

Secured Credit in a Global Economy

- Challenges and Prospects



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CHAPTER 3

LAND POLICY AND SECURITY IN NIGERIA*

INTRODUCTION

It is a fact now universally acknowledged that a country's development requires meaningful private sector participation. Nigeria's development is not an exception. Indeed, by 1997, small, private businesses (both formal and informal) were believed to contribute about 20 per cent of the Gross Domestic Product and amount for about 70 per cent of individual employment.¹

The private sector on the other hand, requires capital in order to be enabled to make the much-desired contribution to national development. One sure way of raising such capital outlay is by the use of land (or land right) as security for credit financing.² It is in this context that one must see the importance and contemporary relevance of a land policy that facilitates security. The burden of this chapter is to identify Nigeria's land policy and to see what nexus there is between the land policy and security; how the existing land policy has impacted on security.

But, as a preliminary issue, what is meant by "land policy"? Or, to take it disjunctively, what is "land", and what is "security" in this context?

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1 Adegbite, O: "SME Development under the Structural Adjustment Programme in Nigeria", *Small Enterprise Development (An International Journal)*, Vol. 8 No. 4 Dec. 1997, pp.4-17 at p. 5

2 See Enefiok Essien, "Land Pledge for Secured Credit Financing in Africa: Nigeria and Ghana" *National Black Law Journal*, (University of Columbia, USA) Vol. 2 Issue 2 (1999) p.16

PRELIMINARIES

Land

A need for clarity as to the meaning of land cannot be more necessary than in the area of the law of securities. The reason for this is, quite often, what is given as security is not the bare land or the earth's surface. Indeed, the bare land would in most cases not be of much value to the lender. "Land" is used here in the common law sense. It extends both vertically and horizontally to include everything upon, in or under the earth, from the surface of the earth downward to the earth's centre and also everything above the earth up to the heavens.³ Very significantly, "land" includes the fixtures on it. For this purpose, a fixture is an article which, by its annexation to the land, has lost its chattel nature and has become, in the eye of the law, part and parcel of the realty.⁴ It has for long now become a maxim of law that "whatever is affixed to the soil belongs thereto".⁵ The term land thus includes the developments or improvements on the land.

Statutory definitions of land are basically in consonance with common law. The Interpretation Act,⁶ for instance, while not defining "land," states what it includes: "any building or any other thing attached to the earth or permanently fastened to anything so attached, but does not include minerals".⁷ Much Nigerian legislation from 1914 has consistently excluded mineral from the definition of

3 *Re Wilson Syndicate Conveyances, Wilson v. Shorak* [1938] 3 All ER 599 at 602.

4 *Per Birkett J. in Hulme v. Brigam* [1943] 1K. B. 152 at 154.

5 *Quicquid plantatur solo, solo cedit*, See: Theobald, H. S.: *The Law of Land*, 2nd edn. London (1929) p. 215; Kersley, M. A.: *Broom's Legal Maxims*, 10th edn., p. 262. On when a chattel loses its chattel character and becomes a fixture, see: *Holland v. Hodgson* [1872] L.R 7 CP 328; *Wiltshire v. Cottrell* [1853] 1 E & B 674, Vol. 118 ER 5896

7 Cap. 192, LFN 1990. s.18(1). It has been held that a "reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit" per Mellish, L. J. in *Hext v. Gill* [1872] 7 Cha. App. 699 at 712; *Johnstone v. Crompton & Co.* [1899] 2 Ch. 190 at 197. For statutory definition of "minerals", see Cap 226 Laws of the Federation of Nigeria 1990.

land and has vested mineral in the government. These include the Petroleum Act 1918,⁸ Minerals Act 1946⁹ and Mineral Oils Act 1948.¹⁰ For the purpose of this paper, however, the issue is not who owns the minerals, or whether “land” includes minerals but rather, where does the land terminate, for it is possible for the individual (or group) to own land while government owns the minerals in the land.¹¹ It is in recognition of this that the Registered Land Act 1965¹² defines land to include “all things growing on the land and buildings and other things permanently affixed thereto, and where land is covered with water, the land itself, but does not include water or any mine, minerals, mineral oil or mineral gas”.¹³ This means that a submerged land, or land which elongates seaward under water, is still land and part and parcel of the land territory from which it elongates. It is for this reason that the continental shelf, an internationally agreed minimum area of 200-mile sub-water land prolongation, is part of the land territory to which it appertains.¹⁴ It is also on this basis that the 1960 Constitution provided by section 134(6) that for the purpose of revenue allocation, the continental shelf of a region shall be deemed to be part of that region. There is no doubt that private developments in the continental shelf can be given as security for credit finance.

