THE LAND TENURE SYSTEM AND RIGHT OF OCCUPANCY IN NIGERIA

Written by **Dr. Dorothy Udo Umoatan Umoatan**

Associate Professor

Abstract

Land Tenure is the body of regulations over ownership and use of land. It is the relationship of the owner to the land and society on one hand and the transfer and creation of interests on the land on the other. The Land Use Act of 1978 is the principal statutes governing land use and management in Nigeria. Prior to the Act, the land tenure system was applicable in Nigeria. The Land Use Act was given a prominent mention and protection in the Constitution of the Federal Republic of Nigeria. The Act came to embrace land use as a general system of land holding in Nigeria and consequently introduced a tenure known as right of occupancy. This article discusses the land tenure system and the right of occupancy introduced under the Act.

Introduction

The Land Use Act of 1978[1] or the Act is the principal Statute regulating land management in Nigeria. The Land Use Act was given a prominent mention and protection in the Constitution of the Federal Republic of Nigeria.[2] The preamble to the Act shows the reasoning behind its enactment. It provides:

> Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law: AND WHEREAS it is also in the public interest that the right of all Nigerians to use and enjoy land in Nigeria and the

[1] Cap L5, Laws of the Federation of Nigeria, 2010.
[2] Constitution of the Federal Republic of Nigeria 1999, Cap P23, Laws of the Federation of Nigeria 2010, S. 315 (5) (d).

> natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved…

The preamble shows that "public interest" is the driving force of the Act; and "the public interest" is the right of all Nigerians to use and enjoy land in Nigeria. Since land provides the physical substratum for all social and economic interaction, land law is inevitable an expression of social status and an instrument of social engineering. Everyone live somewhere, and each therefore stands in some relation to the land as occupier, holder, tenant, licensee, squatter, pledgee, chargee or mortgagee. In this way, land law impinges upon a vast area of social orderings and expectations, expecting a fundamental influence on the lifestyles of even the ordinary people. Real property which is land is technically not merely the earth's surface, but all the land down to the centre of the earth and up to the heavens.[3] Apart from the vertical extension, horizontally, land includes fixtures,[4] that is things permanently, attached or annexed to land, so that by the annexation to land they have lost their chattel nature and have become, in the eye of the law, part and parcel of the land. This is important, because it means that plants, economic trees, buildings and other permanent structures planted in or affixed to the land, become part of the land. Quite apart from the residential dimension, land has a huge economic significance in terms of providing security for capital, investment, business and agriculture. It is in view of the incalculable significance of land that the Land Use Act was promulgated[5] as the single law, which particularly defines the rights and obligations and specifies conditions precedent for any alienation or encumbrance of the land rights. The aim for imposing conditions is to restrain and control alienations of and encumbrances on land and thus enhance tenurial security.[6] Section 1 of the Act provides:

> Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are (sic) hereby vested in the Governor of that State and

[3] Bennett, J. in *Re Wilson Syndicate Conveyance, Wilson v. Shorrock* (1938) All ER 599 at 602
[4] *Holland v. Hodgson* (1872) LR 7 C .P 328
[5] The Act was originally promulgated as a Decree by the Military regime (Decree No. 6 of 1978) but was, upon the exit of the military regime and taking over of government by Civilian, re-designated Act, vide Section 1 of Adaptation of Laws (Re-designation of Decrees, etc) Order No. 13 of 1980.
[6] This is quite apart from the generally known purposes/ aims of stemming the tide of land profiteering and speculation and easing the burden on government when it needs land for development.

> such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

The section has the effect, particularly in the Southern part of Nigeria, of divesting the allodial title to land from communities, villages, families and individuals and expressly vesting the same in the Governors[7] of the States in trust for the people. Thus, the "Governor", takes over the pre-allodial title to land. That is to say that the Governor becomes the Landlord for the benefit of his people. With the Act, the radical title which individuals had in their personally acquired land can no longer be acquired by them.

The crucial conditions necessitating land reforms had existed in Nigeria many decades before 1978. However, the mere presence of these conditions would not lead to reform unless there was the political will by the political elite to do so. In Nigeria, land is the primary and, or the basic means of production in her essentially agricultural community. Its ownership should per-force be in the state to enable the state control it for the common benefit of all.[8] Thus with control conferred by ownership, the State can achieve social justice in the distribution of land, by determining the amount of land an individual could have.

Importantly, before the promulgation of the Act there was trenchant public concern over the high cost of land in Nigeria. This posed tremendous difficulties not only to individuals, commercial farmers, industrialists but also to governments in need of land for sundry development purposes. Evidently, the Federal Military Government of Nigeria was responding to the wishes of Nigerians by promulgating the Act in 1978, and this was received with great exhilaration by the general public. The Act had remedied the outrageous inequities in Nigeria regarding ownership of land.

There was no doubt that prior to the promulgation of the Act, the land holding system was bridled with a number of difficulties which occasioned insecurity of title to land and posed a great impediment of its economic utilization[9]. Under customary law, the basic unit of land

[7] *Dzungwe v. Gbishe(1985)* 2 NWLR (Pt.8) 528; *Savannah Bank Ltd. v. Ajilo* (1989) 1 NWLR (Pt. 97) 805; *Salami v. Oke* (1987) 4 NWLR (Pt. 63) 1

[8] Professor Ben. Obi Nwabueze, The Land Use Decree 1978 and Bank Securities. (Being text of paper delivered at a Conference in Lagos in 1980).

