as shown later, only from the standpoint of tenurial evolvement as opposed to sporadic imposition through Law. A land tenure code requires an efficient land management machinery and effective preservation and protection of vested rights by the state for it to be meaningful, and failure in this regard remains the greatest blunder of the government of the then Northern Nigeria. In any case, the regime of Land Tenure Law in Northern Nigeria prepared natives ahead for state control and management of land under the Land Use Act unlike their counterparts in Southern Nigeria, and explains why the early scheming and general disenchantment with the Land Use Act in the South<sup>45</sup>, was not visible in the North.

42. See e.g Cap R4 Laws of Lagos state, 2003

43. See Vosburg, M, "Well rooted? Land Tenure and the Challenges of Globalization" GHC Working Paper 02/3

44. See Cap 59 Laws of Northern Nigeria, 1963.

45. This culminated in the invention of different devices to stall its operations. These include backdating of agreements and the Use of Power of Attorney.



Fourth, accommodating pre-existing land tenure and allowing parallel systems of tenure to co-exist in a Federal Capital Territory may result in conflicts in the areas of control and management of land within the territory with long drawn effect on title to land<sup>46</sup>, such as it is the case in Lagos State in recent time.

### III. THE PRESENT LEGAL REGIME

Vice-Chancellor Sir, the current legal regime of land tenure in Nigeria is fraught with problems. We are indeed sandwiched between orthodoxy and the quest for Development and economic growth. On this occasion, I can only discuss some of these problems:

#### Land Tenure and the 1999 Constitution

Under the Constitution of the Federal Republic of Nigeria 1999, the subject-matter of land as a legislative item belongs to the residual list<sup>47</sup> within the exclusive legislative competence of the state. It follows therefore that any Act of the National Assembly meant to regulate access to land, or to regulate the control, management and devolution of land rights in the state is unconstitutional and void<sup>48</sup>. There are however two basic exceptions to this proposition as established by the Constitution: the first is the status of the Land Use Act which is not only enshrined in the Constitution<sup>49</sup>, but also deemed to be an Act of the National Assembly<sup>50</sup>; the second is the application of the provisions of the Constitution to the Federal Capital Territory as if it were one of the states of the Federation<sup>51</sup>, so that all legislative powers amongst others, vested in the House of Assembly shall vest in the National Assembly, thus enabling the National Assembly to legislate on land within the Federal Capital Territory.

The entrenchment of the Land Use Act in the Constitution stands out as the relic of militocracy<sup>52</sup> which recognises no division of

46. This is discussed *infra*

47. Land is neither on the exclusive nor the concurrent legislative list.

48. See the case of *Elegushi & 5 Ors v. A.G Federation & 2 Ors* FHC/L/CS/669/95.

49. See the Constitution of the Federal Republic of Nigeria, 1999; s.315 (5).

50. *Ibid*; s. 315 (6).

51. *Ibid*, s.299.

52. This refers to the regime of the Military with all its structures.

legislative powers between the Federal and State governments and to which belongs a unitary system under which the Federal Government could legislate on any item without formalities.

While it is delighting to know from judicial authorities that the Land Use Act is not an integral part of the Constitution<sup>53</sup>, subjecting its amendment to the rigorous provision of the Constitution is retrogressive to say the least. One of the features of an efficient land tenure is the ability to adapt to changing socio-economic circumstances in quest for development. Land use and management evolve over time, susceptible to changing patterns of tenure based on social pressures, economic demands and the requisites of globalisation. Meaningful tenurial changes cannot be brought about through timely amendments to the Act under the stiff requirements of Constitutional amendment.

#### Uncertainty and Insecurity of Tenure

The efficiency of land use and management is dependent on certainty and security of tenure.

Before the Land Use Act 1978, land rights existed under Customary and Islamic law in the form of user rights, or under the general law in the form of estates<sup>54</sup>. Proprietary rights in equity existed by way of trust<sup>55</sup> or by right of prescription<sup>56</sup>. Concurrent interests in property as streamlined by statute were recognised and their full implications ascertained. The Land Use Act regime established a system of right of occupancy harmonising the various degrees of proprietary interest in land and subjecting same to the radical title of the Governor.

53. See e.g. *Nkwocha v. Governor of Anambra state* (1984) 6 SC 62.

54. An estate in English law is the measure of a person's interest in land. It may be classified as freehold or less than freehold.

55. This could be by way of settlement or by operation of law.

56. See the rule in *Akpan Awo v. Cooley Gam* (1915) 2 NLR 100.



The nature of a right of occupancy as a proprietary interest has been the subject of academic<sup>57</sup> and judicial assessment<sup>58</sup>. What ever nomenclature is ascribed to this peculiar specie of property right, its existence is no doubt characterised by quiet enjoyment of the interest, absolute right to the use and enjoyment of improvements made by the holder, the right to alienate the interest with the requisite consent, as well as the legal and constitutional protection of the right against forfeiture otherwise than for the purpose and exclusively through the means established by law and in such cases, not without compensation.

The regime of right of occupancy as the major interest existing on land has some implications for our land tenure system:

#### *Right of occupancy and non-accommodation of equitable interests*

The prominent role of equity in the efficient operation of our legal system cannot be over emphasised. It regulates priority of interests; guards against using the statute as an engine of fraud in determining proprietary interests; ensures specific performance of enforceable agreements; protects holders of defeasible interest in law consequent upon failure of legal formalities, etc. Our courts are enjoined to apply law and equity concurrently, while recourse to equity and reliance on equitable title may be as comforting as reliance on legal title in certain circumstances<sup>59</sup>. The distinction between legal and equitable interest remains sacrosanct and recognised by the Land Use Act as it would appear not to have been jettisoned by the regime of right of occupancy<sup>60</sup>.

57. See Omotola, J.A: *Essays on the Land Use Act 1978* (1980) University of Lagos Press 19; Smith, I. O.: *Practical Approach to Law of Real Property in Nigeria*, op cit. 486-488.
58. See *Savannah Bank (Nig) Ltd v. Ajilo* (1989) 1 NWLR (Pt 97) 305 at 328; *Osho v. Foreign Finance Corporation* (1991) 4 NWLR (Pt. 184) 157 at 192.
59. Payment of purchase price coupled with possession creates a valid equitable interest which is good against the whole world except for the *bona fide* purchaser for value without notice of it. See *Okoye v. Dumez (Nig) Ltd* (1985) 1 NWLR (Pt. 4) 783.
60. See e.g. Land Use Act Cap L5 LFN 2004; s. 48.

However, the implication for Conveyancing, of an assignment of a right of occupancy without full compliance with legal formalities has generated controversy in recent times as to whether equitable interest is lost. In the recent decision of the Supreme Court in *Kachalla v. Banki and 2 Ors*<sup>61</sup>, the question arose as to whether the regime of right of occupancy allows the distinction pre-Land Use Act, between 'legal' and 'equitable' interest. In that case, the court held as follows:

Now, there is no doubt that a distinction exists between a legal estate or "fee simple" as opposed to an equitable interest in land, but that distinction cannot apply in a situation such as this and where the disputed land is governed by the provisions of the Land Use Act, in which the maximum interest any person can hold is a right of occupation and the legal estate or legal interest is vested in the Governor of the state.... The nature of interest any person can acquire is a right of occupancy and no more. So the distinction between "a legal estate in land" and "an equitable interest in land" under the circumstances of this case cannot arise<sup>62</sup>.

The rationale behind the lead judgment's pronouncement against the distinction between legal and equitable interest under the Land Use Act is found in the reasoning of his Lordship that "[t]he tenor of the Land Use Act was to "nationalise" all lands in the country by vesting its ownership in the state"<sup>63</sup> and the fact that [t]he maximum interest preserved in private individual hands is a right of occupancy"<sup>64</sup>.

The crux of the matter in this case appears to be, with due respect, the misleading obiter of Eso JSC in *Nkwocha v. Governor of*

61. (2006) 2-3 SC 41.

62. *Per* Musdapher JSC at 49.

63. *Ibid* at 49.

64. *Ibid*.



*Anambra State*<sup>65</sup> that the effect of the Land Use Act "was to nationalise all lands in the country by vesting its ownership in the state," which the lead judgment relied on. Apart from the inapplicability of an *obiter dictum* as law under the doctrine of *stare decisis*, that obiter has been jettisoned by the same court in many cases which decided that the Land Use Act did not expropriate pre-existing land rights<sup>66</sup>. Besides, the vesting of "all land within the territory of the state in the Governor" is tantamount to vesting of radical title under which all other interests legal or equitable are subsumed; it does not *ipso facto* eradicate such interests.

The conclusion of the court that "equitable interest under the circumstance must be treated as having the same incidents as the corresponding legal estate<sup>67</sup>" has no foundation in law. Legal estate is a product of positive law which prescribes the essential formalities for vesting same; an equitable interest goes to conscience, sanctity of agreement and the desire to forestall using statute as an engine of fraud in many cases. Contrary to the pronouncement of the court, the Land Use Act actually recognises the distinction between legal and equitable interest. For example, section 51 defines a 'mortgage' to include an "equitable mortgage" while one of the exceptions to the requirement of Governor's consent under the Act is where a legal mortgage is created over a property subject-matter of an earlier equitable mortgage created with the consent of the Governor. The distinction is also recognised by property legislation applicable in the various states<sup>68</sup> of Nigeria post-Land Use Act, and supported by Conveyancing practice<sup>69</sup>.

65. *supra* at 340.

66. See e.g. *Salami v. Oke* (1987) 4 NWLR (Pt. 63) 1; *Ogunola v. Eiyekole & Ors* (1990) 4 NWLR (Pt. 146) 632.

67. Per Musdapher JSC at 50.

68. See e.g. Cap 100 Laws of Akwa Ibom State of Nigeria 2000; s.1 (1), Cap 128 Laws of Kwara State of Nigeria 1994; Cap 114 Laws of Sokoto state of Nigeria, 1996; s. 3 (1), Cap 114 Laws of Kebbi State of Nigeria, 1996.

69. It is good Conveyancing practice to ensure issuance of receipt as acknowledgement of payment of purchase price coupled with possession by the purchaser pending completion and vesting of legal title.

If the Supreme Court's pronouncement in *Kachalla v. Banki and 2 Ors* is anything to go by, it renders nugatory or at best makes uncertain the equitable interest of a holder of a right of occupancy despite the clear provisions of the Land Use Act.

### *Partial alienation of joint tenant's interest in right of occupancy*

There is also the problem of co-ownership of a right of occupancy. Whilst the provision of section 48 of the Land Use Act preserves the common law concept of co-ownership subject to the provisions of the Act, the legal parameters for valid alienation of a joint tenant's interest remain elusive. Since the case of *Williams v. Heinsman*<sup>70</sup>, the possibility of unilateral act of severance of a joint tenancy at common law, conditional or unconditional is not in doubt, but can the same position hold under the Land Use Act? Section 25 of the Act provides:

In the case of the devolution or transfer of rights to which any non-customary law applies, no deed or will shall operate to create any proprietary right over land except that of a plain transfer of the whole of the rights of occupation over the whole of the land.

