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**A NEW DIMENSION TO THE CONSENT PROVISIONS IN
THE LAND USE ACT**

Introduction

Ever since the coming into force¹ of the Land Use Act,² a respectable volume of judicial and academic ink has been spilt on the exposition of the consent provisions³ thereof.⁴ However, all such previous attentions have been focused on either whether the consent of the State Governor/Local Government of customary/statutory right of occupancy, or whether such prior consent is an indispensable condition precedent for any valid alienation of usufructuary land right. This bi-partite issue provoked voluminous literature following the Supreme Court decision in *Savannah Bank of Nigeria Ltd. & Anor v. Ajilo & Anor*,⁵ that every holder of right of occupancy, whether statutory or customary, actual or deemed, requires the prior written consent of the Governor or Local Government as the case may be, for a valid alienation.⁶

It is proposed in this paper to examine whether, notwithstanding the apparently strait-jacketed Supreme Court decision in *Ajilo's case* (supra), a subsequent (rather than prior) requisite consent would still suffice. In other words, whether it suffices that consent was obtained at all, irrespective of whether such consent was prior or subsequent to alienation.

Consent, at What Stage?

The question of the stage at which the requisite consent should be obtained, particularly as relates to alienation of statutory right of occupancy, appears to be

¹ The Act came into force on March, 1978.

² See Cap. 202 of Vol. xi of Laws of The Federation of Nigeria, 1990.

³ See for instance Sections 21, 22, 23 and 26 of the Act.

⁴ For just a few of the many works in this area, see: Omotola, J.A. *Essays on The Land Use Act*, 1978, 1980 ed., P. 26 et. seq.; Wifa, B.M., *Essays on current Legal Problems*, Vol. 1, 1985 ed., Chapter 3; F.a. omotola, "The Supreme Court and the Land Use Act", (1988/89) 10 & 11 J.P.PL. at Pp. 1 - 7; J.A. Omotola, *Unifying the Right of Occupancy*". (1986/87) 6 & 7 J.P.P.L. Pp. 1 - 6.

⁵ (1989) All N.L.R. 26; (1989) 1 N. W.L.R. (Pt. 97) 305.

⁶ In this regard, note that a Power of Attorney, being merely an instrument of delegation does not require consent under the Act, notwithstanding that the donor empowers the donee to alienate land, See: *Ude V. Nwara* (1993) 2 N.W.L.R. (Pt. 278) 638 held No. 25.

clearly and convincingly answered by the first arm of section 22 of the Land Use Act itself which says, in part:

*"22(1) 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 ..."*⁷

A combination of the word "Shall" and the phrase "first had and obtained" in Section 22 appears, on first thought, to lead to the irresistible conclusion that the consent must mandatorily be sought and obtained before any alienation. Thus, in the Ajilo case the Supreme Court observed that the consent must be prior. But there, the view of the Supreme Court in the case was Obiter because since the issue before the Court was not the stage at which consent should be obtained but rather whether a deemed grantee of statutory right of occupancy also requires consent to alienate, full arguments were therefore not taken nor did the Supreme Court address the issue directly and fully. In the circumstance, Ajilo case may not be taken as having settled the issue as to whether consent must necessarily be prior. In fact, in the Ajilo case, consent was neither sought nor obtained at any stage of the transaction.

The issue of priority or otherwise of consent however came up frontally for decision in Awojugbagbe Light Industries Ltd. v. Chinukwe & Anor.⁸ In that case the appellant was granted a loan facility of ₦215,000.00 on 11th October, 1979 by the second respondent to establish a nail factory. The appellant mortgaged the property at Nos. 60-64 Abobielemu Layout, Ijebu Road, Ibadan to the second respondent. A deed of mortgage (Exh. E) was prepared. By Exh. H (a letter dated 13th February, 1980) the second respondent sent ten copies of Exhibit E1, a letter sent to the 2nd respondent that the Governor has given his consent to the mortgage on 12th September, 1985. After the letter was obtained, the mortgage deed was registered with the date "8th October, 1985" inserted in it as the date of execution. By 3rd February, 1987, the appellant was indebted to the 2nd respondent to the tune of ₦354,610.27. The 2nd respondent thereupon appointed the 1st respondent as Receiver to take over the factory and Property of the appellant with guards and dogs. The appellant then filed an action in Court claiming various declaratory and injunctive reliefs. The second respondent in turn counterclaimed for the sum of ₦354,610.27 with interest at the rate of 18% per annum. The learned trial Judge considered the