[9] Prof. M. I. Jegede, "Land Use Decree – Six years After". (Being paper presented at the National Symposium of the Nigerian Institute of Estate Surveyors and Valuers on 22nd November, 1984).

holding was communal which in turn, in most cases, may be the family, the village or the clan. The heads of these units held the land as trustees for the benefit of members. The right of the individual to use the land derives strictly from his membership of the unit or community. Non-members, as a rule, are excluded except when permitted to use the land by those heads. The title of any member of the unit was essentially usufructuary, and land which is no longer in use by him reverted to the corporate unit[10]. Under this system land is considered to belong to the living, the dead, and those yet unborn. Thus outright sale of land was prohibited and so land under customary law became completely sterilized for economic and industrial development purposes. Facts of contemporary life, however, provide exceptions to the above rule, such that sales of such land may be permitted. But in societies[11] where authorities in these units were diffused, there was the frequent problem of locating the appropriate person or persons for purposes of valid sale. This gave rise to the familiar and frequent situations where it was said that purchasers of land invariably became purchasers of litigation. Individuals, government and corporations found themselves buying the same piece of land more than twice at exorbitant prices and without assurance or security. It is evident that communal control of land in pre-industrial societies survived only where there was abundant supply of land. On the contrary control by head of the community family or village in-variably broke down wherever the demand of land exceeded supply. This makes conveyance from these units suspicious. It was no longer safe to rely on such conveyances without extensive searches. In rural areas where land records were scanty or nonexistent, the purchaser merely hopes for the best.

Nationalisation and Right of Occupancy

By nationalisation of land, what is meant is that control and ownership of it had been secured in the state or put in the hands of the state. It means that the citizens have been divested of or denied the ownership of any land in the state. The words expropriation and nationalization are used here interchangeable in relation to real property to connote the impairment of the freedom to exercise those main rights which determine ownership of property. Ownership in this context means the most comprehensive of relations that may exist in property; the totality

[10] Ban on outright alienation, and usufructuary rights over land which are basic tenets of customary land law tenure have essentially constituted the corner stone of the Land Use Act.
[11] Most Southern parts of Nigeria are parts of Kogi, Kwara and Benue State in the Northern parts of Nigeria.

of rights and powers that are capable of being exercised over land or property. These include the right to make physical use; the power of management; and right of alienation. The most valuable of these and the greatest index of ownership is not the right of user but rather the right to unfettered alienation of the property. Land is sterilized and has no market or commercial value in the hands of the owner if it cannot be alienated. The most conclusive way in which a person can demonstrate, that he is the owner of a property is his ability to alienate to any person he wished without any super-imposed restrictions. The implication of ownership therefore is that the owner's rights and powers as identified above must be superior and paramount over any other right that may exist in the land in favour of other persons. Ownership therefore has an allodial character.

The Act clearly nationalized all land in Nigeria through a combination of two approaches. It vested all land in the State and abolished private ownership of it which was accomplished by making a right of occupancy the largest interest capable of existing in land in favour of a private person or body. It is explicitly provided that no greater interest than a right of occupancy can pass to any person or body under any existing instrument.[12] Evidently any transaction entered into, or instrument drawn up after the commencement of the Act whereby ownership of land is purported to be created in favour of any person is null and void.[13] In any matter pending at the commencement of the Act, no court can grant to or recognise in either of the parties any greater interest than a right of occupancy.[14] With the exception of land belonging to the federal government or its agencies at the commencement of the Act under sections 49 and 50, all other land comprised in the territory of each state, including land already owned by the government is declared under section 1 to be "vested in the Governor of the State". The vesting of all land in the government has the effect of conferring ownership on it. To vest corporeal land is to vest its ownership. It operates to pass the ownership.

The combined effect of vesting all land in the state and the abolition of private ownership of it is that the state becomes the owner of all land in the country and all land becomes state land. In this regard, all land becomes state land in exactly the same sense as land acquired by the state before the Act by private purchase under voluntary agreement or by

[12] Section 25
[13] Section 26
[14] Section 40

compulsory purchase under statutory powers. Thus as with state land existing before the Act, the ownership acquired by the state under the Act is a beneficial one.

In *Chief R.O. Nkwocha* v. *Governor of Anambra State,*[15] the question was whether the Land Use Act applied to parcels of land which before the commencement of the Act vested in the plaintiff and whether the Governor can exercise his power of revocation over such land. In the case the plaintiff claimed against the defendants for a declaration that the Land Use Act (enacted as Decree No.6 of 1978) did not apply to the plaintiffs deed of assignment of plots No. M-17 and 09 at Independence Layout, Enugu; that the defendants have no right or power or competence to revoke the leasehold interest of the plaintiff in the said plots; that the purported revocation of the alleged right of occupancy in and over the plots of land aforesaid was null and void in that the said revocation and notices thereof were ultra-vires, not for the overriding public interest, capricious and abuse of power. The case was referred to the Court of Appeal and later to the Supreme Court pursuant to section 259(2) of the 1979 Constitution for an authoritative opinion on questions of law. Of interest, is that the ingenious argument of counsel at the high court that the Land Use Act was invalid and therefore inoperative was quickly overruled, and rightly too by P .K. Nwokedi, J. who held that the Act was an existing legislation consistent with the provision of section 274 of the 1979 Constitution and that the courts lacked jurisdiction or power to invalidate it. Of immense importance are the views expressed by the Supreme Court on the text and tenor of the Act in the case:

> The tenor of the Act as a single piece of legislation is the nationalisation of all lands in the country by the vesting of its ownership in the state leaving the private individual with an interest in land which is a mere right of occupancy.[16]

It is submitted that the above is a considered, undoubted and unimpeachable declaration of the highest court in Nigeria. It is suggested that the courts in their interpretative process involving the Act should return to the grand philosophy and text of the above Supreme Court's

[15] (1984) 6 S.C. 326
[16] Per Eso J. S. C. who read the lead judgment of the Supreme Court in the case; Emphasis a 150 supplied.

decision. Similarly in *Savannah Bank Ltd v. Ajilo*,[17] Obaseki J.S.C. acknowledged the revolutionary impact of the Act and thus seemed to have abandoned an onslaught against the Act which he bargain two years earlier in *Salemi v. Oke*[18] and perfected four years later in *Abioye v. Yakubu.*[19] In *Salati v. Shehu,*[20] Uwais, J.S.C. said:

> Unlike what obtained in the past, that is pre-28th March 1978 when the Land Use Act came into force, all land in the territory of each state became vested in the Governor who is to administer it for the use and common benefit of all Nigeria.