The purport of the foregoing provision is essentially to prohibit fragmentation of land or interest therein. It follows therefore that an assignment of a joint tenant's share to a third party is valid only to the extent that it is unconditional and without a possibility of reverter. A conditional assignment of a joint tenant's share in the form of a mortgage or transfer of exclusive possession with the possibility of reverter as in the case of a lease, cannot qualify as "a plain transfer of the whole of the rights of occupation over the whole of the land". The effect of non compliance is strict as section 26 of the Act makes any transaction or any instrument which purports to confer or vest in any person any interest or right over land other than in accordance with the provisions of the Act, null and void.

70. (1861) 1 J & H 547.



Whilst the foregoing may be a logical deduction from the provision of section 25, the interpretation may not follow when the provision is read together with sections 21 and 22 of the Act and construed in the light of judicial pronouncements even in recent times. Both provisions of sections 21 and 22 of the Act permit alienation of a right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever provided the consent of the appropriate authority is sought and obtained. The law is that any provision of a statute is best construed in the light of other provisions and that literal interpretation of a provision is jettisoned when the meaning would lead to absurdity except construed together with other provisions of statute. Particularly in relation to different parts of a statute, the law is that the court shall construe different sections under the same part together to ascertain the true meaning of any of its sections. That a conditional or partial alienation of a joint tenant's share is possible is supported by judicial authorities<sup>71</sup>.

If the literal meaning of the provision of section 25 is neutralised by sections 21 and 22 of the Act and judicial pronouncements, unilateral act of severance may pose some practical Conveyancing problems: First, where the assignment is partial or short of absolute transfer such as a lease or a mortgage, the mortgagor with his equity of redemption or the lessor with his reversion may eventually wield back his interest in the land (in the first case upon repayment of the loan and in the second, in the event of the expiration of the lease and eventual re-entry) and thus reverting to the status quo at will. Second, such partial alienation may eventually turn out to be absolute as for example, where there is eventual enforcement by the mortgagee upon default by the mortgagor, since the mortgagor's interest in the joint property can be attached where he fails to redeem the mortgage<sup>72</sup>. Third, the unity of possession associated with joint tenancy has the implication that a lessee of a joint tenant must

essentially be exercising the right of a lessor as a joint tenant since possession in law must be singular and exclusive with the result that the lease is binding only so long as the lessor remains alive, and ceases to be binding after his death for, the lessor's estate has no interest in the land which interest passes to other joint tenants. Fourth, severance by secret acts may always be used by one joint tenant actor to his sole advantage but to the prejudice of other innocent joint tenants. This is so, for example, where a lease created without the knowledge of other joint tenants expires before the death of one of the joint tenants ignorant of the existence of the lease. The lessor may claim that the interest of the deceased joint tenant automatically passes to the others by the operation of the doctrine of survivorship, whilst on the other hand, upon the death of the lessor, evidence of such expired lease may be adduced by his executors to establish severance of the deceased's interest, and *ipso facto*, their entitlement to the deceased's share in the property as tenant in common.

As I pointed out elsewhere<sup>73</sup>, the equivocal connotation to which partial alienation by a joint tenant is exposed is rooted in the idea that it is possible for one joint tenant to alienate an interest that he does not actually have. The doctrinal fallacy of tenancy in common resulting from the act of severance has made it possible to hang an interest in joint tenancy and later acquire same by terminating the tenancy in common at will.

The idea of severance of a joint tenancy leading to tenancy in common is a contradiction in terms. If a joint tenant in law has nothing to transfer to a third party in the sense that he does not hold a separate interest, it should ordinarily follow that an attempt to sever an undefined interest in the joint ownership would be ineffectual and incapable of rendering nugatory the doctrine of survivorship which is the ordinary legal effect of joint tenancy. Besides, a mechanical conversion through severance will

71. See e.g. *Obasohan v. Omorodion* (2001) 13 NWLR (Pt. 729) 206.

72. See *Menkiti v. Agina* (1965) NMLR 122; *Union Bank of Nig. Ltd & Anor v. Jimba* (2001) 12 NWLR (Pt. 727) 505.

73. See Smith, I.O., "Alienation of Interest in Land by a Joint Tenant: Conceptual Difficulties and Legal Implications". *Journal of Private and Property Law* vol. 23, 43 at 51.



disappoint the reasonable expectation of a settler and defeat the intention of the testator under a Will.

### *Alignment of vested right pre-Land Use Act with the right of occupancy*

The seeming alignment between vested rights pre-Land Use Act and the regime of right of occupancy since the decision of the Supreme Court in *Savannah Bank v. Ajilo*<sup>74</sup> has always been a source of confusion. In terms of duration of tenure<sup>75</sup>, obligation to accept and pay for a certificate of occupancy<sup>76</sup> and be bound by its terms<sup>77</sup>, and the possibility of reverter of title<sup>78</sup>, there lies a huge dichotomy between the two species of rights.

### *Security of tenure of a holder of Statutory right of occupancy*

Section 8 of the Land Use Act subjects an actual grant of statutory right of occupancy by the Governor to a fixed term. The term is usually expressed to be for a duration of 99 years<sup>79</sup>; it could be less<sup>80</sup>. Because a fixed term will inevitably come to an end by effluxion of time, technically, all rights appertaining to the land reverts back to the reversioner i.e the Governor, at the expiration

74. (1987) 2 NWLR (Pt. 57) 429.

75. A deemed grant is generally not limited to a term of years.

76. A deemed grantee has no obligation to apply for a Certificate of Occupancy, and whereas a deemed grantee who applied for and was issued a Certificate of Occupancy is only liable for the cost of issuance of the Certificate in the event of failure to accept and pay for the Certificate, the holder of an actual grant who refuses to collect and pay for the Certificate shall, in addition to being liable for the cost of issuing the Certificate, forfeit the right: See Land Use Act Cap L5 LFN 2004; s. 9 (2) and (3).

77. Only the actual grantee who has obligation to accept and pay for a Certificate is bound by its terms.

78. Because the interest of an actual grantee is limited to a term of years (see s. 8 of the Act), his interest would probably revert back to the Governor at the expiration of the contractual term.

79. See e.g. The Land Use Regulations L.S L N 38 1981.

80. Nothing in the provision of section 8 of the Act suggests that the duration has to be 99 years.

of the term, and like the situation under a leasehold interest, the holder is expected to relinquish possession.

Where there are no improvements on the land, no issue arises as to the status of the holder for, he owns not the land but only the improvements made thereon. However, where the holder owns improvements on the land which he retains at the expiration of his term of years, the question is whether on known legal principles, his rights over same do not become extinguished. There is no doubt that actual grants can only be made on land that can be appropriately tagged state land, not necessarily so by force of statute, but by virtue of acquisition by, or forfeiture to the state of such parcels of land under the provisions of the Act. Such parcels of land are subject exclusively to state control and management devoid of application of any pre-existing tenure.

Being state land of a sort, perhaps the same consideration that applies to state grants under the state land Laws applies *mutatis mutandis* to it. For example, proviso to section 11 of the State Land Law of Lagos State<sup>81</sup> provides that "improvements by a lessee of state land pursuant to a term of lease which does not exceed thirty years belongs to the allottee and may remove same". In other words, where the lease of state land exceeds 30 years, the allottee can neither claim ownership thereto nor remove same. Apart from the question of constitutionality of this provision, it cannot apply for being at variance with section 15 of the Land Use Act which vests the sole right and absolute possession of all the improvements on the land in the holder of a statutory right of occupancy during the term. The presence of such indicia of title as right to enjoyment of absolute possession and right to alienate contained in this provision, suggest that the ownership of improvements and that of the land on which they are made are not coterminous, but separate and to that extent, they may be removed. But can their enjoyment outlast the duration of the grant? For example, can such improvements remain on land whilst

81. Cap S11 Laws of Lagos State 2003.



a mortgage or sublease subsists thereon or can a mortgagee or sub lessee remain therein after the expiration of the period of grant? The provision of section 15 of the Act recognises and preserves the rights over improvements made by the holder, but only "during the term of a statutory right of occupancy" and not after. The natural effect is the operation of the *quic quid plantatur* rule immediately after the expiration of the term held, so that the improvements pass to the state with the land.

It may be argued that the natural effect would be construed as apparently unconstitutional pursuant to the provision of section 44 (1) of the Constitution for being a compulsory acquisition not in the manner or for purposes prescribed by law, and also for non payment of compensation in respect thereto. However, recourse to the Constitution may not be a viable option in the face of the clear provision of section 44 (2) (c) of the Constitution which excludes "any general law relating to any...rights or obligations arising out of contracts" from the ambit of section 44 (1). There is no doubt that the provision for a term certain in the Certificate of Occupancy is a contractual term which certainly gives rise to rights and obligations, whilst the unequivocal provision of section 15 of the Act limits the enjoyment of the rights over improvements made by the holder to "during the term of a statutory right of occupancy", amounting therefore to justifications for the application of the principle of *volenti non fit injuria* against the holder. The only option available to the owner of the improvements or his estate is perhaps an application for renewal of the term by way of a re-grant for which no provision is made by the Act.

The foregoing suggests a hopeless state of insecurity of tenure of a holder of a statutory right of occupancy subject of an actual grant and yet, we are made by judicial authorities<sup>82</sup> to admit that

82. See e.g. *Savannah Bank v. Ajilo* (supra)

a deemed grant which suffers no such limitations is of equal status with an actual grant.

### Non Accessibility to Land

Both the 1963 Republican Constitution<sup>83</sup> and the Constitution of the Federal Republic of Nigeria 1979<sup>84</sup> protected real property rights in Nigeria subject to some qualifications<sup>85</sup>. However, no provision was made guaranteeing "the right of every citizen of Nigeria to acquire and own immovable property anywhere in Nigeria"<sup>86</sup>. This omission could be as a result of certain presuppositions. In the first place, protection of real property rights presupposes the existence and exercise of property rights permissible by law, otherwise the need for protection could not have arisen. Secondly, the existence of property right is presumed to be the creation of the general law which is settled. Thirdly, the 1999 Constitution could rightly presume a guarantee of right under the Land Use Act<sup>87</sup> (a statute enacted a year before the commencement of the Constitution and entrenched in the said Constitution) to the extent that all land comprised in the territory of the state and vested in the Governor of that state "shall be held in trust and administered for the use and common benefit of all Nigerians"<sup>88</sup>.

However, following the ratification, enactment and incorporation of the provisions of the African Charter on Human and Peoples' Rights as a local statute in Nigeria<sup>89</sup>, and subsequently, the enactment of the Constitution of the Federal Republic of Nigeria 1999<sup>90</sup>, an unequivocal guarantee of real property rights became entrenched as a fundamental right in Nigeria. Article 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act provides:

83. No.20 Laws of the Federation of Nigeria and Lagos, 1963; s.31 (1).

84. Cap 62 LFN 1990; s. 40 (1).

85. See sub sections (2) and (3) thereof.

86. Contra, Constitution of the Federal Republic of Nigeria, 1999; s. 43.

87. See Cap L5 LFN, 2004.

88. *Ibid*, s. 1.