Land which may be subject of security thus goes beyond the earth’s surface to the very depth of the earth, excepting minerals, and includes the fixtures to land and the sea-ward prolongations of the solid land territory to the extent allowed by law to the country, and by extension to the respective littoral states.

Security

We talk about security where the creditor, in addition to the personal

8 See now Cap. 350 LFN 1990

9 See now Cap. 226 LFN 1990

10 repeated by 1969, No. 51

11 This is indeed the case in Nigeria.

12 Which applies only to Lagos

13 s. 166 (emphasis mine).

14 Article 76 of the United Nations Convention on the Law of the Sea 1982. Nigeria is a party to this Convention.

promise of the debtor to discharge the obligation, obtains rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of debtor’s obligation to the creditor.¹⁵ This makes it clear that real security (as apposed to personal promise – or personal security) is contemplated. This may take the form of a mortgage of the land, a charge or a pledge.

LAND POLICY

When we talk of “land policy” we have in mind a well thought-out system of land administration and management. Nigeria’s land policy has, in course of time, imbibed West African, East African and British colonial influences.¹⁶

After exhaustive discussions of the “West African Land Tenure Question”¹⁷ in 1912, the West African Lands Committee deduced three major competing land policies. These are the policies of **dualism**,¹⁸ **paternalism**,¹⁹ and **transformation**.²⁰ Nigeria (or parts thereof) has at different times adopted one or the other of these land policies.

Dualism relates to the concurrent application of traditional as well as received land tenures. Expectedly, dualism is characterized by legal pluralism and is riddled with choice of law problems. It led to

15 *Bristol Airport PLC v. Powdrill* [1990] 2All ER 493 at 502; Enefiok Essien, *Law of Credit and Security in Nigeria*. (2002) p. 44; Sykes, E. I. and Walker, S. : *The Law of Securities* (1993) p.12-13; Gough, W.J.: *Company Charges* (1996) p.4

16 As once noted by Oputa, JSC in *Folarin v. Durojaiye* [1988] 1 NWLR (Pt. 70) 35 at 364, “Our Colonial contact with England exposed us to English common law and statutes of general application. English law itself was highly coloured and radically influenced by Roman law concepts as England was once a Roman colony, and the American Restatement bears visible scars and easily discernable marks of its English common law origin”.

17 Meek, C.K. : *Land and Customs in the Colonies*, 2nd edn., pp. 177 et seq.

18 See Park, A. E. W.: “A Dual System of Land Tenure: The Experience of Southern Nigeria” (1965) JAL vol. 9, p.1; Olawoye, C.O.: *Title to Land in Nigeria* (Evans Bros) (1974), Chapter 2; James, R. W.: *Nigeria Land Use Act: Policy and Principles* (1987) p. 7

19 Also referred to as the “Northern Nigeria Land Policy”, having been first recommended in the Report of the Northern Nigeria Lands Committee 1908.

20. First recommended in the Report of the East African Royal Commission on Land and Population, Cmd. 9475.

a multitude of limping land transactions, i.e., transactions that were valid under the traditional law but invalid under the received law. It engendered uncertainties of titles due to defective conveyancing machinery and the absence of documentary roots of title. The absence of title deeds rendered customary tenants unable to raise money on the security of their lands. Dualism operated mostly in the Southern part of Nigeria from, during and, for some time, after the period of colonialism. This is because unlike in Northern Nigeria, land in the South was not “at the disposal and under the control of the Governor”.²¹

The colonial government showed no desire to interfere with the pre-existing customary tenure and its natural evolution. This is because, in the view of Lord Lugard, it seemed preferable that the natural evolution of land tenure should not be arbitrarily interfered with, either on the one hand by introducing foreign principles and theories not understood by the peoples, or on the other hand, by arresting progress in evolution, by stereotyping by legislation primitive systems which were in a transitional state.²² One has always wondered why the Colonial Government found it unnecessary to interfere with land tenure in the South and instead adopted dualism, but adopted a different policy in the North.²³ The truth appears to be that the colonial government had in fact planned to also “nationalize” land and introduce the right of occupancy policy in the South, as in the North, but was afraid of the public reactions because “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

21 Essien, Enefiok: *Law of Credit and Security in Nigeria* (2000) at p. 106. The advantage of dualism in the legal system is said to be the possible evolution of a system presently based on indigenous forms of social and economic organisations. Thus, it is argued, land tenure should not be a total transformation: James, R. W.: *Nigerian Land Use Act: Policy and Principles*, *op. cit.* at p. 9.