Furthermore in *Momodu Ilo v. G. A Davies,*[21] the Court of Appeal, per Adenekan Ademola declared:

> What is important now is to bring it home to them that the land in dispute will now be administered and regulated by the Land Use Act. Individual holders of parcels of land will have to deal with the land with the consent of the Governor and any alienation without the consent of the Governor would be void.

And in *Sule Shado v. Murtala Alao*[22] Nnaemeka-Agu J.C.A. (as he then was) approved the exproprietory effect of the Act. He said:

> It has not been canvassed before us what precisely is the position of a lease holder in possession who is entitled to a grant of right of occupancy as against the title of a fee-simple owner. By operation of law, the title of either of the later class over the land has been vested in the Governor.[23]

[17] (1989) 1 NWLR (pt.97) p. 305
[18] (1987) 9 – 11 S. C. 3 at p. 50
[19] (1991) 5 NWLR (pt. 190) p. 130 at page 219.
[20] (1986) 1 NWLR (pt. 7) p. 198 at p. 209.
[21] Suit No. CA/L/43/84
[22] Suit No. CA/L/159/84
[23] Emphasis supplied

But six years later in Abioye's case,[24] Nnaemeka-Agu J.S.C. inexplicably repudiated nationalisation of land and declared that the legislature did not intend to make any change in the existing law.[25] In *Savannah Bank Ltd v. Ajilo*[26], the Court of Appeal per Kolawole J.C.A., was impressively emphatic that:

> The mischief aimed at by the Land Use Act was the abrogation of absolute ownership or freehold interest by the community, the family and the individual. Thai was a complete revolution of the land tenure system in Nigeria.[27]

Right of Occupancy under the Land Use Act

The Act did not specifically define a right of occupancy it introduced. The nature of the right introduced would therefore be discerned from the general provisions and tenor of the Act. It however defined a "Customary Right of Occupancy" as "the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by a Local government under this Act," and statutory right of occupancy as a right of occupancy granted by the governor under this Act".

However it is important to note immediately that Abernathy J. in *Director of Lands and Mines* v. *Sohanl*[28] felt satisfied that for all general purposes there is no difference between a right of occupancy and a lease and that the only substantial difference was in name. Similarly in *Henvinchsorft vs. Dadd*[29] and *Majiyagbe vs. Attorney General*[30] decided under the provisions of the Land Tenure Law 1962 of Northern Nigeria, the courts were also inclined to liken a right of occupancy to a lease. Some eminent Nigerian text writers on property law

[24] See foot note 30 ante
[25] Ibid at pp 248 – 249.
[26] (1987) 2 NWLR at p.421
[27] Emphasis supplied. The Court of Appeal in two other cases sustained this purposeful and unimpeachable interpretation of the Act: *L.S.D.P.C. v. Foreign Finance Corporation of Nig. Ltd.* (1987) 1 NWLR 413; *Obikoye and Sons Ltd. v. Governor of Lagos State* (1987) 1 NWLR 385
[28] (1952) 1 T. L. R. 631
[29] (1960) 1 E.A. 327 at 335
[30] (1957) N.N.L.R 158

are also in agreement with the above judicial position. Hence Professor Elias[31] and Justice Onwuamaegbu[32] agree in effect that a right of occupancy is a lease especially when it is actually granted by the state.

On the other hand it was held by the Privy Council in *Premchand Nathu and Co. Ltd.* v. *The Land Officer*[33] that the concept of right of occupancy is *suigeneris* and that the intention of the law maker in introducing the right of occupancy system was to establish an entirely new interest in land. This view appears supported by certain commentaries on the right of occupancy introduced under the Act. It was argued by Professor J.A. Omotola that there was nothing wrong in the right being a new form of right as the categories of right over land need not be closed.[34] He was emphatic therefore that a right of occupancy was a hybrid form of right, something between a personal and proprietary right.[35] It is encouraging that even the chief proponent of the sterility of the Land Use Act concedes thereto that the right of occupancy created under the Act is less than a proprietory one. In other words it is conceded by this authority that the right is one that is less than an ownership[36]. In terms of definition, the right of occupancy introduced under the Act may be defined as the right to use and occupy land in accordance with the terms and tenure set-forth by the state within the provisions of the Act.

Nature of the Right

The starting point in understanding the nature of right of occupancy introduced under the Act is to appreciate that all forms of ownership, both under common law and customary law have been vacated or extinguished at the commencement of the Act. Typically the former private owner became automatically divested of his title which was converted to a mere right of occupancy[37]. A similar view was expressed by the Supreme Court in *Surufatu Salami v.*

[31] T. O. Elias, Nigerian Land Law and Custom (1962) p. 284.
[32] Dr. (Justice) M. O. Onwuamaegbu, Nigerian Law of Landlord and Tenant, (1966)p. 216
[33] (1962) A. C. 177
[34] J. A. Omotola, Essays on the Land Use Act (University of Lagos Press) (1980) p. 24
[35] Ibid
[36] Professor J. A. Omotola however made an inexplicable 'about-turn in his later essays. See Does the Land Use Act Expropriate, (1985) 1 J.P.P.L 1; The Land Use Act Staggers, (1987) 7 – 8 J.P.P.L. 1
[37] See e.g., Section 1, 34, 36; *Nkwocha v. Governor of Anambra State, supra*