89. Cap A9 LFN 2004.

90. Cap C23 LFN 2004.



*The right to property shall be guaranteed. It may only be encroached upon in the interest of the community and in accordance with the provisions of appropriate laws.*

The 1999 Constitution<sup>91</sup> guarantees property rights in section 43 as follows:

*Subject to the provision of the constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.*

The right to acquire and own immovable property shall necessarily include the right to use and alienate land rights within the parameters of the law, and notwithstanding the status of land as a residual item meant to be legislated upon exclusively by the state<sup>92</sup>, it would be unconstitutional for any State House of Assembly to make Laws, making it impossible for any citizen of Nigeria within or outside the state from accessing land within the state<sup>93</sup>.

To what extent, one may ask, is the right guaranteed by the constitution accessible, enjoyable or enforceable by a citizen of Nigeria? This right no doubt should impose a correlative obligation on the state to actualise it and this includes not only making real property accessible with the least bottlenecks through prompt allocation in the event of application by the citizenry, but also and

91. *Ibid.*

92. *Ibid.*, s. 4 (7) (a).

93. There are three known qualifications to this basic provision on property rights: First, the provision is subject to other provisions of the Constitution, so that where any of such provisions precludes the exercise of this right of property, the constitution shall have its way (see *Yusuf v. Obasanjo* (2003) 4 NWLR (Pt. 847) 554 at 632 for the interpretation of the phrase 'subject to'). Second, the right to acquire and own immovable property anywhere in Nigeria is restricted to "every citizen of Nigeria". Thus, only a person who qualifies as a citizen of Nigeria under the Constitution and no other shall be entitled to the right (see *Ogunola v. Eiyekole* (1990) 4 NWLR (Pt.146) 632). Third, the right to own land anywhere in Nigeria presupposes compliance with the requisite formalities for vesting land right or acquiring legal interest in land as prescribed by the applicable State Laws.

essentially making it affordable. But it is doubtful whether these correlative duties exist in any form. Where an application made for allocation of a plot of land is turned down by the Governor by simply not making an allocation for example, would this amount to a breach of section 43 of the Constitution and if so, what remedy lies?

Section 5(1) of the Land Use Act empowers the Governor to grant a statutory right of occupancy to any person for all purposes including other interests and appurtenances whether or not in an urban area. It is clear from this express provision that an express grant by the Governor is discretionary so that the latter is not obliged in anyway to make such grant. The law is that an order of *Mandamus* does not lie to compel the exercise of a discretionary power conferred by statute<sup>94</sup> and to that extent, land may become inaccessible to an applicant without legal remedy. Allocation of land at cut throat cost is another bottleneck and makes the land unaffordable and hence, inaccessible.

Where land is made unaffordable or inaccessible in the manner explained, there is obviously a breach of the constitutional provision capable of forming the basis of an action in fundamental rights enforcement under the Constitution, any provision of the Land Use Act notwithstanding. The authority for this proposition is section 1(3) of the Constitution which makes null and void any law which is inconsistent with any of its provisions. Thus while it may be procedurally wrong to tackle the decision of the Governor by applying for the prerogative writ of *Mandamus*, instituting an action for the enforcement of a right under section 43 of the Constitution is safe. Violation of the right should be wide enough to cover not only instances of discriminatory practices in the acquisition and transfer of land, but also instances of administrative and managerial bottle necks in land transactions, for access shall be interpreted to cover all unfettered opportunities to acquire and enjoy land and the natural fruits thereon.

94. See *Queen v. Minister of Land and Survey, Ex-Parte Bank of the North Ltd.* (1963) NNLR 58.



## Inequitable Distribution of Land

Access to land inevitably involves equitable redistribution in a way that land will not be concentrated in the hands of few individual land speculators. Perhaps it is pursuant to that objective that the Land Use Act limits and controls the quantum of undeveloped land at the disposal of any person in the urban area<sup>95</sup>, or reduces the quantum of holding to 500 or 5000 hectares for agricultural and grazing purposes respectively if the land is in the non urban area<sup>96</sup>. Also, the requirement of land for economic, industrial and agricultural development by government is the justification for revocation of land rights and compulsory acquisition of land when the need arises<sup>97</sup>.

However, access to land in Nigeria has been a mirage. It is a paradox that in pursuing the laudable developmental goals of Nigeria as enshrined in various instruments<sup>98</sup>, government is hampering development by making land unaffordable through the prohibitive cost of land and the cut throat consent fees. Acquisition of land by government for public purpose has lost all purposive coloration, and has become an instrument of oppression. Whilst the law remains that revocation of a right of occupancy may be declared void retrospectively if it was not made to fulfill the legitimate ends of government as contained in the notice of revocation, but simply to transfer the acquired land to an individual or group of persons, the Supreme Court held curiously, in the case of *Lawson v. Ajibulu*<sup>99</sup> (*Lawson's case*), that revocation of right of occupancy for public purpose includes a situation where the acquired land is transferred or leased to a private developer in furtherance of public purpose. The Supreme Court distinguished this case from the earlier case of *Ereku v. Military Governor of Mid-western State*<sup>100</sup> on the ground that whereas in the latter case, public purpose was not pursued contrary to the

95. See Cap L5 LFN 2004; s. 34 (5).

96. *Ibid*, s.6 (2).

97. *Ibid*, s. 28.

98. See *infra*

99. (1997) 6 NWLR (Pt. 507) 14.

100. (1974) All NLR 695.

letters and spirit of the Act, in *Lawson's case*, the grant to the private company was meant to carry out a public purpose. The rationale behind the Supreme Court's decision in *Lawson's case* was that carrying out of a public purpose need not be by the government itself; a rationale which appears to be apposite in the wake of private sector participation in quest for social and economic development of the country. This objective is buttressed by the provision of section 51 (1) of the Act which defines public purpose to include "use by any body corporate directly established by law or by any body corporate registered under the Companies and Allied Matters Act as respects which the Government own shares, stocks or debentures".

While it could be said that private sector participation in development is in line with the global perspective, this construction may be open to abuse. Not only can the individual selfish interests hide under the corporate veil, allocation of acquired land to a private company for the enhancement of its commercial objectives and towards making profit cannot amount to public purpose, since it is aimed at benefiting the company or a group of people and not the public at large. Also, the use of acquired land for the provision of the so-called low cost houses for the public at highly prohibitive prices and without access to mortgage facility is a mockery of public purpose and may be challenged not only as a failure of the purpose of acquisition under section 28 of the Act, but essentially as an infringement on the individual right to own property under section 43 of the Constitution.

The utility of agricultural land as security for loan to develop mechanised farming and boost agriculture is at a low ebb with the retention of section 36 (5) of the Land Use Act which places a total bar on alienation. The Agricultural Credit Guarantee Scheme<sup>101</sup> has been frustrated by insecurity of title to land and the unattractive value of agricultural land in the market.

101. Cap A11 LFN 2004.



The general notion of offering land as security is gradually losing significance to creditors as a result of administrative bottlenecks, the high cost of perfection and non entitlement to compensation in certain cases, in the event of revocation by government. Restriction of grant of a right of occupancy to Nigerians to the exclusion of foreign investors<sup>102</sup> hampers industrial growth and technology transfer.

### Subjugation of Customary Land Title and Effects

Whilst preservation of land and its natural endowments within the community or family gradually gave way in the 20th century to the demands of economic growth and State policy of compulsory acquisition for socio-economic development, the long drawn system of landholding and land use under the indigenous system survived. The evolution of the individual landholding and the introduction of registration of interests notwithstanding, proof of root of title still remained paramount as an act of registration would not cure defect in title.

The enactment of the Land Use Act merely threw confusion into the realm of customary land tenure system, allowing for strange propositions to emerge with drastic consequences. For example, the Court of Appeal got it wrong completely when in *Kasali v. Lawal*<sup>103</sup> and in *LSDPC v. Foreign Finance Corporation and Ors*<sup>104</sup>, the court held that customary land tenure had been swept away by the Land Use Act; an anomaly which the Supreme court had to correct in subsequent decisions<sup>105</sup>.

Preservation of the customary land tenure by section 24 of the Land Use Act which provides that devolution of such right of occupancy would be regulated, in the case of customary right of occupancy, by the customary law existing in the area, or customary law of the deceased at the time of his death, in the case of statutory right of occupancy, is no more than paying lip

102. See Land Use Act Cap L5 LFN 2004; s.1; *Ogunola v. Eiyekole* (1990) 4 NWLR (Pt. 146) 632.

103. (1986) 3 NWLR (Pt. 28) 308.

104. (1993) 1 NWLR (Pt. 270) 485.

105. See e.g. *Salami & Ors v. Oke* (1987) 4 NWLR (Pt. 63) 1.

service going by the provisions of the Act and some judicial decisions.

The inelegant drafting of the transitional provisions of sections 34 and 36 led a respected commentator<sup>106</sup> to opine that "the transitional provisions of the Act especially sections 34 and 36 and other relevant provisions intend to replace the community and, or the family with the individual member thereof, as a basic unit of land holding in Nigeria". It also led the Supreme court in *Abioye v. Yakubu*<sup>107</sup> to hold that the Customary tenant as opposed to the overlord was entitled to a customary right of occupancy; a precipice for mutiny and chaos. Recognising the customary tenant in occupation or possession of land being used for agricultural purposes as one entitled to right of occupancy as opposed to his overlord, while subjecting such right to the terms and conditions of his customary tenancy is absurd to say the least. If anything, the natural consequence of vesting a right of occupancy in the customary tenant is to statutorily expropriate the rights of the overlord and make the customary tenant subject only to the control of the local government, the repository of the right vested. This of course, would be objectionable under the relevant principles governing expropriation of land rights<sup>108</sup> and may give rise to a cause of action in favour of the overlord. However, if the fundamental objective of the Act as confirmed by judicial decisions is to make land available to those desirous of using it as opposed to hoarding and speculating in same, it would appear in reality, that the tenor of customary tenancy has given way to individualisation of land rights pursuant to state land policy.

Devolution of customary land rights have been subjected to assault of all sorts since the enactment of the Land Use Act. One of the potent instruments of family cohesion, unity and sustainability of identity in perpetuity, is devolution of real property through intestacy. It results not from the volition of the holder or occupier

106. See Justice Umezulike, op cit. at 101-102.

107. (1991) 5 NWLR (Pt. 190) 130.

108. See *Dzungwe v. Gbishe* (1985) 2 NWLR (Pt. 8) 528; *Kyari v. Alkali* (2001) 11 NWLR (Pt. 724) 412.



of a right of occupancy, but by operation of law so that upon the death of the holder intestate, customary law governs automatically, the succession rights of prospective inheritors.