22 Lugard, F. D.: Political Memoranda, No. 10-Lands, para 31

23 Essien, Enefiok, *op. cit.* at p. 107

ownership of the land beyond the term of his own life”.²⁴ In fact in 1911 the Secretary of State for the Colonies had reportedly enquired whether the Northern Nigeria law could be applied in the South.²⁵ A Committee was set up to enquire into land questions but this provoked fear and reactions in the inhabitants that land rents would be introduced,²⁶ and so the Committee ceased to sit.²⁷

In the course of time, dualism was supplemented with paternalism. Both policies therefore went on concurrently, the latter supplementing the earlier one rather than substituting it. By promulgation of “benign laws”, the Colonial Government restricted its involvement in land matters in Southern Nigeria to administrative controls, particularly in restricting the alienation of lands to aliens (i.e. non-Nigerians). It was this protective, paternalistic land policy that later prompted the Colonial Government, to vest all lands and rights within the Southern Provinces in the Governor in trust for Her Majesty.²⁸ Even when the rights had become so “vested” in the Governor in trust for Her Majesty, thus suggesting absolute title in the Government, the “natives” and other occupiers still occupied *nec vi, nec clam, nec precario* and exercised all rights to the land in accordance with customary law. This paternalistic policy as explained by Meek, is that “even where the State had sometimes seemed to have made an unwarranted claim to legal ownership this claim has been made with the express purpose of protecting the actual ownership of the native communities”.²⁹

Full paternalism was applied much earlier in Northern Nigeria. The pre-colonial conditions and nature of traditional land holding in

24 Lugard, F. D., *op. cit.*, para 38

25 *Ibid*, para 31

26 *Ibid*

27 *Ibid*, para 30

28 Niger Lands Transfer Ordinance 1916, s. 3.

29 Meek, C. K.; “A Note on Crown Lands in the Colonies”, *Journal of Comparative Legislation and International Law*, 3rd Series, vol. xxvii (1946) parts iii and iv at p. 91. This paternalistic policy may also be given as the reasoning behind the holding in *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 AC 399, that the Crown’s radical title was in reality a “Comparatively Limited Right(s) of Administrative Interference”.

the North were congenial to the early adoption of this policy. Just a bit of legal history will be useful here.

In the early nineteenth century, most of Northern Nigeria³⁰ was conquered by the Fulani in a religious war variously described as the Fulani, the Sokoto or the Usman Dan Fodio jihad. Following the conquest, the Fulani took over all lands in the conquered areas (excepting Sokoto and Gwandu, because these had already been Muslim areas) in conformity with the Maliki Law of Islam which stipulates that 'all lands which come into the possession of the Faithful through conquest became *wakf*, that is, are tied up immediately after the conquest'.³¹ The *wakf* land was regarded as public property (in the sense that it was vested in Allah through the muslim community) over which no individual could have radical title.³² The area was placed under the control of the Emir, who was the political, judicial and spiritual leader.³³ The conquered people remained on the land but paid tribute to Islam.³⁴

Though land became held by the emirs under the Fulani rule, the Emirs merely held the land for the common benefit of the Muslim community in accordance with Islamic doctrines. They thus held it "in trust" for the people, with the Emirs having no beneficial interest or proprietary right to the land.³⁵ The Emir was just in the same position as the chief or headman described by the Privy Council in the *Amodu Tijani case, supra* except that he had a relatively much larger constituency which transcended family and village bonds.

30 Excepting the old Bornu Kingdom and a few ethnic groups, such as the jukuns, which successfully resisted conquest by the Fulani jihad, though they were later incorporated into emirate system of Northern Nigeria: Lubeck, P. M.: *Islam and Urban Labour in Northern Nigeria*, (Cambridge University Press) 1986, p. 165.