Sunmonu Oke,[38] as per Kawu, J.S.C. who delivered the lead and the judgment of the Apex Court:

> Absolute ownership of land is no longer possible since according to the provisions of Section I of the Act all land comprised in the territory of each state in the federation are hereby vested in the governor of the state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Decree.[39]

Thus an examination of the nature of the right of occupancy under the Act must proceed contextually against the background of expropriation of land in Nigeria. As the Supreme Court made clear in the above case:

> The only land which is not affected by the provisions of Section 1 is any land which was held by the Federal government or any of its agencies as at the commencement of the Act.[40]

In other words the only land not affected by Section 1 which vests all land in the state in the Governor, is the land which under Section 49 was held by the Federal Government at the commencement of this Act. Evidently the right is less than ownership and therefore cannot amount to a proprietory right over land. It is essentially and inextricably the right to use and occupy land. It is a right that is not alienable unless the consent of the State's Governor was sought and obtained.[41] The Super-imposition of consent of the state as a crucial component of the right of occupancy system and transactions there-under deprived the right of any proprietary character. In other words, the invalidity of alienation for lack of consent deprives the interest affected of any proprietary quality. It is a right highly inferior to a leasehold. A lease is a proprietary interest, among other reasons, because it is alienable without the consent of the lessor. But suffice it to say that the right introduced under the Act also carries with it no

[38] (1987) 9 – 11 S. C. 43
[39] Ibid at p. 63
[40] Ibid
[41] Sections 21, 22, 23

compensation upon revocation by the state except for the replacement of the unexhausted improvement thereon[42]. It therefore implies that no compensation is payable for exhausted improvements on the land even though the Act provides no guide on what amounts to exhausted improvement. It is also a right which attracts no compensation to the holder or occupier upon revocation by the state for the holder's breach of any condition upon which the right of occupancy was granted or deemed granted by the State[43]. The State is the repository of ownership of land as a physical thing or as a corporeity. As a corporeity it has been snatched from the holder or citizen by a declaration of national policy embedded in the Act. The holder is permitted an incorporeal interest on the corporeity. Thus given the vesting of ownership of land in the Governor under the Act, the right of occupancy introduced by it therefore creates a tenurial relationship between the Governor of the state as the supreme land lord and the holder or occupier of the right, as a tenant. The holder, of course, holds in consequence, an interest which is less than the Governor's ownership.

Communal Land holding under the Act

The Land Use Act 1978[44] as noted above is a fundamental statute affecting Land Tenure in Nigeria today. The Act has modified substantially the existing Land Tenure Systems in Nigeria, but the amazing aspect is that it has not abrogated or pretended to substitute them; in its provisions, it recognized the customary land tenure as a valid and subsisting law regulating land tenure in Nigeria. The Act has as its objectives, the following;

(a) To remove the bitter controversies, resulting at times in loss of lives and limbs, which land is known to be generating.

(b) To streamline and simplify the management and ownership of land in the country.

(c) To assist the citizenry, in respect of owing the place where he and his family will live a secure and peaceful life.

(d) To enable the government to bring under control the use to which land can be put in all parts of the country and thus facilitate planning and zoning programmes for particular uses.

[42] See, section 29
[43] See sections 28 and 29, 34 and 36.
[44] Herein after referred to as the "Act"

In this respect, the Act, by virtue of its section 1, provided that all land comprised within the territory of each state is held in trust and "administered for the use and common benefit of all Nigerians", while therefore vesting the land in the Governor, the act recognized the existing rights of all citizens on land. In cases where the land is located in Urban areas, the land shall continue to be vested in the person in whom it was vested before the act, if the land is developed, where the land is undeveloped then, any portion in excess of half hectare will be forfeited to the government. In the non-urban areas, the section 36 of the Act provided that the occupier shall continue in occupation as if the customary right of occupancy has been granted by the occupier. Occupier is defined as any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-leases or sub-under lessee of a holder.

All existing rights in land has been converted to a right of occupancy, where it is in urban area it is deemed grant or granted by the Governor of state and referred to a statutory right of occupancy while in non-urban area it is deemed granted or granted by the appropriate local government and referred to be customary right of occupancy. The Act has preserved the existing rights being held under customary law by the community and family who are the rightful owners of land under customary law. In section 24 of the Act, the devolution of rights under customary law on the death of the holder of a right of occupancy is preserved, and thereby the family property is preserved, while section 34(4) of the Act recognises any "encumbrance or interest valid in law", and such land shall continue to be so subject and the certificate of occupancy issued". Section 35 of the Act on the issue of compensation also recognises the interest of the land holder under customary law, when it provides *inter alia:* "Section 34 of this Act shall have effect not withstanding that the land in question was held under leasehold, whether customary or otherwise." Affirming the position, the Supreme Court per karibi-whyte in the case of *Ogunola v. Eiyekole*[45] observed as follows:

> Land is still held under customary tenure even though dominium is in the Governor. The vast pervasive effect of the Land Use Act is the diminution of the plenitude of the powers of the holders of the land. The character in which they held remains the same. Thus an owner at customary law remains owners, owners the same event

[45] (1990) 4 NWLR (Pt. 146) 632 at 653

though he no longer is the ultimate owner. The owner of land now requires the consent of the Governor to alienate interests which hitherto he could do without such consent.

Clearly, the Act has only modified the customary land tenure, but the rights of the land owner under customary law whether family or communal remains intact. The right enjoyed under customary law had always been known to be absolute rights of ownership. The family or community owner has ultimate rights in the use and management of their land. However, with the coming into force of the Act, the rights had now been converted to statutory or customary right of occupancy depending on whether the land is located in urban or non-urban areas.