The position after the Land Use Act is that of equating two parallel concepts of 'transfer' and 'devolution' with the result that devolution of property under customary law is cynically subject to the consent of the Governor or the Local government<sup>109</sup>. In Lagos State for example, any devolution of customary right before eventual transfer, recited in a Deed of assignment, attracts a consent fee in retrospect, in addition to the consent fee in respect of the current transaction<sup>110</sup>. The authority for this practice as a proponent of this consent requirement posits<sup>111</sup>, is the consent provision of the Land Use Act which makes unlawful alienation by assignment, mortgage, transfer of possession, sublease, or *otherwise howsoever*, emphasis being placed on the words "or otherwise howsoever". This view is however contrary to the *ejusdem generis* rule of construction of statutes<sup>112</sup>. My position which is also the position of the law is that the meaning of the words "or otherwise howsoever" should flow from the preceding forms of alienation specifically mentioned which amount to a 'conveyance' *inter vivos* conditional or unconditional, as those are proper cases of alienation.

Devolution under customary law unlike transfer *inter vivos*, is brought about by operation of law and not by any conscious act. This position is buttressed by the provision of section 22 (2) which presupposes that an instrument of assignment must have been prepared by the parties for the Governor to endorse his consent thereon. A devolution is not contemplated in this wise, since no instrument is required at customary law for any property to devolve on intestacy.

109. Devolution is equated with transfer for purposes of the application of the Consent provisions under the Land Use Act.

110. The flaw in this approach is that past transactions more often than not, took place before the Act in which case, requirement of consent would not arise.

111. See Justice Umezulike, *op cit* at 82.

112. This rule of construction enables the Court to construe any word or phrase in the context of others in its company.

Except real property is allowed to devolve naturally on intestacy, customary land right becomes expropriated by the state on the death of a holder of agricultural land under section 36 (5) of the Act. Since such devolution either testate or intestate would be a transfer to any person, and any such transfer is clearly prohibited, the land would escheat to the state as land without immediate ownership or *bona vacantia*, and thereby disappointing the reasonable expectation of the deceased intestate. It also follows from the provision of section 36 (5) which prohibits fragmentation of land and makes it illegal, that partitions and sub divisions to the various inheritors which usually follow intestacy at customary law have unfortunately been rendered nugatory.

From the foregoing, it is clear that preservation of customary land tenure under section 24 exists only on paper and the view may rightly be held that irreparable damage has been done to an indigenous institution which goes to the very root of various land titles from time immemorial. Land use divorced from social realities cannot be sustained, and events in the recent past<sup>113</sup> have demonstrated how deadly conflicts resulting from this woolly stance of state policy on customary land rights could be. My position in recent times is that while it is apt to say that the Land Use Act preserved customary land rights on paper, in reality, abrogation of such rights is apparent.

The orthodox conception of grant of customary right of occupancy over land in non urban areas being the prerogative of the local government,<sup>114</sup> has been circumvented by states under the prerogative of the Governor who is entitled under the Act to make statutory right of occupancy over land whether or not in an urban area<sup>115</sup>. The fact that the Governor also determines by an instrument under his hand, whether an area shall be declared urban or not, forecloses any doubt as to the overriding power of state control. In Lagos State for example, the whole state was

113. The Ife-Modakeke mayhem in Osun state, and the Ajah crises in Lagos State are two examples out of many of such ugly occurrences.

114. See the Land Use Act Cap L5 LFN 2004; s. 6 (1).

115. *Ibid*, s. 5 (1).



generally declared urban as far back as 1981 subject to some areas exceptionally zoned<sup>116</sup> suggesting that customary right of occupancy actual or deemed is non-existent. This immediately raises a query as to the transfer or devolution of customary right of occupancy in a state like Lagos where customary right of occupancy is not feasible. The substratum of any landholding since the advent of the Land Use Act is a right of occupancy whether actual or deemed, statutory or customary, and since a customary right of occupancy has ceased to be of relevance in Lagos State, the possibility of such transfer or devolution would, at best, remain a moot point. It is my view that whilst vested rights under customary law in Lagos State remain extant, devolution or transfer of such rights must follow the path of statutory right of occupancy.

Where customary right of occupancy exists, the local government can only access land for a development project by depending on the Governor to revoke the right of occupancy. In most cases, the aspiration of the local government is dampened by the overriding state policy which may run counter to the grassroot needs. Agricultural development to feed the teeming population in the rural areas and provide employment is hampered as a result of non availability of land resources to harness by the local government.

## Insecurity of Title to Land

### *Unreliable Customary Land Titles*

Customary land title has drawbacks posing danger to Conveyancers. In transactions involving transfer of customary title, it is either that the true representatives of the family or community are unknown or that the layout Plan does not depict the true picture of landholding. The various forms of customary

116. This is by virtue of the Designation of Urban Areas Order, 2nd March 1981 which revoked the earlier Designation of Urban Areas Order: See Cap L60 Law of Lagos State, 2003.

land relationship recognised in law further compound the problem. A customary pledgee of land may constitute himself into a land owner in the absence of concrete evidence that the land is being held as a security for loan. Customary tenants holding land in perpetuity subject to good behaviour sometimes lay claim to uninterrupted and exclusive possession from time immemorial insinuating ownership over the land in question and putting any adverse claimant to the strictest proof of a better title. Oral history may fade away with time, reliable evidence may be wanting in showing the true state of facts, there may be dispute intra family as to the ownership of portions of family land resulting in the purchaser having to pay twice for the same land or pay to one of the disputants and be dragged into litigation with the other.

Modern Conveyancing practice however recognises the use of Power of Attorney as a potent way of obviating the problem of identifying the true family representatives to consent to transfer of family land. Where a Power of Attorney is executed in favour of some members of the family, only those members can deal with the land, and since the document is a registrable instrument, the purchaser simply identifies the appropriate parties to execute a Deed of transfer in his favour through a search at the lands registry.

Judicial authorities have however shown that protection of the third party purchaser through the use of Power of Attorney remains a wishful thinking. The law since the Supreme Court decision in *Anjuwon v. Adeoti*<sup>117</sup> is that whilst any sale under a Power of Attorney is valid, where the donor sold *dehors* the power, the sale is equally valid and that the only issue that may arise is one of priority in the competing sale<sup>118</sup>. Thus, an assignment of a right of occupancy with the requisite consent at customary law following a previous assignment validly done under a Power of Attorney is equally valid, and where registered before the previous transaction, may even have priority over the latter.

117. (1990) 2 NWLR (Pt. 132) 271.

118. See *Oshola v. Finnih* (1991) 3 NWLR (Pt. 198) 192.



Supposedly, the underlining thinking behind the Supreme Court's decisions on the point is the general principle of agency that what an agent is empowered to do, the principal can do himself.

The orthodox application of the agency principle in this manner is unrealistic for the following reasons: First, a Power of Attorney by Deed cannot be altered by any customary practice. Second, a Power of Attorney divests the family of all rights to deal in the land in any manner already covered by the Power of Attorney until the donee of the power is divested of such rights by revocation of the Power of Attorney accordingly. Third, even where the illegitimate sale by the family representatives before or after the valid sale of the Attorney is registered as first in time, such registration cannot cure the defect in the illegitimate transaction or confer priority of interest. Fourth, a Power of Attorney can only be revoked expressly by the donor or in any other way prescribed by it, and there is no such thing as revocation by conduct which the illegitimate transaction of the representatives of the family *dehors* the Power of Attorney portends. If the Supreme Court's thinking in this regard is allowed to persist, assignees of deemed grants will be exposed to the danger of insecurity of title with adverse consequences.

#### *Investigation of title fraught with difficulties*

The process of investigation of title through the orthodox Conveyancing practice of calling for abstract of title and verifying the facts contained therein could be a way of minimising to a large extent, the dangers of insecurity of title to land. But an abstract of title may refer to forged documents after all, and production of such documents from the Lands Registry is not a safeguard, for registration of instrument does not necessarily cure defect in title<sup>119</sup>.

119. See e.g. Cap L58 Laws of Lagos State 2003; s. 25; Cap 75 Laws of Anambra State 1991; s. 24 and corresponding provisions in other states. See also *Onasanya v. Anifowose* 4 FSC 94; *Folashade v. Duroshola* (1951) 1 All NLR 87.

Presumptions as to good title may be rebutted, while an action lies in damages against the vendor who concealed the facts only if he had knowledge of the existence of such facts<sup>120</sup>. Statements and facts contained in a recital operates by way of estoppel against the party making it and his successor in title mainly, and not against an adverse claimant having a better title<sup>121</sup>. Although a root of title going back to the statutory period<sup>122</sup> may limit the rather protracted investigation of title, it does not foreclose subsequent claims to title on the same land.

#### *State guarantee of title a mirage*

State guarantee of title under the Registration of Titles Law<sup>123</sup> is a mirage. The owner of registered interest receives no more than a possessory title for, the security of title of such first registered owner is not guaranteed<sup>124</sup> and a subsequent purchaser must investigate the validity of such title in the same way as if the land was not registered. Judicial reflection on the real effect of title registration depict a hopeless state in which such registration gives no better title to the registered owner than he had before<sup>125</sup>.

If the pronouncement of the Supreme Court in *Majekodunmi v. Abina*<sup>126</sup> is anything to go by, and the interest of an adverse possessor is registrable under the Registration of Titles Law, then the interest of the paper owner stands the risk of being jeopardised. Also, the fact that the first registered owner's interest

120. See *Selkirk v. Romar Investments Ltd* (1963) 1 WLR 1415 at 1423.

121. See *Onasanya v. Anifowose* (1959) 4 FSC 94.

122. The statutory period for presumption of title in the former Western Nigeria (now Oyo, Osun, Ogun, Ondo, Ekiti, Edo and Delta States of Nigeria), and other states with Property legislation is 30 years: see s. 71 (1) of the Property and Conveyancing Law Cap 100 LWN, 1959; and 40 years in others: see s. 1 Vendor and Purchaser Act, 1874.

123. See Cap R4 Laws of Lagos state 2003

124. Ibid, s. 53 (1).

125. See Butler Lloyd Ag CJ in *Animashaun v. Mumuni & Ors* (1941) 16 NLR.

126. (2002) 1 SC 92. That the estate of an adverse possessor is recognised and registrable was expressed *obita* by the Supreme Court in that case at 112. For a critique of that decision, see Smith, I.O.: "The Relevance of Adverse Possession under the Registration of Titles Law of Lagos State". *Journal of Private and Property Law* vol 22, 23-42.



is subject to overriding interests<sup>127</sup> which are not apparent on the register, makes the work of the Conveyancer arduous.

### Documentary 'Ownership' and Insecurity of Title

Production of document of title is one of the ways of proving title; and a potent one at that. For Conveyancing purposes, recitals contained in muniments of title twenty years old or more constitute a presumption of accuracy of the content, and a *prima facie* evidence of title<sup>128</sup>. A paper owner stands a better chance of being registered under the Registration of Titles Law and production of document of title in an action for declaration of title in the absence of sufficient proof of adverse claim, may serve as a *prima facie* evidence of title.