31 Ruxton, F. H.; *Maliki Law*. Oxford; O.U.P., 1916.

32 It is reported however that this was ignored in the first flush of conquest, as extensive grants were made, in Zaria for instance, to the principal Fulani conquerors: Smith, M. G.; *The Economy of Hausa Communities in Zaria London*: M. S., 1955, p. 105.

33 Yakubu, M. G.; *Land Law in Nigeria, op. cit.* p.10

34 The point has already been made above that the tributes were probably not for the land but for the land produce. See further. Orr, C. W. J.: *The Making of Northern Nigeria, op. cit.* 5102, p. 29; Lugard, F. D.: Political Memoranda, No. 10 - Lands, para.8

35 Lugard, F. D., *ibid*, para. 7; Keith, A. B.: "Land Tenure in Nigeria", (1912) Journal of African Society, p. 245.

This later fact brought about a weakening of the system of communal land ownership as it existed prior to the Fulani rule, because the position of the Emirs who held the land in trust for the inhabitants and allocated portions to them in return for their paying tributes or tithes can hardly be equated with that of the erstwhile family or village heads. The control by the Emirs was more centralized and each person obtained land not on the basis of his family or village bond but on individual basis.

Between 1902 and 1903 the British Government conquered Northern Nigeria and took over the "ultimate rights in the land". As put by Lord Lugard³⁶:

When Northern Nigeria was conquered in 1902-3, each of the present Emirs was appointed by me on terms embodied in a "Letter of appointment"... in which, *inter alia*, the ultimate rights in the land, *in so far as they were held by the Fulani dynasty as conquerors* were transferred to the British Crown. No attempt was made at the time to define those rights.... It may be argued that under the law of Islam, the right of the conqueror to *unrestricted ownership* of the land is recognized.

It is arguable that what the British Crown took over was "ownership" in the sense of power of "control", which is what was vested in and exercised by the Emirs as earlier stated, and not "unrestricted ownership" as stated by Lord Lugard, which the Emirs never had.³⁷ Indeed Lord Lugard himself have stated that the Emirs only "owned" in the "native sense".³⁸

With Lord Lugard as Governor of Northern Nigeria, and subsequently succeeded by Percy Girouard, land legislation was introduced in the area, commencing statutory land tenure. The first

36 Lugard, F. D.: *ibid*, para 7 (second emphasis mine)

37 Also, McDowell, C. M.: "The Breakdown of Traditional Land Tenure System in Nigeria", in Gluckman, M.(ed.): *Ideas and Procedures in African Customary Law, op. cit.*, p. 267 at 272.

38 Lugard F. D. *Political Memoranda*, No. 10- Lands para 25.

was the Public Lands Proclamation of 1902,³⁹ which divided all the lands in Northern Nigeria into two, namely, Crown lands and Public Lands.

Crown lands comprised mainly the lands acquired from the Royal Niger Company and certain other lands taken up by government for public purpose, e.g., as sites of various provincial headquarters, like Zungeru and Lokoja.⁴⁰ These were placed under the direct control of Government, by s. 4(1) of the Crown Lands Proclamation, 1902. The Crown considered that it had beneficial interest in the lands acquired from the Royal Niger Company. This view was mistaken because it was premised on the erroneous belief that the Royal Niger Company itself had such beneficial interest conveyed to them from the local chiefs by private treaties concluded between the company and the chiefs between 1885 and 1890. The point has already been made that the chiefs were not owners of the lands; they were mere “trustees” for the communities and their powers in relation to the lands were limited to control and administration. In his reply to his Excellency the Governor in the Northern Nigeria Lands Committee,⁴¹ Sir M. R. Menendez, C. J. said “According to native law and custom lands are vested in the chiefs as trustees for the communities under them. Under no circumstances may a trustee part with the fee simple. This can only be done with the consent of the community”.

It may be argued that in transferring interest in the land to the Royal Niger Company the chiefs did so as agents of the communities in the sense that their authority derived from the tacit assents of the members, but they exceeded such authority if they purported to convey a beneficial interest.⁴² Such conveyance would be *ultra vires* their power and therefore void. It does appear clear however that the chiefs never intended to convey a beneficial interest to the

company. Lord Lugard himself had stated elsewhere⁴³ that these chiefs had protested against any claim by the Royal Niger Company that the private treaties they had entered into transferred beneficial interest in the land to the company. The claim by the British Government to beneficial interest in these lands, based on such interest in the Royal Niger Company, cannot be sustainable.