It should be noted that only the family has the power to alienate its land or deal with it in any manner whatsoever, however, before a legally valid title can be passed now, there must be consent of the Governor of the State to the transaction.[46] Section 36(5) and (6) of the Act seemed to have prohibited any transfer of land that is subject to customary right of occupancy, but the act specifically provides that any such transfer shall be void. There is a difference between allocation of land within the family members and transfer of the land to a person not being member of the family. Where it is within the family, or community, since the family or community continues as the absolute owner of land and the member only occupies the land, then there is no transfer of interest by the family, but where the transfer is to an outsider, then it will seem to be prohibited where the land is within non-urban area subject to customary right of occupancy.

The Act has not extinguished the incidents of customary ownerships of the land in Nigeria. Section 36(1) and (2) of the Act refers to "occupier" and "holder" of the land. Both may be granted the deemed customary right of occupancy. The holder is the person holding land as customary owner while the occupier is the customary tenant within the meaning of section 50 of the Act.[47] The Act recognized the interests of the land holder under customary

[46] Sections 22 and 34 of the Act
[47] *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 130.

law though the right that may now be enjoyed is subject to the ultimate power of the Governor, the customary land tenure is still in existence in Nigeria. The Section 1 of the Act has transferred all land within the state to the Governor of the state to hold in trust for the people. The holders of land under customary tenure continue to hold same as if a statutory or customary right of occupancy has been granted to then by the Governor.

Land in Non-Urban Area

It is submitted that Section 36 of the Act deals with occupancy rights relative to land in the non-urban area. Section 36 subsections (2) and (40) must arrest our attention. Section 36 subsection (2) enacts:

> Any occupier or holder of such land, whether under customary right or otherwise howsoever shall if that land was on the commencement of this Act being used for agricultural purposes, continue to be entitled to possession of the land for use for agricultural purposes, as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate local government.

And subsection (4) of Section 36 further enacts:

> Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a customary right of occupancy issued by the Local Government and if the holder or occupier of such developed land, at his discretion produces a sketch or diagram showing the area of the land so developed, the local Government shall, if satisfied that the person immediately before the commencement

> of this Act has the land vested in him, register the holder or occupier as one in respect of whom a customary right of occupancy has been granted by the Local Government.

Under Section 6 subsection (2) occupancy right was recognized in favour of a holder[48] or occupier[49] of land in the non-urban area[50] who at the commencement of the Act was using the land for agricultural purposes; and was holding or occupying the land under customary law or otherwise howsoever. In other words, occupancy right is clearly recognized in favour of a member of a family lawfully holding or occupying portion or portions of family/community land allocated to him at the commencement of the Act, for farming or agricultural purposes. Farming on family or community land is usually an individual affair. The interest vested in the family/community before the commencement of the Act is greater than the sum total of the separate individual title or ownership to either the whole or any part of the family/community land. The interest of the individual member is usually a user-right. It is submitted that, it is clearly that individual user-right that the Act recognized solely or, at least, mainly. It is that user-right in the individual member of the family that the Act seeks to elevate and secure.

Furthermore, where the individual member of family has under Section 36(4) of the Act developed the land, occupancy right becomes recognized in him if and only if the land was vested in him before the commencement of the Act. The requirement that the land must have vested in the individual family member is to ensure that the member was not unlawfully occupying such land, such as where he is occupying the land without the consent of the relevant

---

[48] "A holder" in the words of the Supreme Court in *Onwuka v. Ediala* (1989) 1 N.W.L.R. (pt. 96) p. 182 "is a person or community that had title to a parcel of land before the coming into force of the Land Use Act 1978". See also, *Attorney General, Lagos State v. J.B. Sowande* (1992) 8, N.W.L.R. pt. 261 p. 589 upon the authorities, *"a holder"* of rights of occupancy is a person.

(a) Who by virtue of his previous possession or ownership of the land before the commencement of the Act is entitled to a right of occupancy, or,

(b) A person to whom a right of occupancy has vividly passed to on the death of the original owner.

[49] See, e.g. Section 51(2) of the Act where an occupier was defined to include sub-lessee, and sub-under lessee of a holder. This could be interpreted to include, Customary tenants lawfully occupying such land of their land lords. It therefore, relates to third party interests on the land at the commencement of the Act. These are interests created by and dependent on the superior interests of the Pre-Act owners of land in Nigeria.

[50] The term *"NON-URBAN AREA."* Clearly, refers to land outside the urban area which is governed by Sections 34 of the Act. Non urban area will therefore include the peri-urban and the rural area not designated as urban area by the Governor. We say so because the Governor has the power to declare every part of the State as urban area (whether rural or not).

members of the family. In property law, reservations could be raised to whether land could be said to vest in an allocatee of family/community land. An affirmative answer must be returned. Land as a corporeity could either vest in possession[51] or in ownership.[52] Thus a member of family who has developed or is in effective possession of the family or community land allocated to him could be said to have such land vested in him. And he is the person rather than the family as a unit, in whom the right of occupancy is recognized.

More importantly, the use of the word, "person" under Section 36(4) of the Act makes it clear that the family unit was not contemplated. In the first place, a family is not a person in law. So much is clearly settled on the authorities.[53] Typically, if "a person" is used to include a family, it would not have been necessary for the law maker under Section 35 of the Act to speak specifically of an estate laid out by any person, group or family in whom the lease hold interest or reversion in respect of the land was vested immediately before the commencement of the Act.[54]

It is therefore clear that there should not have been any reference to "any person" group or family, if the word "person" was to embrace "group" or "family". In other words, the use of punctuating comma after "any person" and immediately before the words "group" or "family" under Section 35(1) of the Act, places the phrase "any person" in utter apposition to the phrase, "group or family". In other words, the phrase "group or family" becomes an additional element distinct from "any person".