A Certificate of Occupancy, when issued as evidence of a grant of statutory right of occupancy under section 5 (1) (a) of the Act, guarantees security of title provided that the land, the subject-matter of the right, is properly vested in the Governor. For the avoidance of doubt, apart from the state land already vested in the state before the Land Use Act, land is properly vested in the Governor under the Act in three situations:

- (i) undeveloped land in urban areas in respect of which rights of the previous holder in excess of half hectare have been extinguished pursuant to section 34 (5) (b) and 6 (b) or;
- (ii) lands which by the tenor of section 36 of the Act were neither used for agricultural purposes nor developed immediately before the commencement of the Act so that by virtue of section 1 of the Act, such lands became vested in the Governor; or

127. See Cap R4 Laws of Lagos State, 2003; s. 52 (h).

128. See Evidence Act Cap E14 LFN 2004; s.129 and the case of *Johnson v. Lawanson* (1971) 1 All NLR 56.

- (iii) lands the subject of statutory or customary right of occupancy granted or deemed granted which rights have been properly revoked by the Governor in accordance with section 28.

The source of grant in these cases is the Governor who, by virtue of section 1 of the Act, became vested with radical title over all land comprised in the territory of each state subject to other provisions of the Act. Not only is the immediate title easily ascertainable, security of title is relatively assured.

However, a Certificate of Occupancy issued by the Governor as evidence of a deemed grant upon application in the prescribed form is precarious. Because such Certificate of Occupancy tends to evidence a pre-existing title, security of title is not necessarily assured save where the pre-existing title is valid and indefeasible<sup>129</sup>. Registration of the Certificate does not cure any defect in the title of the holder<sup>130</sup> while a defective title may be a reason for rectification of the register under the Registration of Titles Law<sup>131</sup>. To the extent that the Registration of Titles Law subordinates the title of a registered proprietor to that of an adverse possessor, the latter's title is indefeasible under the Law and poses a threat to the security of registered title. This idea of the existence of an off register mechanism which destroys title appears to make a mockery of the state guarantee of title and underscores the political philosophy that adverse possession is "land theft".

### Certificate of Occupancy May be Invalid

A Certificate of Occupancy may be invalid on its face thereby voiding its status as an evidence of a valid grant. The first rule of validity may be gleaned from the provision of section 9 (1) of the

129. See *Registered Trustees, Apostolic Church v. Olowoloni* (1990) 6 NWLR (Pt. 158) 154; *Olohunde v. Adeyoyu* (2000) 10 NWLR (Pt. 676) 662.

130. See *Onasanya v. Anifowoshe* (supra); *Folashade v. Duroshola* (supra).

131. See Cap R4 Law of Lagos State, 2003; s. 61 (2).



Land Use Act as to the need for such certificate to be issued under the hand of the Governor. However, by virtue of section 45 (1) of the Act, "the Governor may delegate to the state Commissioner all or any of the powers conferred on the Governor by this Act subject to such restrictions, conditions and qualifications, not being inconsistent with the provisions or general intentment of this Act as the Governor may specify. Pursuant to this provision, the Governor may, through a Legal Notice, delegate the power to issue a Certificate of Occupancy to a Commissioner. But in doing so, the Governor must be guided by the provision of section 18 (1) of the Interpretation Law<sup>132</sup> which provides that reference to "State Commissioner in any enactment means a Commissioner in charge of the relevant subject in question". The test whether a Commissioner is *in charge of the relevant subject-matter in question* is an objective one requiring a close scrutiny of the responsibilities of the Commissioner in relation to Land Use and Regulations made in connection thereto pursuant to the Act, and not in relation to general land use as may be construed in common parlance. Thus, whilst the State Attorney, General and Commissioner for Justice, or Commissioner for Lands, Physical Planning or the Environment may, by virtue of their positions and responsibilities, be the appropriate delegatee in this regard, it would be out of place to delegate for example, to the Commissioner for Transportation, Budget and Planning, Sports or Special Duties, notwithstanding that certain responsibilities of theirs appertain to land use or the logistics for actualising same.

Any Legal Notice purportedly delegating power to issue a Certificate of Occupancy to a Commissioner other than one "in charge of the relevant subject-matter" as it is the case in Lagos state is null and void as a subsidiary legislation to the extent of its inconsistency with the parent legislation, i.e. the Land Use Act. In such situation as this, the power to issue a Certificate of Occupancy remains vested in the Governor so that any Certificate issued under the hand of the wrong Commissioner as it were, is

132. See Cap. 14 Laws of Lagos State, 2003.

invalid. Where the void Certificate of Occupancy is in relation to actual grant, the substratum of the grant is gone, and there is in reality, no grant. Unlike the deemed grant which subsists as a right already vested in the holder, an actual grant exists only by virtue of a grant; the instrument of grant being the Certificate of Occupancy. One can imagine the drastic consequences of an invalid Certificate of Occupancy on the rights of the state to enforce covenants there under, or on the efficacy of title in the hands of estate developers and secured creditors.

The evidential value of a Certificate of Occupancy depends on the indefeasibility of the holder's title so that where the latter's title is defective, the Certificate of Occupancy evidences nothing and remains a miserable scrap of paper<sup>133</sup>.

### **Expropriation of Land Right Without Fair and Adequate Compensation**

The provision of section 29 of the Land Use Act on payment of compensation is reminiscent of the provision of the Constitution<sup>134</sup> only to the extent that there can be no expropriation of land right without compensation. Unfortunately, the very letter and spirit of the concept of compensation has been jettisoned. Whilst the Constitution requires prompt payment of compensation<sup>135</sup>, the fairness and adequacy of it can only flow from the nature of compensation itself. The Black's Law Dictionary<sup>136</sup> defines compensation as:

*Indemnification;...making whole; giving as equivalent or substitute of equal value;...That which is necessary to restore an injured party to his former position....*

133. *Ogunleye v. Oni* (1990) 2 NWLR (Pt. 35) 745.

134. See Constitution of the Federal Republic of Nigeria, 1999 Cap C23 LFN 2004; s. 44 (1).

135. *Ibid*; s. 44 (1) (a).

136. See *Black's Law Dictionary* 6th ed. at 283



It is the essence of compensation from the legal meaning ascribed to it, that it has to be fair and adequate, for that is the main essence of "making whole"; "giving an equivalent or substitute of equal value", or "restoration of an injured party to his former position". Any compensation short of these is unconstitutional for being unfair and / or inadequate and may be so challenged in court notwithstanding the non-specific mention of the two qualifying adjectives by the Constitution.

Arriving at a fair and adequate compensation requires a painstaking consideration of such factors like nature and length of use, injurious affection, general inconvenience, the possibility of acquiring property of similar size within a comparable location at affordable cost, etc. These factors are so fundamental to the realisation of the constitutional right to compensation that failure to take cognisance of them may amount to a breach of the Constitution. To the extent that the provision of section 29 of the Act takes no cognisance of these factors, it remains a potential target of litigation. Also, section 29 betrays the notion of trust in section 1 of the Act by limiting compensation of holder or occupier to the value of unexhausted improvements<sup>137</sup>.

The provision of section 33 of the Act on allocation of alternative accommodation in lieu of compensation for revocation of a right of occupancy over developed land requires no consultation with the holder of the right thereof as to his equivalent preference. Also, the valuer of such alternative accommodation is not an independent agent, but an appropriate officer of the Land Use and Allocation Committee. It is only hoped that the holder in this case would have recourse to election of a better alternative, or perhaps challenge the valuation in court. The draftsman of the Act appears to be clever by half in inserting the ouster clause in section 47 (2) which provision has been declared unconstitutional by the court<sup>138</sup>.

137. See Cap L5 LFN 2004; s. 29 (1)

138. See *Kanada v. Governor of Kaduna State* (1986) 4 NWLR (Pt. 35) 361.

Restricting compensation payable to only holders and occupiers to the exclusion of a mortgagee<sup>139</sup> thereof, jeopardises the security interest of creditors and poses danger to real investments. In the absence of a better arrangement under the mortgage agreement, the mortgagor who qualifies for compensation as holder takes compensation in addition to the loan facility, leaving the mortgagee to wallow in cold wind.

### **Conflict of Interests in the Realm of Land Use, Control and Management Within a Federal Structure**

The three tiers of government i.e. the Federal, State, and Local Governments have roles to play in the use, control and management of land within the Nigerian Federation. This position is recognised by the Land Use Act. For example, while the State and the Local governments are vested with the power to make different grants, the power of the Federal Government to hold land for developmental purposes is assured.

#### **State and Local Governments**

So far, there has not been any conflict between the state and the local governments in this regard, although as already pointed out, the role and powers of the local government in landholding have been eclipsed by the state.

#### **Federal and State Governments**

The land rights of the Federal Government which is recognised by section 49 of the Land Use Act evolved from some historical antecedents especially where there was Federal dominance as in the case of the former Federal Capital Territory of Lagos. Let me hasten to point out that the apparent conflicts between the Federal and State Government over title to land in the former Federal Capital Territory of Lagos resulted from the parallel

139. See s. 51 (2) of the Act.



existence of indigenous land rights and the sovereign rights in 1861<sup>140</sup> culminating in the acclaimed rights of the Federal Government subsequently. This is compounded by the creation of Lagos State in 1967<sup>141</sup> resulting not only in dispute between the Federal and Lagos State Government over title to land in the former Federal Capital Territory, but also between the Lagos State Government and the indigenes over right of reverter upon failure of purpose of acquisition by the Federal Government.

The Court of Appeal got it wrong with due respect when the court held in *Tourist Company Nigeria Plc & Ors v. Maersk Nigeria Ltd*<sup>142</sup> that the States Creation Decree Numbers 14 and 25 of 1967 did not transfer title to land in the Federal Capital Territory of Lagos to the Lagos State Government when the state was created, but that the land remained in the Federal Government with the state holding the land in trust for the Federal Government. The court reasoned, following the submissions of counsel to the 1st Defendant / Respondent, that whereas section 1(1) of Decree No 25 specifically referred to transfer of immovable property in the colony province of Ikeja, Epe and Badagry from the former Military governor of the former Western State to Lagos State, there was no provision whatsoever in the court's view, for the transfer of any immovable property in the former Federal Territory hitherto vested in the Federal Government, to the newly created Lagos State. As I pointed out elsewhere<sup>143</sup>, constitutionally, reference to a State is reference first and foremost to its territory which includes the available land mass as defined and / or delimited by the Constitution. Any derogation from this constitutional structure by a statute renders same null and void. The legal and Constitutional effect of the states creation Decree<sup>14</sup> is that the political and territorial structure of the affected state became

140. The year 1861 is significant in the history of the Nigerian land tenure system as a result of the Treaty of Cession under which King Dosunmu purportedly ceded title over the territory of Lagos to the British Crown.

141. See State (Creation and Transitional Provisions) Decree No. 14, 1967.

142. Suit No. CA/L/496/99.

143. See Smith, I.O., "Title to Land in the Former Federal Capital Territory of Lagos State: Matters Arising". *Journal of Private and Property Law* vol. 25, 12 at 20.

transferred along with the title over its land mass, so that the former entity known as the Federal Territory of Lagos ceased to exist as it merged with the colony province of Ikeja, Epe and Badagry of the former Western Region to form Lagos State.