evidence and dismissed the appellant's claims, holding that there was no evidence that the deed of mortgage was executed before the consent of the Governor was obtained. On appeal however, the Court of Appeal held, inter alia, that:

"Where there was execution of the mortgage deed before the Governor gave his consent, contrary to the stipulation of Section 22 of the Land Use Act, the instrument cannot for reason of obtaining consent subsequent to execution render the document or instrument invalid in view of Section 22(2) of the Land Use Act."

Section 22(1) of the Act has already been reproduced above; but section 22(2) provides that:

"The Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy of the assignment, mortgage, or sub-lease 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 sub-section (1) may be signified by endorsement thereon."

In view of Section 22(2) therefore, the Court reasoned that by requiring an already executed instrument to be presented to the Governor for consent, it anticipates a situation where, in some cases, consent may be obtained subsequent to the alienation. In the words of the Court,

"There is nothing in the Act preventing prior execution of an instrument before an approach is made to the Governor for consent. So that the provision that the consent of the Governor must first be had and obtained before a mortgage can be made, means no more than that the agreement entered into will remain inchoate until the Governor's consent thereon is sought and obtained. Governor would be handicapped in his duty to protect public policy if he gives his consent blind folded. Public policy is better protected by his having foreknowledge of what he is called upon to consent to. Consenting to a sub-lease, mortgage, transfer of possession prior

⁷ *Emphasis mine.*

⁸ (1993) 1 N.W.L.R. (Pt. 270) 485.

⁹ At page 509

to the parties drawing up an agreement is analogous to buying a pig in the poke."¹⁰

The Court of Appeal drew inspiration from the Privy Council decision in Denning v. Edwards¹¹ where a provision for prior consent in Kenyan Crown Land Ordinance was judicially interpreted to allow for alienation before Governor's consent was obtained.

The Court of Appeal decision no doubt makes for good sense. It also removes the rough edges which the consent provision has had on alienees. Such alienees now know that the alienation is "inchoate" in so far as the Governor's consent is not yet obtained, but they have the assurance and satisfaction that when the consent is eventually obtained, nobody can thereafter challenge it for being subsequent. This interpretation thus maintains the Governor's consent as being of essence rather than a mere "routine affair" in the alienation. It is undoubtedly justified in view of Section 22(2) of the Land Use Act. Objections may only be taken if subsection(1) of that section is read in isolation. In fact even the opponents of this humane and accommodating interpretation concede, howbeit glibly, that some form of agreement representing the parties' consensus must have been reached before the Governor's consent is obtained.¹² It may further be noted that Section 22(2) talks of submission of an "instrument" for consent. There must therefore necessarily be an already executed instrument to which consent is required. A mere draft hardly qualifies for an "instrument."¹³

The issue of prior consent under Sections 15(b), 22 and 26 of the Land Use Act also came up, though tangentially, for decision in Ogunsola v. Nicon.¹⁴ The main issue for decision was whether it is illegal for a mortgage deed to be subsequently executed and Governor's consent obtained after the loan for which the mortgage is to be security has already been granted. The Court of Appeal, upholding the judgement of the trial High Court, held that it is not illegal for a loan agreement to be entered into without security and that a stipulation that such a loan agreement shall begin to operate at a date prior to the execution of deed of legal mortgage is not, per se, illegal or contrary to public policy. The Court of Appeal therefore held that since the consent of the Oyo State Governor

¹⁰ *Ibid*, at Pp. 509 - 510.

¹¹ (1961) A.C. 445. See also Solanke v. Abed & Anor (1962) All N.L.R. (Pt. 1) 230.