In family or community land, each member of the family has his own allotment which he occupies and uses alone either for residential or agricultural purposes. In Nigeria, there is nothing like collective farming of family/community land. The occupation and use of family or community land is distinctly an individual affair. It is scarcely arguable that occupancy and user of family or community land is an individual affair. And the focalization of the various individual holdings into the larger family holding or title has tended because of certain customary instances, to sterilize land for commercial purposes and other security transactions.

[51] Richardson v. Robertson (1862) L.T. 75; See also I. A. Umezulike, *Issues in Contemporary Nigerian Land Law* (up at) for fuller discussion of the concept.
[52] *Warbe v. Manitoba Farm Lands Associated* (1954) 14 WLR 289.
[53] See, per Hubbard F. J. in *Ekwuno and Ors v. Ifejika and Ors* (1960) 5 F.S.C. 15 at 160.
[54] See, Section 35(1).

Another important indication that the Act has abolished family unified interests in land is that none can be said to hold land of which it or he was the previous allodial owner. That would be a contradiction in terms. In property law, "to hold" means "to have as a tenant". Consequently, the word "held" as is used under Section 36 of the Act must refer therefore, not to previous owners, but to those holding lesser interests of the previous owner's title. It refers to individual members of the family who hold allocations of the family/community land rather than to the family as a unit. Thus, when the Act speaks under Section 36(4) of where the land is developed, it shall continue to be held by the person in whom it was vested before the commencement of the Act. It refers, clearly to individual members of the family who held occupancy or user, or farming or possessory rights over the family/community land. This surmise is unassailable having regard to the social objective underpinnings of the Act and its intention to make the individual the basic unit of land holding under the Act. It is therefore, inescapable that family or community land tenure in the non-urban area is abolished as regards both ownership and occupancy rights.[55] This is in consonance with the object of the Act to protect persons lawfully occupying and using land for residential, agricultural or other lawful purposes. Thus, the individual member of the family or community is the person in whom occupancy right is recognized and protected under the Act.

Land in Urban Area

Evidently Section 34 of the Act is solely determinative of whether occupancy right was saved as respects family or community land in urban area of a State. Specifically, Section 34 subsection (2) of the Act enacts:

> Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under the Act.

[55] See, generally or inferentially the dictum of Ademola J. C. A. in *L.S.D. P. C. v. Foreign Finance Corporation* (1987) 1 N.W.L.R. (pt. 50) p. 413 at p. 444.

Subsection 3 of Section 34 enacts further:

> In respect of land to which subsection (2) of this section applies, there shall be issued by the Governor on application to him in the prescribed form a certificate of occupancy if the Governor is satisfied that the land was immediately before the commencement of this vested in that person.

Evidently, Section 34 of the Act which is partly reproduced above is identical to Section 36 in content except that whilst the former covers land in the urban area, the latter deals with land in the non-urban area. Consequently, to avoid being circular in our arguments, it is submitted that what is said in respect of Section 36 of the Act about the meaning of the words "person" and "held" and the non-applicability of the provision to family and the land previously owned by it is also true, for the land in the urban area of the State. In other words, the individual occupier of family or community land rather than the family which owned it, is the person in whose favour a right of occupancy is recognized under the Act. The content of Section 34 (1) of the Act may be considered, at First blush, to have weakened the above proposition. It enacts as follows:

> The following provisions of this Section shall have effect in respect of land in an urban area vested in any person immediately before the commencement of the Act.

The use of the word vested under Section 34(1) of the Act may be considered to refer to the family, which enjoyed allodial or ownership right over the land immediately before the commencement of Act. This is because of the commonly held mistaken view that land is vested only in ownership. From the tenor and objective of the Act, the phrase "vested in any person immediately before the commencement of the Act," refers solely to the individual member of the family who at the commencement of the Act was in possession and use of the family or

community land. The Act, it is submitted did not recognize or intended to recognize occupancy rights in the family as a body. It rather recognized those rights in the individual members of the family in occupation and user of the family/community land. It therefore operated as the abolition of family/community land holding in Nigeria. The Act is obviously in favour of the individual as the basic unit of land holding in Nigeria. It has the objective obviously, of taking social justice to the individual.

Consent Requirement and the Right of Occupancy

Under Sections 21 and 22 of the Land Use Act, 1978, the approval of the Local Government or consent of the Governor of the state (whichever is applicable) is required for a valid alienation or assignment of interest in land. The Act in Section 21 provides as follows:

> It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever:
>
> (a) Without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable sheriffs and civil process law, or
>
> (b) In other cases without the approval of the appropriate Local Government.
>
> S.22 provides thus:
> It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained.

In *Savannah Bank (Nigeria) Ltd. v. Ajilo*,[56] the respondent mortgaged his land, which he acquired prior to the Land Use Act 1978 to secure a loan, which was granted to a company where he had majority shares. When he defaulted, the mortgagee sought to sell the property.

[56] (1989) 1 NWLR (Pt.77) 305

He commenced proceedings to restrain the mortgagee from selling on the ground that the mortgage was void, the Governor's consent not having been obtained to it. The case was argued on the narrow but technical contention that since the mortgagor acquired his land prior to the Land Use Act, there was no need for consent to validate the mortgage.

Since the land was acquired prior to the Land Use Act, Section 34 applies which states that all such landowners are deemed to have been granted a statutory right of occupancy by the Governor.

Subsections 5 to 8 relate to land in urban area, which was undeveloped before the Act came into force. For this class of land, Subsection 7 provides that alienation can only be effected with the prior consent in writing of the Governor. Subsection 8 imposes punishment of one year imprisonment or a fine of ₦5,000 for any contravention of subsection 7. The contention of counsel for the mortgagee was that the mortgaged property comes within Subsections 1 – 4, being a developed land, and that no mention of consent is made with reference to such land. The Supreme Court however held that section 22 governs all statutory rights of occupancy, whether expressly granted by the Governor under Section 5 (1) (a) or deemed granted under section 34 (1) – (4).