The better view is that expressed by the Federal High Court in *Elegushi & Ors v. The A.G Federation & Ors*<sup>144</sup> in which the court declared unconstitutional, *ultra vires*, null and void Decree No. 52 of 1993 which vested in the Federal Government all lands within 100 metres limit of the 1967 shoreline of Nigeria and any other land reclaimed from any lagoon, sea or ocean in or bordering the Federal Republic of Nigeria. Consequently, the purported allocation of land under the Decree was properly declared *mala fide*, unconstitutional, null and void. The rationale behind the decision is fourfold: First, our constitutional history would show that land has always been a residual matter within the exclusive legislative competence of either the regions before 1967 or the states thereafter. Second, title to land whether under the Crown Grant Act or the Crown Lands Act or the Ikoyi Lands Act became vested in the government of Lagos State on the creation of Lagos state by Law on 27 May 1967. Third, the law is that title to beach and foreshore lands is vested in the State Government<sup>145</sup>. Fourth, the provisions of the Decree expropriated private interest in land without compensation; an unconstitutional act which cannot be tolerated. Revocation of vested rights without compensation violates the provisions of the Land Use Act, the Constitution and the African Charter on Human and Peoples' Rights.

Apart from lands in the Federal Capital Territory Abuja absolutely managed and controlled by the Federal Government and its agencies, availability of land in the states to execute Federal Government projects depends on the willingness of the Governor to either allocate land or acquire same for the Federal Government. Collaboration between the two tiers of government

144. Suit No. FHC/L/CS/669/95.

145. See *Attorney-General, Southern Nigeria v. John Holt & Ors* (1910) 2 NLR 1 at 11.



cannot be taken for granted as events in the past have shown that political rivalry could lead to calculated attempts by the state to frustrate laudable projects of the Federal Government by denying the latter access to land<sup>146</sup>. Because the state has been pronounced the sole Planning Authority to issue development Permits in respect of any form of development within its land territory, allocation of Federal land for developmental purposes may be frustrated by denying the developer the necessary development Permit.

It is no gainsaying that the rivalry and non collaboration between the Federal and State Governments have adversely affected the development plans of the Federal Government and execution of laudable projects. There has been total neglect of Federal Government properties and projects in the states, and in recent times, sale of such properties has been resorted to.

### **Land Administration in the Federal Capital Territory: A Mockery Exercise.**

Both the Federal Capital Territory Act<sup>147</sup> and the Constitution of the Federal Republic of Nigeria 1999<sup>148</sup> established a true Federal Capital where ownership of all lands became vested in the Federal Government exclusively to be controlled and managed for the Federal Government by a Minister acting for the President through the Federal Capital Development Authority<sup>149</sup>. All pre-existing rights were expropriated with provisions made for compensation. Unlike the position under the Land Use Act, land is not held in trust and the law recognises and preserves no other right, customary or otherwise. Only grants of statutory right of occupancy can be made by the Minister, and the Land Use Act designation of land into urban and non urban area does not apply<sup>150</sup>.

146. It is on record that during the Second Republic, Oyo State under the aegis of the Unity Party of Nigeria refused the Federal Government controlled by the National Party of Nigeria, access to land in the state.

147. See Cap F6 LFN 2004.

148. See Cap C23 LFN 2004.

149. See Cap F6 LFN 1990; s. 18.

150. See *Ona v. Atenda* (2000) 5 NWLR (Pt. 656) 244.

The framework of land administration in the Federal Capital Territory had the great potential of certainty and security of tenure with an effective system of development control put in place. However, events in recent past exposed the inefficient system of development control, insecurity of title following the abuse of the use of Power of Attorney and the absence of a coordinated lands registry, wrong process of revalidation of titles and abuse of land rights, as well as unguided exercise of power of revocation. Confusion as to the appropriate court having jurisdiction over land matters compound the problems.

### ***Inefficient system of development control***

Despite the existence of applicable provisions of the Nigerian Urban and Regional Planning Act (NURPA)<sup>151</sup> and the development control regulations made by the Minister for the Federal Capital Territory pursuant to sections 3 and 5 of NURPA, lack of proper co-ordination, monitoring and effective enforcement mechanism, have made the system of development control inefficient. Reports also abound of approvals given in error with the developer later made to bear the brunt of official negligence. Properties initially developed without the requisite Development Permit with the collusion of unscrupulous officials of the FCDA, and subsequently assigned to unwary third parties, fell within the demolition exercise of the El Rufai's administration. The experience was agonising especially against the backdrop of lack of explanation or justification by the Authority.

### ***Insecurity of title***

The regime of land titling in the Federal Capital Territory is replete with title racketeering following the proliferation of the use of Power of Attorney as an instrument of transfer or change of ownership from the donor's name to the donee's. There are instances of forged Powers of Attorney registered as instruments of transfer

151. No. 88 1992. See Cap N138 LFN 2004.



with the fraudulent transferees selling the property to unscrupulous purchasers who discovered the fraud too late.

The law as to the use of Power of Attorney is clear. A Power of Attorney is an instrument of delegation<sup>152</sup> and from the standpoint of the law of agency, the donor is said to delegate powers of control and management mainly to the donee of the power. It is not the equivalent of a Deed of Assignment which vests title absolutely in the assignee. From the point of view of judicial authorities, the donee is not precluded from exercising any or all the powers highlighted in the Power of Attorney notwithstanding that the power of Attorney remains extant. When this happens, the interest of the third party purchaser may be in jeopardy.

The system of registration is a reflection of the fluke transactions and protects no title in particular.

#### *Wrong process of revalidation of title and abuse of land rights*

The era of El Rufai as the Minister of the Federal Capital Territory was a period of unusual happenings in the annals of land administration in Nigeria. One of such unusual happenings was the executive order of the Minister withdrawing all Certificates of Occupancy of non governmental plots (developed or undeveloped) ever allocated in the Federal Capital Territory. Public outcry resulted in overwhelming panic on the part of government, culminating in the offering of tenuous distinction between "withdrawal" and "revocation". Attempts to clarify his position after series of opprobrium yielded no fruitful results.

A perusal of the provisions of the Land Use Act would show that no where is provision made for the withdrawal of Certificates and that revocation can only be done for overriding public interest or for public purpose. This means in effect that the Minister's action was simply illegal and a naked and blatant abuse of power.

152. *Ude v. Nwara* (1993) 2 NWLR (Pt. 278) 638.

Many questions immediately flow from this: given that the terms contained in the Certificate of Occupancy constitute special contract between the holder of the right of occupancy and the Government under section 8 of the Act, would the terms and clauses inserted in the new Certificate operate with retrospective effect? Would the initial grant cease to be valid for mere withdrawal of a Certificate? Would the circumstances not amount to a proper case of estoppel against government? What happens to unexhausted improvements in the event that the Certificate is not revalidated?

Events that unfolded in recent times revealed that the whole exercise was a sham, and a fraudulent game of robbing Peter to pay Paul for, the series of illegal revocations were followed by re-allocation of large expanse of land to the Minister and his Principals without qualms. The stage should be set really for persons affected to do what the Plaintiffs / Respondents did in *Estate of Abacha v. Eke Spiff*<sup>153</sup> by taking actions in court for the restoration of their land rights.

The negative effect of the parochial attitude of the Minister and his cohort is a retrogression on the developmental goals of the Federal Capital Territory and amounts to inefficient utilisation of a common resource.

#### *Confusion as to the appropriate court having jurisdiction over land matters*

The FCT like many states, has both the Federal High Court which is particularly Federal in outlook with jurisdiction streamlined by the Constitution<sup>154</sup>, and the High Court of the Federal Capital Territory which has the equivalent jurisdiction with the State High Courts<sup>155</sup>. The issue as to the appropriate court to exercise jurisdiction over land matters in the FCT is problematic for two

153. (2003) FWLR (Pt. 144) 531.

154. See the Constitution of the Federal Republic of Nigeria, 1999; s. 251.

155. *Ibid*, s. 257.



reasons: First, title to land as a subject-matter of litigation is one that is amenable to the jurisdiction of the State High court and *ipso facto* the High Court of the Federal Capital Territory. Secondly, where the FCDA is a party, there is always the presumption that being a Federal agency, the Authority can only be sued in the Federal High Court.

Arguments abound as to the real status of the FCT. The correct view appears to be that the FCT is not a state although the provisions of the Constitution shall apply to it as if it were one of the states of the Federation. Thus, while FCT is not one of the states named in the first column of Part I to the first schedule of the Constitution but defined separately in Part II of the first schedule thereto, it has the basic paraphernalia of a state having been vested with the three essential organs of a state with necessary modifications and adaptations. Consequently, all the legislative, executive and judicial powers vested in the House of Assembly, the Governor of a state and in the courts of a state vest respectively in the National Assembly, the President of the Federation, and in the courts established by the FCT.

Conflicting decisions abound thereby rendering the position uncertain in any event. Given the provision of the Constitution as to the status of the FCT, it would appear that the High Court of the FCT could exercise jurisdiction in all cases where the State High Court would, and decline jurisdiction also in circumstances falling under the provision of section 251 of the Constitution.

#### IV. IN SEARCH OF AN EFFICIENT LEGAL FRAMEWORK

Given the Millennium Development Goals set by the United Nations<sup>156</sup> with land as the "foundation of shelter, food and employment", there is increasing pressure in the developing world to implement reforms that will facilitate more efficient land use in quest for economic development and poverty alleviation.

156. The Instrument was signed by world leaders in New York. The goals set therein represent the development vision of the international community to be achieved by the year 2015.

The various National Development Plans we have had<sup>157</sup> laid much emphasis on good management of land as a catalyst for the achievement of developmental goals. Such developmental goals and aspirations are encapsulated in the National Economic Empowerment and Development Strategy (NEEDS)<sup>158</sup> which stressed the need to create wealth, provide jobs, restructure the economy and position the nation for economic growth by reducing poverty level with a view to making Nigeria one of the twenty most advanced economies in the world.

One of the sectoral strategies of NEEDS is agriculture and food security. In this regard, it is recognised that "[a] land tenure system that inhibits the acquisition of land for mechanised farming is a major constraint inhibiting private sector participation in the transformation of the agricultural production...."<sup>159</sup> These goals and aspirations coincide with basic objectives of the Land Use Act enacted thirty years ago which were the recognition and preservation of the rights of all Nigerians in the land of Nigeria; and the recognition, protection and preservation of the rights of Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for sustenance of themselves and their families<sup>160</sup>.

The materials produced by the United Nations and its various agencies, particularly the Food and Agricultural Organisation and the International Labour Organisation, and the investment policies of the World Bank, suggest the need to reform the traditional land arrangements, secure title and promote a functioning land market to further economic development and alleviate poverty in the developing countries. Most importantly, it is argued that it is a fundamental right to have access to a means of livelihood and self support and land re-distribution has been seen as creating

157. See e.g. the Third National Development Plan (1975-1980) Federal Military Government of Nigeria, 1975.

158. National Economic Empowerment and Development Strategy (NEEDS) Nigeria (National Planning Commission, Abuja, 2004).

159. *Ibid*, 68

160. See Preamble to the Land Use Act Cap L5 LFN 2004.



such opportunities<sup>161</sup>. In one Report<sup>162</sup>, the World Bank cited Latin America as a region where extreme inequalities in land distribution contributed to high rates of unemployment or under employment. The search for an efficient legal framework should therefore take cognisance of socio-economic expectations.