Public lands on the other hand, comprised all land which upon conquest the British Government took over from the Fulani leaders, and included the lands held by the few ethnic groups that had successfully resisted the Fulani jihad. Government restricted its control in respect of public lands to the requirement for consent of the Governor to any alienation to a non-native.⁴⁴

The Proclamation of 1902 was succeeded by the Land and Native Rights Proclamation, 1910,⁴⁵ which abolished the bi-partite division of lands into Crown and Public lands and provided that “all right of control over the lands of Northern Nigeria, occupied or unoccupied, have passed to the Government”⁴⁶ to be administered to the common benefit of natives. The proclamation thus limited the Government’s interest to “control” and acknowledged impliedly that that was all the chiefs had had. It also provided for the requirement of Governor’s consent to any alienation of land to a non-native.

Next was the Lands and Native Rights Ordinance 1916,⁴⁷ which revived and substantially re-enacted the 1910 Proclamation, and confirmed for Northern Nigeria that there could be no absolute titles to lands held by “natives” nor by “non-natives” and that at best occupiers could only hold “rights of occupancy” under the law, rights which were severely limited and controlled.⁴⁸ Section 4 of the Ordinance provided:

43 Lugard F. D.: “Annual Report on Northern Nigeria”, 1902, pp. 157-160.

44 s. 5; Lugard F. D.: *Political Memoranda*, No. 10 Lands, para 15.

45 No. 9 of 1910.

46 s.3

47 No. 1 of 1916

48 Allot A. N.: “Nigerian Land Use Decree”, ([1978] .22 J.A. L. pp. 136-160; McDowell, C. M.: “Trespass and Title in The Northern States of Nigeria” (1973) 17 J.A.L. pp.94-115.

39 No. 13 of 1902

40 See C. W. J.: *The Making of Northern Nigeria*, op. cit., p. 244.

41 See Appendix iv at page 31 of the Minutes of Evidence And Appendix at the Northern Nigeria Land Committee, [Cd. 5103] London: O. U.P., 1910.

42 Perham, M.: *Native Administration in Nigeria*. London O. U. P., 1937, p. 305.

All lands and rights over the same are hereby declared to be under the control and subject to the disposition of the Government and shall be held and administered for the use and common benefits of all natives and no title to the occupation and use of such land shall be valid without the consent of the Governor.

The ordinance thus completed the shift in emphasis from the family control of the land by the family heads and community chiefs, from local control of land by the Emirs, to central control by the Governor. It lay with the Governor under section 6, to grant rights of occupancy and issue certificate of occupancy periodically. No provision was made for freehold. All existing native lands to land were thus expunged, at least theoretically, leaving the natives as rent-paying, short-term lessees completely at the mercy of the Government. In practice, however, the natives continued to hold land as before, not paying rent and not having a determinable tenure. The reason for this disparity between theory and practice is explained Lord Lugard at page 292 of his *Dual Mandate* when he said:

Since, however, it was obviously impossible to issue certificates to millions of native occupiers, with no adequate staff or survey, the Colonial Office decided that native holders might continue to be dealt with by their rulers, acting in theory as delegates of the Governor. In the result, therefore, no certificates (without which rent is not chargeable) were issued and the law remained a dead letter so far as native occupiers were concerned. They were unaware that it had declared their titles to be invalid, unless granted under a certificate by the Governor.

The 1916 Ordinance was later revised and largely re-enacted by the Land Tenure Law 1962⁴⁹ following Nigeria's independence in 1960. It is remarkable that the 1916 Ordinance lasted for so long without a change or repeal even after the Northern Nigeria achieved self-government in 1959. It is not within the province of this work to examine the reason for its longevity. These may be found

49 Cap. 59, Laws of Northern Nigeria, 1963.

elsewhere.⁵⁰ The few modifications to the 1916 Ordinance which were reflected in the Land Tenure Law were such as to reflect the socio-political changes in Northern Nigeria as a result of Nigeria's independence. Thus, all lands in Northern Nigeria became under the control and subject to the disposition of the Minister for Land and Survey whose duty it became to administer the land for the use and common benefit of all natives of Northern Nigeria; and, under s.6(1), to grant right of occupancy, say for grazing, building purposes, and to issue right of occupancy to the grantee of a certificate of occupancy in evidence of the grant,⁵¹ and in proof that the grantee thus had "exclusive right to the land subject of the right of occupancy against all persons other than the Minister".⁵² His consent was also now required for alienation of the land.⁵³ Under s.34(1) of the Law, Government could revoke the right of occupancy for "good cause", which included non-payment of rent and other dues as specified in the grant, alienation of a right contrary to the provisions of the law (e.g without the requisite prior consent), or where the land is to be used for "public purpose".