It is submitted that *Savannah Bank v. Ajilo*'s[57]case appears to illustrate the fact that Governor's consent is required for alienation of all types of statutory right of occupancy. Section 23 has substantially the same provision save that it applies to alienation by a sublessee of a statutory right of occupancy holder. The wording of Section 22 of the Land Use Act provides that the Governor's consent "shall" be "first had and obtained." It therefore means that, it is mandatory to seek and obtain the consent before alienation. However, S.22 (2) reads:

> The Governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when so required deliver the said instrument to the Military Governor in order that consent given by the Military Governor under Subsection (1) may be signified by endorsement thereon.

[57](1989) 1 NWLR (Pt.77) 305

In *International Textiles Industries Nigeria Ltd. v. Aderemi*,[58] the Supreme Court held that in accordance with the *Savannah Bank v. Ajilo's*[59] case, that by virtue of Section 22 of the Land Use Act, the holder of a right of occupancy alienating or transferring his right of occupancy must obtain the consent of the Governor to make the transaction valid. If he fails, then the transaction is null and void under Section 26 of the Act.

However, we submit here that the provision of the Land Use Act does not just provide that consent should be obtained to a transaction; rather it makes it the duty of the holder of a statutory right of occupancy to obtain consent before alienation. The section provides that "it shall not be lawful for the holder of a statutory right of occupancy to alienate without consent." The reasoning of the Supreme Court Justice is predicated upon the provisions of section 26 of the Land Use Act, which renders the instrument or transaction conferring interest in land not in accordance with the provisions of the Act null and void. Section 34(7) & (8), by providing a penalty for non-compliance with the consent requirement, make the transaction both void and illegal. In *Solanke v. Abed,*[60]Unsworth, FJ quoting *Maxwell on the Interpretation of Statutes*[61]said of this type of provision: "Where a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable only. The penalty makes it illegal." Another provision on consent is section 25 (b) of the Act, which reads: "A statutory right of occupancy shall not be divided into two or more parts on devolution by the death of the occupier, except with the consent of the Governor."

This provision will apply to executors and administrators of the estate of a deceased person who may have to alienate part of the real estate in the course of administration. It appears that it would also extend to assents by executors in favour of the beneficiaries if the assent involves the division of the statutory right of occupancy into two or more parts. The modern trend of apparent alienation of land by "owners" perhaps to circumvent the customary law concept of allodism is by way of "irrevocable power of attorney" granted by the "owner" to the "purchaser". A power of attorney is an instrument given by one person to another as an authority to act on his behalf or on his place and stead. The power ordinary is given by deed and should be strictly followed. It has a statutory backing in all parts of this country.

[58] (1999) 6 SC (Pt.1) 1; *UBN Plc v. Ishola* (2001) 15 NWLR (Pt.735) 47
[59] (1989) 1 NWLR (Pt.77) 305
[60] (1962) NNLR 92, 94
[61] 10th ed. P. 212.

Devolution of Right of Occupancy upon Death of Occupier

Devolution of property rights under the Land Use Act upon death of the occupier or holder of right of occupancy to the beneficiaries results from a WILL or operation of customary law of the deceased intestate.[62] It has been argued that devolution of property upon death intestate of its owner results from operation of law, not from any act or volition on the part of the owner. It may not be an alienation by the holder within the meaning section 22 of the Act, but it is a form of transfer, all the same requiring the consent of the Governor. Under section 21 of the Act, alienation of customary right of occupancy is forbidden without the consent of the local government or Governor. And under section 22, alienation of statutory right of occupancy is also prohibited without the consent of the Governor first had and obtained. It must be pointed out that if the estate of the deceased is regulated under customary law, the right of occupancy passes directly to the inheritors without any intervening vesting in the administrators of the estate so that question of transfer by the holder arises. But it is our view that such passage from the deceased to the inheritors directly is a transfer all the same forbidden under either section 21 or section 22 without the consent of the local government or the Governor of the State.

But where the property is administered under non-customary law no direct transfer of the right of occupancy to the inheritors takes place. It passes first to the administrators of the estate who at end of the administration would transfer the estate to the beneficiaries as part of the exercise of distributing the estate.

Revocation of Right of Occupancy

Section 28 of the Land Use Act empowers the Governor to revoke a right of occupancy earlier granted. Section 28 (1) Act empowers the Governor of a State to revoke a right of Occupancy.

The grounds upon which a certificate of occupancy can be revoked include:

[62] Section 24

Overriding Public Interest

Overriding public interest in the case of a statutory right of occupancy means:

(a) the alienation by the occupier, by assignment, mortgage, transfer of possession, sublease or otherwise of any right of occupancy or part thereof contrary to the provisions of the Land Use Act or of any regulations made there under 28(2)(a).

(b) the requirement of the land by the Government of the state or by a Local Government in the state in either case for public purposes within the state or the requirement of the land by the Government of the Federation for public purpose of the Federation.[63]

(c) the requirement of the land for mining purpose or oil pipelines or for ay purpose connected with it.[64]

In the case of a customary right of occupancy, overriding public interest means

(a) the requirement of the land by the Government of the state or by a Local Government in the State in either case for public purpose within the state or the requirement of the land by the Government of the Federation for public purposes of the federation . (b) the requirement of the land for mining purposes or oil pipelines or for any purpose connected with it.

(c) the requirement of the land for the extraction of building materials

(d) the alienation by the occupier by sale, assignment, mortgage, transfer of possession sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval.