### Reform of Traditional Land Arrangements

While the preservation of the traditional system of land tenure is desirable towards the development of agriculture, provision of employment in the rural areas and therefore checking the incessant rural-urban drift, certain excesses must be contained.

The fraudulent conduct for which many family representatives are known from time immemorial must be checked. The Court of Appeal in a recent case of *Awure v. Iledu*<sup>163</sup> took a bold step by sidelining the orthodox path of customary tenure principle in the interest of natural justice. In that case, a gullible purchaser of family property was taken advantage of, when successive representatives of the family extorted money from him under the pretext that the previous sale was done without requisite consent and without ratification thereafter. Invoking the equitable jurisdiction of the court in that case, the court *Per Ogunwumiju JCA*<sup>164</sup> held as follows:

It is the duty of the courts to discourage this prevailing practice of land owners extorting money from land purchasers with the excuse that the wrong member of the family alienated the land. This was what the Land Use Act failed to achieve in spite of its lofty objectives. It is unfortunate in my humble view that the teeth has been taken out of and the desired effect of the Land Use Act

161. Progress in Land Reform, Second Report, UN, (1956) 180; World Bank, *Workers in an Integrating World*; World Development Report, 1995 (Oxford, 1995) 3-4; World Bank Country Study, *Review of Columbia's Agriculture and Rural Development Strategy* (Washington DC, 1996).

162. World Bank, *Workers in an Integrating World*, op.cit at 4.

163. (2008) FWLR (Pt. 402) 7657.

164. *Ibid*, 7706-7707

has been largely negated...No modern society can progress economically without a high degree of certainty in land tenure and the imposition by law or equity of prescriptive titles to ensure that there is closure of land disputes. When a rule of customary law in itself not contemptible but established to ensure equal benefit of family interests is now being set up and utilised to perpetrate acts contrary to natural justice, equity and good conscience, I humbly think it is time to revisit it...Where it is clear as in this case that the family are deliberately reselling the land at regular intervals, then the position of the law must be shifted to meet this current but prevailing social hazard. I believe that there is equitable jurisdiction vested in this court to protect the interest of a person who had been induced or encouraged to expend money under an invalid unenforceable land transaction"

The Court of Appeal, using the platform of equity, endorsed the rule that an invalid sale by the family can be ratified subsequently. With this stance of the law, the institution of customary tenure is reformed and the value of customary title is enhanced.

However, there is the need to address the present position of a purchaser from the donee of a Power of Attorney whose Power is overreached by sale through the representatives of the family, to restore confidence in the customary tenurial system.

### Making Land Accessible

There is the need to actualise the constitutional guarantee of access to land and realise one of the main objectives of the Land Use Act by ensuring an effective equitable distribution of land, making land affordable and available for investments, and creating an enabling environment for land acquisition by removing all administrative bottlenecks and high costs of processing fees attending perfection of land rights.



Assuring an effective equitable distribution of land requires fulfillment of genuine public purpose as ground for government acquisition of land and making land affordable. Rejection of application for land allocation must adduce reasons and therefore amenable to judicial review. The present position where the Governor owes no obligation to the citizenry for the manner of allocation is undemocratic and an arbitrary exercise of power over a common resource. The provision of section 5 of the Land Use Act requires an amendment to make Governor's power purposeful and equitable.

The quest for agricultural and industrial development in line with the global trend will come to naught where foreign investors with the required capital and technology are excluded from holding rights of occupancy pursuant to section 1 of the Act<sup>165</sup>. Developing countries are opening their frontiers to foreign investments and technology transfer; this country cannot afford to lag behind.

Removal of all administrative bottlenecks and reduction in the high costs of administrative fees will not only facilitate a timely completion of land transactions and enhance business efficacy, it will increase the level of perfected titles by individuals and thus enhance a viable land market. Requisite consent should have a time frame, reasons must be given for refusal, and assessments should not be arbitrary. Consent fees are by nature administrative fees as opposed to a Duty or Tax. The current high rate of consent fees cannot stand if properly challenged in court.

### **Assuring Certainty and Security of Tenure**

Certainty and security of tenure is the hallmark of an efficient and enduring land tenure system. A system of tenure which allows unilateral severance of the joint holder's interest conditionally or unconditionally without Notice as it is the position at present, renders the estate of other joint tenants uncertain and incomprehensible.

165. See *Ogunola v. Eiyekole* (1990) 4 NWLR (Pt. 135) 745 at 784.

Whatever may be the reason for the adoption of the principle of severance in the 19th Century England, the fact remains that modern conveyancing practice is focused at making investigation of title easier and conveyancing cheaper and less difficult to comprehend. Whereas in the case of tenancy in common, the title of each tenant has to be examined separately and the root of title investigated and ascertained, the Conveyancer saves time and cost under a joint tenancy arrangement since the root of title is the same. The letter and spirit of different provisions of the Property and Conveyancing Law<sup>166</sup> of Western Nigeria actually dealt away with the turgid, complex and traditional conveyancing practice by discouraging the concept of tenancy in common and ensuring that title is located in one definite source.

The law of severance in relation to joint tenancy is out of tune with the realities of life and general conveyancing practice in modern times. The popular and most effective method of severance in modern times is by means of a Notice in writing by a joint tenant and the mutual agreement between joint owners for effective alienation or partition of the property. The idea of unilateral alienation dovetailing into a tenancy in common is fast becoming unpopular and must be discouraged by law. There is therefore the need to align the provision of section 24 of the Land Use Act with its consent provisions with a view to actualising the actual intendment of the Act on severance of interest.

A tenure short of a freehold estate as we have in the actual grant by the Governor should be explicit as to the consequences of reverter of interest in the event of expiration of the period of holding. As pointed out earlier, an actual grant of a right of occupancy enures for 99 years or less. The holder of an actual grant is entitled to know what happens to his rights thereon at the expiration of the term. The scenario painted by the State Land Law is to say the least, awkward and raises a fundamental Constitutional issue as to the propriety of expropriation of rights without compensation.

167. See Cap 84 Laws of Lagos State, 2003, s. 52 (b).

168. Report No. 271 of the Law Commission in the United Kingdom, 2002.

166. Cap 100 Laws of Western Nigeria, 1959.



## Securing Title to Land

The problem posed by insecurity of title to land is enormous. Apart from the huge financial losses caused to individuals, and corporate investors by insecurity of title to land, agricultural and industrial development may be hindered to the detriment of economic growth. There is the need therefore to protect title over that indispensable phenomenon of natural endowment. The surest way of securing title to land is through title adjudication and registration while accommodating adverse possession within the scheme of title registration.

To actualise a system of adjudication and registration of titles, the Registered Land Act of 1965 should be adopted in all states of the Federation while local government areas within the state should be constituted as adjudication districts for the exercise. The main feature of this Act is the provision of compulsory registration of all titles and interest in land except those enumerated as overriding interests, after a systematic adjudication of such titles and interest within the designated territory.

Adjudication involves compilation of a list of all unregistered titles and the nature of the right or interests to which any claim relates, visit to the land for the purpose of ascertaining the owners of rights thereon, and holding of public inquiries to ascertain claims. Adjudication is facilitated by delimitation or mapping out of parcels of land.

Individuals, families and communities would submit compulsorily, registered survey plans from which cadastral maps of the whole land within the territory of the state would be worked out, so that boundaries can be ascertained and the extent of interest on land ascertained. Production of reliable Survey Plans and consequently, an accurate and effective cadastral maps, will make registration of titles more meaningful.

The problem of identifying the persons to deal with family land will be over with the registration of ten or more members of the family as joint proprietors to deal with family land.

Since the Land Use Policy in Nigeria is to discourage land speculation and make land available for use and enjoyment of Nigerians, there is the need to accord recognition to the property rights of the person in possession where the registered proprietor genuinely has no use for the land and does not wish to keep it. The principle of relativity of title is too deeply rooted in our land tenure system to be uprooted without negative consequences.

The importance of adverse possession is underscored by the Registration of Titles Law which recognises it as a right which may override the interest of the registered proprietor of a legal estate<sup>167</sup>. What is however required is a modification of the concept by stripping it of its anomalous credentials and making it responsive to socio-economic considerations. It may then be construed not negatively as a threat to the security of registered title which is inconsistent with a registration system, but positively as an effective means of transferring title from one person who has abandoned actual and legal possession of the land to another person who desires, through adverse possession, to embark on productive land use.

These considerations informed the proposal of the Law Commission in the United Kingdom as contained in the Report on Land Registration for the 21st Century<sup>168</sup> culminating in the Land Registration Act 2002. Under the provisions of the Act, adverse possession for any length of time will not itself confer title on the adverse possessor. Instead, an adverse possessor may apply to be registered as a proprietor after a minimum period of ten years adverse possession<sup>169</sup>. Upon such application, the Registrar shall notify the registered proprietor (and certain other

167. See Cap R4 Laws of Lagos state, 2003; s. 52 (h)

168. Report No. 271 of the Law Commission in the United Kingdom, 2002.

169. Schedule 6, paras 8-11.



persons) of the application<sup>170</sup>. The person notified must serve a counter notice within a period to be determined by the rules<sup>171</sup>. If the person notified does not serve a counter notice within the stipulated time, the applicant is entitled to be registered as proprietor of the estate in respect of which he applied<sup>172</sup>. If an appropriate notice is served, then subject to three exceptions<sup>173</sup>, the application to register must be rejected and the registered proprietor given two years to take possession proceedings against the adverse possessor. Failure to take such proceedings entitles the adverse possessor to apply for, and be given registration at the expiration of the two year period.

There is the need to adopt this new position in the United Kingdom in line with the land policy in Nigeria. Not only has emphasis shifted in many African countries from mere landholding to land use, the desire to harmonise documentary ownership with the fact of possession underlines the land policy in many common law jurisdictions in modern times.

### **Actualising the Constitutional Right to [Fair and Adequate] Compensation**

Whilst the Sovereign power of eminent domain remains a universal phenomenon and a potent instrument of equitable distribution of land in quest for economic development, the inalienable property right of a holder of right of occupancy requires protection in line with global standards. Apart from compensation with regards to land acquired for mining purpose or oil pipelines, or for other purposes in connection thereto which the Land Use

170. Schedule 6, para 2 (1)

171. Schedule 6, para. 3

172. Schedule 6, para. 4.

173. First, that it would be unconscionable because of estoppel, for the registered proprietor to dispossess the applicant and that the applicant should, in all the circumstances be registered. Second, where the applicant is for some other reason entitled to be registered as proprietor. Third, where there is a boundary dispute concerning adjoining land, the applicant believing for at least ten years, that the relevant land was his and where the estate to which the application relates has been registered for at least one year: See Schedule 6, para. 5 (4) of the Act.