¹² See, e.g., Umezulike, I.A.: "The Heady Question of Execution of Mortgage Deed Before Consent - Awojubabge Light Industries Ltd. v. Chinumkwe Evaluated" (1993) Jus. Vol. 4 No. 3 Pp. 69 - 72.

¹³ For definition of "instrument," see: Oredola Okeya Trading Co. (Nig.) Ltd. v. A-G. Kwara State & Anor (1992) 7 N.W.L.R. (Pt. 254) 412 HELD 3, 4.

¹⁴ (1991) 4 N.W.L.R. (Pt. 188) 762.

was obtained to the deed of mortgage before its execution, such deed was validly made notwithstanding that the security was for a loan already advanced before the execution of the mortgage deed.¹⁵ The principle in this case therefore appears to be that where a mortgage deed is executed as security for a loan facility, it does not matter that the loan had already been granted prior to the mortgage security, but the date of execution of the deed must not precede the date of grant of the Governor's consent. Does this mean that the date of execution must be left blank and filled in only after the Governor's consent and date thereof have been endorsed thereon? This is indeed mere technicality. It should suffice that the Governor's consent has been obtained; the stage at which it is obtained should not be allowed to blur the essence of the transaction. In any event, the issue whether consent should be prior or subsequent was not frontally and fully addressed in the case as was done in the Chinukwe's case.

Much later, in Jacobson Engineering Co. Ltd. & Anor v. United Bank for Africa Ltd.,¹⁶ the issue on appeal was whether prior consent of the Governor is needed to create an equitable mortgage. After quoting the first arm of Section 22 of the Land Use Act the Court concluded that:

*"After the commencement of the Land Use Decree, whatever was created upon delivery of the Title Deed, whether equitable or legal mortgage, the law is the same and that is to the effect that the Bank cannot sell nor an order be made that the Bank should sell without the consent of the Minister first had and obtained."*¹⁷

In this case however there was no consent obtained at all, whether prior or subsequent to the equitable mortgage. So the issue of the stage of consent never arose frontally as it did in the Chinukwe case. Besides, subsection (2) of Section 22 of the Land Use Act was not considered at all, whereas same was exhaustively considered and given scholarly treatment in the Chinukwe Case.

Also deserving of at least a mention on this point, is the recent case of Union Bank of Nigeria Limited v. Adeuya.¹⁸ One of the issues for determination here was whether a Mortgage Deed executed on 28th March, 1983

¹⁵ *Ibid*, at Pp. 770 -771

¹⁶ (1993) 3 N.W.L.R. (Pt. 283) 586.

¹⁷ *Ibid*, at page 601, The use of "Minister" must be a slip; the Court must have intended to say "Governor".

¹⁸ (1993) 6 N.W.L.R. (Pt. 299) 375.

could be security for an overdraft granted much earlier since 1981.¹⁹ Governor's consent to the Mortgage was obtained on 10th September, 1980.²⁰ It may be noted here that in this case though Governor's consent was obtained before the execution of the Mortgage Deed, the priority or otherwise of the consent was not an issue.

Conclusion:

The liberal, humane interpretation of the consent provision given by the Court of Appeal in the Chinukwe case is wholly supported. So far, it is the only case wherein the issue, as raised by subsection 2 of section 22 of the Land Use Act, has been given full judicial attention. As has been stated above, the view of the Supreme Court in the Ajilo Case that the consent should be prior was Obiter because firstly, the issue of priority or otherwise of consent never arose for determination by the Supreme Court in that case; Secondly, Sub-section (2) of Section 22 was neither referred to nor discussed in that case. There is every likelihood that if the issue were to present itself before the Supreme Court, that court would also tow the same liberal, humane interpretative approach as did the Court of Appeal in the Chinukwe Case. The humane, liberal approach of the Supreme Court in interpreting the consent provisions in the Land Use Act is not new. For instance, the Act makes it the duty of the "holders" or alienor, as the case may be - to obtain consent to the alienation of right of occupancy. If one goes strictly by the wording/letter of Section 22(1) and Section 26, it would not matter whether the failure to obtain consent is caused by the alienor, the transaction would simply be totally null and void and of no effect. But the Supreme Court has always refused to take this hard-line attitude. In Ajilo's Case, for instance, the issue was raised in the trial High Court as to whether the grantors of those rights, whose duty it is to obtain such consent should be allowed to seek to invalidate the transaction for lack of Governor's consent. The issue was however merely raised but not canvassed in the Court of Appeal and Supreme Court, both of which only considered whether deemed grant also needed consent.²¹ But the Supreme Court had opportunity to consider the situation in a few other cases.