Public Purpose

Public purpose on the basis of which a certificate of occupancy could be revoked by the Government of a state is expressed in section 51 of the Land Use Act 1978 to include:

(a) For exclusive Government Use or for general public use

(b) For use by anybody corporate direct established by law or by anybody corporate registered under the companies and Allied Matters Act in respect of the Government own shares, stocks or debentures.

(c) For or in connection with sanitary improvements of any kind.

[63] S. 28 (2) (b) of the Act.
[64] S. 28 (2) (c) of the Act.

(d) For obtaining control over land contiguous to any part or over land the value of which will be enhanced by the construction of any railway, road or other public work or convenience about to be undertaken or provided by the Government

(e) For obtaining control over land required for or in connection with development of telecommunications or provision of electricity.

(f) For obtaining control over land required for or in connection with mining purposes

(g) For obtaining control over land required for or in connection with economic, industrial or agricultural development

(h) For obtaining control over land required for or in connection with economic, industrial or agricultural development.

(i) For educational and other social service.

Breaches of the terms of the grant of the certificate of occupancy

The Government may revoke a statutory right of occupancy on grounds provided for in section 28(5):

(a) a breach of any of the provisions which a certificate of occupancy is by section 10 of the Land Use Act deemed to contain (b) a breach of any term contained in the certificate of occupancy or in any special contract made under section 8

(c) a refusal or neglect to accept and pay for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Governor under section 10(3).

Compensation upon revocation of right of occupancy

Section 29 of the Land Use Act provides that if a right of occupancy is revoked, the holder and the occupier should be entitled to compensation for the value at the date of the revocation and the unexhausted improvements. The holder may also exercise the option to accept resettlement for such revocation. Compensation is payable under the Land Use Act upon the revocation of a right of occupancy for public purpose, or for the extraction of building materials by government only on unexhausted improvement[65] and not for a bare land. The

[65] S. 51(1) of the Act defines unexhausted improvement as "anything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of

rationale for this assumption is that since land is owned by the State under section 1, there is no basis for State to compensate the expropriated Landowner. If however, the land is revoked because the land is required for mining purpose or oil pipelines or other purposes connected with mining and oil pipelines, the occupier shall be entitled to compensation under the appropriate legislation of the Mineral Act or Mineral Oil Act or any legislation replacing it.[66]Compensation could be assessed on the basis of rental payable by the occupiers on the land during a year in which the right of occupancy was revoked or replacement cost together with the interest at the bank rate for delayed payment where building, installation or improvements is involved. Compensation payable on crop is at the discretion of the State Chief Lands Officer or Federal Chief Lands Officer as the case may be.[67]

Section 44(1) of the 1999 constitution is that no property of a citizen should be taken from him except in compliance with due process of law.[68] Section 29 of the Land Use Act provide that where the right of occupancy has been revoked on grounds that the lands is required for mining purposes, oil pipelines or purposes connected with it or for the extraction of building materials, there is a corresponding obligation on the Government to pay the holder or occupier compensation.

In *Elf Petroleum Nigeria Limited v. Daniel C. Umah & ors,*[69] the court held that having fouled to acquire the Plaintiff's land for the purpose of establishing a gas plant at Obite Community in Ogba /Egbema /Ndoni Local Government Area of Rivers State, by valid revocation and payment of compensation to the Plaintiffs, it was unconscionable for the Defendant Appellant to go on the Plaintiff/Respondent land to conduct oil exploration activities.

Section 35 of the Land Use Act stipulates that where the compensation relates to land held under leasehold whether customary or otherwise and is comprised of an estate laid out by any person, group or family entitled to the reversionary interest, the Governor shall in respect of improvement pay to that person, group or family compensation as specified in section 29 of the Land Use Act.

long-lived crops or trees, fencing, wells, roads and irrigation or reclamation works, but does not include the result of ordinary cultivation other than growing products".

[66] S. 29 (2) of the Act.

[67] S. 29(4) of the Land Use Act.

[68] See *Seleh v Monguno* (2006) 15 NWLR (Pt. 1001) 26 at 70.

[69] (2007) 1 NWLR (Pt. 1014) 44

There shall also be deductible from the compensation payable under section 35 any levy by way of development or similar charges paid in respect of the improvement on the land by the lessee to the person group or family in which the reversionary interest of the leasehold vests and the amount to be deducted shall be determinable by the Governor taking cognizance of all the circumstances of the case.

Conclusion

The State Governor is the repository of ownership of land in the state[70] and the highest interest existing on land today in Nigeria is a right of occupancy.[71] The implication of the right of occupancy being the highest interest on land in Nigeria is that land has been nationalized and all pre-existing allodial and English estates, abolished.[72] Agriculture and agro-related industries, mining and quarrying; manufacturing; electricity and water supply; housing estates and road construction, transport and communication, railway and metro lines depends on availability of land. There is no doubt that development plan preparation and plan implementation in the private sector, Federal, State or Local Government levels, especially in the above economic sectors are also dependent on readily available land. And the right of occupancy system introduced under the Land Use Act is designed to make land easily available to Governor, public and private entrepreneurs for sundry development purposes. To make land easily available to persons and organizations or agencies of government who need same for economic and industrial use, survey information of all land in the state is imperative in all the states of the federation of Nigeria.

[70] Section 1

[71] Sections 34 and 36

[72] *Nkwocha v. Governor of Anambra State (1984) ALL NLR 324 at 340.* Professor I. O. Smith makes the startling claim that Esho JSC declaration of nationalization in Nkwocha's case was a misleading obiter which has been jettisoned by the Supreme Court in *Salami v. Oke* (1987) 4 NWLR pt. 63 p. 1; *Ogunola v. Eyekole & Ors* (1990) 4 NWLR pt. 146 p. 632. (See Professor I. O. Smith "Nature, Scope and Protection of Real Property Rights Post Land Use Act 1978: An Over view).