Act refers to the appropriate Laws for details<sup>174</sup>, the Act contains no indices for calculating the quantum of compensation payable with regards to other categories of revocation. There is the urgent need for details in calculating the quantum of compensation taking into consideration, the totality of the holder's or occupier's physical relationship with the land and the enjoyment of his interest thereof, the duration of use, injurious affection, and general inconvenience. There is the need also to restore the confidence of creditors in real property as subject-matter of security by ensuring that in the event of revocation, compensation is payable to the person entitled to the right of occupancy at the time<sup>175</sup>. The process of payment of compensation should involve entertainment of claims to be submitted to the Land Use and Allocation Committee for consideration in order to determine the actual person entitled to compensation.

### **Redefining the Role of Different Tiers of Government in Land Use**

Land Use Policy under a Federal system necessarily involves mutual co-operation amongst the tiers of government in order to pave way for even development and attainment of the developmental goals of the whole structure. The rationale behind making land a residual matter is not necessarily to make land use the exclusive prerogative of the state, but to make every state the legitimate custodian of the land mass within its territory with the Governor holding the land in trust to administer not necessarily for the benefit of the indigenes of the State, but for the benefit of all Nigerians within the Federal structure.

The natural effect of this is that various interests from the grassroot through the State to the centre must be accommodated in quest for economic growth. There is the need therefore to give legal backing to this arrangement to forestall further derogation by the states.

174. See Cap L5 LFN 2004; s. 29 (2).

175. The definition of holder in s. 51 (1) of the Act takes care of this suggestion when the qualification is removed.



For effective utilization of land for agriculture, other economic use and general rural development, there is the need to encourage full participation by the local government in land management with the state giving the necessary financial incentives. The bulk of the state land mass lies in the non urban areas over which the Local governments should naturally have administrative control in line with the overall state objectives. Making customary rights of occupancy over such parcels of land viable for lending and other investments such as housing, requires effective land management, making transfer of land flexible and title to land ascertainable through the technique of registration already discussed. Extending the coverage of Governor's grant to non urban areas as the case is under the Land Use Act is unrealistic. There is also no justification for making land in non urban areas inalienable.

There is no basis in law for the reluctance of the state to make land available to the Federal Government once a Notice is issued by or on behalf of the President declaring such land to be required for public purpose. The Governor is obligated once the Notice is issued to revoke the right of occupancy in question<sup>176</sup>. No discretion may be exercised in this regard and an appropriate action lies in court against any recalcitrant Governor to compel the latter to revoke the right of occupancy. It is pertinent to add that where the purpose for which land was acquired fails, the land reverts back not to the state government through whom the revocation took place, but to the holder of the right of occupancy thereof before revocation<sup>177</sup>.

One area where the excesses of the Federal Government is manifestly causing unsustainable land use and which must

176. See s. 28 (4) of the Act.

177. It does not matter that compensation had been paid to the original owner of the land. It has been held rightly that the issue of compensation is different from the issue of reversionary right arising from failure of public purpose of government land; that compensation is paid for loss of rents and mesne profits; and that compensation is not payment for reversionary interest: See *Chief Ibikunle-Fafunwa Onikoyi & Ors v. AG Federation & Ors*. Suit No. LD/ 1172/ 93. 178.

therefore be checked as a matter of utmost urgency is the indiscriminate sand filling and dredging of the state shoreline by private developers purportedly approved by the National Inland Waterways Authority (NIWA), a Federal Government agency vested with title over the strip of land within 100 metres of the foreshore, under the National Inland Waterways Authority Act<sup>178</sup>. These activities of the private developers along the Lagos shoreline particularly the Ikoyi foreshore, Park view extension and Banana Island have negative consequences for the Lagos State environment and portends great danger for lives and properties.

Before the enactment of the Act by the National Assembly, ownership of the foreshore belonged to the state appertaining to the foreshore<sup>179</sup>. The enactment of this Act raises a query about its Constitutionality and reminiscent of Decree No. 52 which was declared unconstitutional null and void by the court in *Elegushi v. AG Federation & Ors*<sup>180</sup>. Apart from this, the incessant sand filling have taken no cognisance of the implication of section 1 of the Land Use Act which vests title to all lands within the territory of a state in the Governor of that state, whilst the indiscriminate dredging projects constitute an abuse of the environment and a violation of the requirements of the Environmental Impact Assessment Legislation.

These illegal projects continue unabated against Planning control and Regulations of the state. This state of quagmire is better checked or averted by repealing the NIWA Act and restoring sanity to the foreshore.

The interest of the Federal Government within the territorial land mass of the state is streamlined by the provision of section 47 of the Land Use Act with regards to accrued title of the Federal Government before the Act, and section 28 (5) with regards to rights of occupancy revoked by the state government on behalf

178. Cap N47 LFN 2004.

179. See *Attorney General, Southern Nigeria v. John Holt and 2Ors.* (supra)

180. Supra.



of the Federal Government. Land use in respect of these parcels of land since the decision of the Supreme Court in *AG Lagos State v. AG Federation*<sup>181</sup> is constrained by the State Planning Law and the Regulations made thereunder, as well as the Environmental Impact Assessment of any project likely to pose environmental hazards in the State. The whole process requires due consultation and mutual co-operation in the interest of sustainable development.

### **Provision of a Property and Conveyancing Act for the Federal Capital Territory**

The application of the Land Use Act to the Federal Capital Territory cannot be in doubt in view of the provision of section 51 (2) of the Act, but certain peculiarities of the FCT make modification of its application necessary. Non application of certain provisions and lack of proper directions as to the adaptation of some provisions make it possible to give diverse interpretations to the control and management of land in the FCT. Worse still, the pre-existing Laws on registration of interest in land with all their inadequacies, the outmoded 19th Century English statutes of general application, and the anachronistic bunch of common law principles, still apply in a Capital that was established in the last quarter of the 20th Century. The National Assembly has not been forthcoming with Acts to correct these anomalies in response to the global trend and the special needs of an ultra modern city.

If the need for property legislation was not apparent in 1976 when the FCT was established, subsequent confusion in landholding, titling and conveyancing, the haphazard land use policy and the incoherent system of development control, should be enough justification for conceiving and actualising a legal regime in the 21st century. The new independent legal regime should define in clear terms, the basic features of land holding in the FCT, the process of land use, control and management, the process of land titling, and vesting of land rights amongst others. Without a

181. (2003) 12 NWLR (Pt. 833) 1.

clear cut land policy and an efficient system of land use, control and management, the FCT cannot fulfill the main objectives behind its creation, and the hope of investors and private developers may be dashed.

### **Harmony between Sectoral Legal Regimes**

Land use, control and management are governed by sectoral legal regimes for effective operation of land tenure. This is normal. What is abnormal is the conflict or contradictions between sectoral legislations resulting in inefficient framework. For example, although a Certificate of Occupancy under the Land Use Act evidences an actual or deemed grant, a deemed grantee is not obliged to apply for and obtain a Certificate of Occupancy but entitled to be issued one at any time upon application. It follows therefore that a deemed grantee of a right of occupancy may apply for and be issued with a Certificate of Occupancy subsequent to issuance to him of a Development Permit. In the event of conflict between the conditions stipulated in the Certificate and those stipulated in the Permit earlier granted, would the conditions stipulated in the Certificate of Occupancy render nugatory the conditions in the Development Permit earlier granted?

Other contradictions abound between sectoral legislations under our land tenure system which must be identified and aligned.

### **Putting in Place An Efficient System of Land Disputes Resolution**

Whilst it is possible to minimise land disputes by putting in place the reforms earlier suggested, the possibility of dispute arising cannot be ruled out all the same. Actions for declaration of entitlement to right of occupancy constitute the chunk of civil actions in our courts while disputes continue unabated between individuals, families and communities, taking different forms even after decisions of courts.



Land matters are the most complex of civil matters and, depending on the nature of dispute, the extent of claim and the weight of burden of proof, many years may be sacrificed during which credible witnesses may die and lives lost to violence. Land disputes between families and communities do not terminate with the decision of court, as the aftermath may send a wrong signal dovetailing into incessant mayhem. A case study of the many years of mayhem between the Ife Overlords and the Modakekes of Ile Ife in Osun State, and between the Olumegbon Chieftaincy family of Lagos and the Ajah community in Lagos State would support this observation. In both cases, there had been decisions of courts which changed nothing and improved on nothing.

The decision of the Supreme court in *Asani Taiwo v. Adamo Akinwunmi*<sup>182</sup> adjudging the Onitire as being entitled to forfeit the customary tenancy of the Ijeshatedo people for misbehaviour, only resulted in protracted face off between the parties until the younger generation on both sides sheath the sword and resolved to turn their years of animosity to commercial advantage. Any assignee of right of occupancy is now expected to pay both sides as a matter of practice, which goes to indicate that perhaps litigation is not an effective method of dispute resolution in communal land matters. The sanity reigning around the Ile Ife axis today between the Ife Overlords and the Modakekes has nothing to do with earlier court decisions on land disputes around that axis, but due to the wise application of socio-political solution to a kindred problem.

Whilst litigation may be appropriate for land disputes involving individuals, or tiers of government, disputes between families and communities are best resolved by the process of mediation or conciliation involving true representatives nominated on both sides. The actual process to adopt depends on the nature of dispute and the character of interests involved for, while conciliation may be appropriate for resolving disputes between Overlords and the customary tenants and for less complex cases

where agreements can be reached quickly and under minimal tension, mediation may be resorted to in more difficult cases with focus more on the interest of parties than their legal entitlements.

Mediators or conciliators shall be professionals preferably lawyers, with thorough understanding of nature of land rights especially under the customary land tenure system and conversant with the peculiarities of the environment from the perspective of its historical evolution. In both cases however, the Local Government Area shall be responsible for setting the necessary machinery in motion with the support of the State. Agreements reached under the process of conciliation may be subject to review as circumstances may determine every five years. Details of each process shall be set out by legislation.

## CONCLUSION

Vice-Chancellor Sir, it is mere wishful thinking to conceive of a singular route to land tenure efficiency through legislation. A synthesis of the dual land tenure system (i.e the English and the Customary / Islamic systems) is also unrealistic, for each system has different peculiarities and rooted in different socio-economic environment with diverse cultural backgrounds. Attempt at harmonisation under the umbrella of the Land Use Act must take cognisance of the peculiarities of local circumstances to bring about any meaningful and effective land use and management.

From the discussion so far, a number of factors have been identified, consideration of which would eventually provide a symbiotic formula for an efficient legal regime of land tenure in Nigeria. These factors as indices of land tenure efficiency, represent the minimum consideration for accomplishing and sustaining a viable pattern of land tenure within the parameters of national goals and objectives. These factors which depend on one another for efficacy of the whole framework determine whether, in any event, there is any responsive movement towards an efficient legal regime of land tenure in Nigeria.

182. (1975) 1 All NLR (Pt. 1) 202.



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My list is not exhaustive. I ask my numerous other friends, colleagues and associates not mentioned, to forgive me for this shortcoming.

**I DEDICATE MY INAUGURAL LECTURE TO MY WIFE ADEFUNKE SMITH AND MY CHILDREN.**

Vice-Chancellor Sir, this is my inaugural lecture.