The main drawback of the paternalistic land policy is that it is discriminatory in so far as it aims at securing the right of occupation and use only of a particular ethnic group. Under the Land Tenure Law 1962, for instance, all lands were brought under the control and subject to the disposition of the Minister for Lands and Survey, for the use and benefit of all natives⁵⁴ of Northern Nigeria.⁵⁵ The

50 Nwabueze, B. O. *Nigerian Land Law, op. cit.*, pp. 235-239; Elias, T. O.: *Nigerian Land Law, op. cit.*, pp. 18-27; Yakubu M. G.: *Land Law in Nigeria, op. cit.*, pp. 15-20.

51 s. 10(1) Land Tenure Law, 1962.

52 s.19, *ibid*

53 ss.27, 28, *ibid*.

54 Section 2 of the Law defines "native" to mean a person whose father was a member of any tribe indigenous to Northern Nigeria. Even the preamble to the Law clarifies the intention of the Law to be the assurance, protection and preservation of "the existing rights of the natives of Northern Nigeria to use and enjoy the land of the Region and the natural fruits thereof". This is now overtaken by the Land Use Act 1978 which applies generally, and requires that the land be held for the benefit of "all Nigerians". Though the Land Tenure Law is preserved as an 'existing law' under S. 317 of the 1999 Constitution, the section that lands in Northern Nigeria are to be held for the benefit of all natives of Northern Nigeria is pro tanto void as it negates the constitutional right of all Nigerians to hold or "own" landed property anywhere in Nigeria.

55 s. 15 of the Land Tenure Law.

policy of paternalism was much later adopted for the whole country through the Land Use Act 1978. This will be discussed later.

The transformation policy requires a radical somersault from the traditionally communal policy of land holding. It requires the evolution of individual land holding which is then registered, thus ensuring security of title and reducing litigations and disputations over title, and the attendant costs. Registration policy was introduced in Lagos but turned out to be "quite limited in scope"⁵⁶ among other defects.

The present land policy in Nigeria has been variously described as that of **Trusteeship** or **Nationalisation**. But which is it? The policy is embodied in the Land Use Act 1978, section 1 of which states:

Subject to the provisions of this Decree, all land comprised in the territory of each State in the federation are (sic) hereby vested in the military Governor of that 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.

Without expressly saying so, the section has the effect, particularly in the Southern part of Nigeria, or divesting the allodial titles to land from communities, villages, families and individuals, and expressly vesting the same in the Military Governors⁵⁷ of the States in trust for the people. Thus the "Military Governor", which term today signifies "[Civilian] Governor"⁵⁸ takes over the pre-1978 allodial land. The family or community, as the case may be, no longer has the allodial title.

56 Registered Land Act, 1965 (Lagos); Willoughby, P. G.: "Land Registration in Nigeria: Past, Present and Future" (1965) N.L.J. 260

57 *Dzungwe v. Gbisha* [1985] 2 N.W.L.R. (Pt.8) 528; *Savanah Bank Ltd. v. Ajilo* [1989] 1 N.W.L.R. (Pt.97) 305; *Adenipekun v. Onigemo* [1983] 10 DSLR 85 at 88; *Salami v. Oke* [1987] 4 N.W.L.R. (Pt.63) 1, [1987] 9-10 S.C. 43

58 There was controversy whether the term "Military Governor" includes civilian Governor. This has now been resolved. In *Nkwocha v. Governor of Anambra State & 2 Ors* [1984] 6 S.C. 362, the Supreme Court settled the issue by holding that by virtue of s. 276 of the 1979 Constitution, a civilian governor could operate the Land Use Act.