¹⁹ *Ibid*, at page 382.

²⁰ *Ibid*.

²¹ See: Omotala, J.A.: "Interpreting the Land Use Act", The Journal of Nigerian Law, Vol. 1, at Pp. 109-120.

In Solanke v. Abed & Anor,²² the Federal Supreme Court, in considering a similar consent provision in the Land and Native Rights Act, held, inter alia, that:

*"An occupier of lands subject to the land and Native Rights Act, who, without the consent of the Governor, lets part of the land to a Tenant under a Tenancy Agreement and permits him to enter into occupation under the agreement, cannot, as against the Tenant, in an Action for Trespass brought by the Tenant, rely upon his own wrongful act, so as to allege that the Tenancy Agreement was null and void and unenforceable under Section 11 of the Act."*²³

A similar humane, equitable note was sounded in another respect by the Supreme Court in Oilfield Supply Centre Ltd. v. Johnson,²⁴ when it said:

*"It is the appellant who should have applied for a permit for him and failed to, before he helped them found company that now intends to meet him with illegality perpetrated by the same company. Certainly Equity will not permit an "Action" that is a complaint by the Appellants, based on their own default, to arise."*²⁵

And in Adedeji v. National Bank of Nigeria Ltd. & Anor,²⁶ the Court of Appeal, taking a cue from the Supreme Court, invoked the equitable principles in favor of a mortgagee where the mortgagor had failed to obtain the Governor's consent. There, the appellant, by Deed of Legal Mortgage dated 7/3/80, mortgaged his landed property at Opebi Village, Ikeja, to the 1st respondent for a building loan of ₦200,000.00 to enable him complete the buildings on the land. The appellant defaulted in the payment of the loan and the 1st respondent instructed the 2nd respondent, and auctioneer, to carry out the sale of the land; whereupon the appellant commenced legal action at the High Court claiming to be granted his right of equity of redemption in respect of the property and an injunction to restrain the respondents from interfering with the land or taking any

²² (1962) All N.L.R. (Pt. 1) 230.

²³ *Ibid*, held No. 4.

²⁴ (1987) All N.L.R. 446.

²⁵ *Ibid*, held No. 4.

²⁶ (1989) 1 N.W.L.R. (Pt. 96) 212.

step to sell it until the final determination of the Suit. The learned trial High Court Judge dismissed the action on the ground that it was not brought in good faith and therefore was an abuse of Court process. On appeal, the appellant's sole complaint was that the Deed of Legal Mortgage dated 7/3/80 was null and void and could not be relied upon as the required consent of the Military Governor was not obtained thereto in accordance with Section 22 of the Land Use Act. The Court of Appeal held that a transaction will not be declared null and void for failure to obtain approval at the instance of the party, be he the Plaintiff or Defendant, whose responsibility it is to seek and obtain the approval.²⁷

In sum therefore, the cases where the Supreme Court and the Court of Appeal have stated that consent must be prior, the statements have been mere assumptions: The Courts normally just assumed that it should be so, apparently based on Section 22(1) of the Land Use Act; subsection (2) of the Section has never been given a thought. It may therefore be said that the Court of Appeal ***refused to abide by the age-old doctrine of judicial precedent in the Chinukwe Case***, for this case can be distinguished from all others. It is hoped that before long the Supreme Court will have an opportunity to have a final say in this new dimension to the consent provision in the Land Use Act.

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²⁷ *Ibid*, held No. 9.