With the Act too, the radical title which individuals had in their personally acquired land can no longer be acquired by them. The point that no person or group has an allodial title to land was vividly captured by Kolawole, JCA, when he said that "the mischief [sic] aimed at by the Land Use Act was the abrogation of absolute ownership or freehold interest by the community, family and the individual."⁵⁹ Obaseki, JSC, went even further in a paper he delivered to the Nigerian Association of Law Teachers in 1988 when he said,⁶⁰ "[i]t is an understatement to say that this Decree or Act abrogated the right of ownership of land hitherto enjoyed by all Nigerians. Whereas a Nigeria would own land absolutely anywhere in the Southern States of Nigeria, this took away from him that right of ownership."

The vesting of land within the state territory in the State Governor has an express exception: all lands which were held by the Federal Government or by any agency⁶¹ of the Federal government at the commencement of the Act continue to be vested in the Federal Government or the Federal agency.⁶² The Act does not state in whom vests the land comprised in the Federal Capital Territory. However, since this is a separate territory and does not form part of any State, it would not vest in the state Governor; it probably vests in the Federal Government.⁶³

It is arguable that though the Act now vests the allodial title in the Governor, this does not preclude the continuance of lesser land rights which were previously held by the allodial owners, for example,

59 *Sule Shado v. Mustapha Alao*, Unreported suit No. CA/L/159/84 of 7/10/85.

60 Quoted by Nnamani, JSC, in "The Land Use Act -11 Years After" *op.cit.*, p. 36.

61 By s. 49(2) of the Act, "agency" here "includes any statutory corporation or any other statutory body (whether corporate or unincorporated) or any company wholly-owned by the Federal Government".

62 s. 49(1)

63 Particularly in view of 317(1)(b) of the Constitution of the Federal Republic of Nigeria, 1999, which provides that "any property, right... which immediately before the date when this section comes into force was vested in ... the former authority of the Federation... shall" without further assurance vest in the President and Government of the Federation. See also: James, R. W. : *Nigerian Land Use Act: Policy and Principles*, (Ile-Ife: University Press, 1987) p. 34.

rights they held whether landlords, lessors, mortgagors or pledgors, notwithstanding that such lesser rights were dependent on the allodial title. This can be the only explanation why the former allodial owners are still free to create lesser interests than their own, such as subleases and encumbrances such as mortgages and pledges, even though they no longer have the allodial title.⁶⁴ There is, however, the opposing view that by vesting the allodial title in the Governor every pre-existing right or interest in land had been divested from the erstwhile allodial owners and transferred to the Governor. This view is based on the argument that by vesting land in the state in the Governor, the Act has ‘nationalised’ all land. According to Kayode JSC in the *Nkwocha Case*, “the tenor of the Act as a single piece of legislation is the nationalization of all lands in the country and vesting of its ownership in the state...”

To “nationalise” in this context literally means “to bring under the control of, to make the property of, the nation”⁶⁵; or “to vest the control, ownership or the like, of in the nation”.⁶⁶ As a legal concept, nationalization is a specie of expropriation and involves a complete takeover with a view to continued exploitation by the state in lieu of exploitation by private persons; it involves the determination of all pre-existing private interests and rights, and leaves no room for the creation of future ones.⁶⁷ One might say that the vesting of the allodial title to land in the Governor has nationalized land in the literal sense because the ownership and control of land are now in the government. But legally, land has not been nationalized because,

64 With the only limitation that they now need the Governor’s consent to do so. Section 21, for instance, allows prospective creation of lesser interests in land in non-urban areas, with the only limitation that the approval of the Local Government is needed. In *Abioye v. Yakubu* [1991] 5 N. W. L. R. (Pt. 190) 130, the Supreme Court held at page 237: “The only change in the law which is justifiably described as radical is that the radical title no longer vests in the family, community or individual at customary law. It now vests in the Governor. But within the plenitude of the holding, the community, family or individual can still make valid alienation, subject to the consent or restriction imposed under the Land Use Act”. Also: *Salami v. Oke* [1987] 4 N. W. L. R. (Pt.63) 1.

65 *The Shorter Oxford English Dictionary on Historical Principles*, vol.2, 2nd. edn. Oxford; Clarendon Press, 1936.

66 *Webster’s New International Dictionary* (London: Bell & Sons Ltd., 1928).

67 *Iranian Oil Company v. Kaisha* [1953] I. L. R. 305. The case considered the effect of the Nationalization Law of Iran which deprived oil companies of their rights and interests.

as already stated above, pre-existing private rights and interests still exist in land and future ones can be created; and under the Act, no compensation is payable to the allodial owners as would have been done in the case of nationalization.⁶⁸

It is our view therefore that the vesting of land in the Governor does not nationalize land, it only transfers the allodial title from the former allodial owners to the Governor, leaving intact all lesser rights. If by the vesting of land in the Governor, he thereby took over all rights in addition to the allodial title⁶⁹, all previous land rights would have been extinguished and the Act would not have given further opportunity for prospective land transactions. This would have worked against the use of land as security and the role of land in national development because it would have, from the date of the vesting, deprived individuals of the ability to raise money on the security of land even if the land lay unutilized or under-utilised.

In the light of the foregoing argument, it cannot be said that the land policy in Nigeria as created under the Land Use Act 1978, is that of nationalization. Rather, the land policy is that of trusteeship. This is immediately obvious from the provision of section 1 of the *Land Use Act*⁷⁰ which has been quoted above *in extenso*. Trusteeship aims at securing the implementation of fundamental objectives of national policies and proscribes discrimination in land matters: land is to be administered for the benefit of “all Nigerians”, not just a section of Nigerians.

Some have said that the trust so created by the Act is “obscure”⁷¹,

68 Where there is no compensation it would most probably amount to confiscation rather than nationalization (or expropriation). This is generally a rule of international law but it shows state practice and the justice in it would probably make it applicable municipally.

69 Nnamani, JSC says it is a ‘partial nationalization’: “The Land Use Act – 11Years” *op. cit.*, at p.36. Our view is that either there is a nationalization or there is not; if it is “partial”, then it is no nationalization.

70 *Nkwocha v. Governor of Anambra State & 2 Ors* [1984] 6S.C. 362 at 364; *Salati v. Shehu* [1986] 1 NWLR (Pt. 15) 198 at 209.

71 Omotola, J. A.: “Does as the Land Use Act Expropriate?” (1985) 3 JPPL 1; Umezulike, I. A., “Does the Land Use Act Expropriate? – Another View” (1986) JPPL 61

that “it must either be a strange trust or no trust at all”⁷²; and others have maintained that it is either a true trust⁷³ or a “pretentious trusteeship”⁷⁴. It has been judicially described variously as a “legal trust”⁷⁵ and a “bare trust”.⁷⁶ Again it is not within the province of this paper to discuss the trusteeship concept under the Land Use Act. This may be found elsewhere⁷⁷. However, it is necessary to show howbeit summarily, that Nigeria’s land policy is that of trusteeship, particularly as there has been great opposition to this view. There can be no better way to do this than by debunking the arguments often advanced against the trusteeship policy.

One argument is that under the *Land Use Act*, the Governor is a trustee by virtue of his office rather than by being specifically appointed by an instrument in writing or under an order of court as laid down in the law of trusts.⁷⁸ The vehemence with which this view is held is brought out by Umezulike when he said⁷⁹, “But the Governor exercising powers under the Act is first and primarily appointed into a political office and his “trusteeship, if any, arises incidentally *virtute-officii*. And a trustee *virtute-officii* is a startling proposition under the English law. It is unheard of.”

With respect to learned writer, we view with great suspicion the proposition that a trust by virtue of office is unheard of and a startling proposition in English law. Not even in Nigerian law. As shown above, the Governor’s trusteeship is derived from the statutory provision that he is to hold the land ‘in trust... for...all Nigerians’. English law has since the nineteenth century recognized that the

72 Umezulike, I.A.: “The Concept of Trust under the Land Use Act 1978 – a Reality or An illusion?” (1992) JUSTICE, vol. 3 Nos. 9-10, pp. 98 -108.

73 Fekumo, J. A.: “Does the Land Use Act Expropriate? - A Rejoinder” (1987) 8-9 JPPL 5.

74 Report of Presidential Committee on the Review of the 1999 Constitution, vol. 1 (Main Report) February 2001 para. 19.1 (at page 64).

75 *Nkwocha v. Governor of Anambra State & 2 Ors*, supra at 362; *Salati v. Shehu*, supra at 198.

76 *Abioye v. Yakubu* [1991] 5 NWLR (Pt. 190) 130

77 Enefiok Essien, “The ‘Trust’ created by the Nigerian Land Use Act 1978” (1998) 2 University of Uyo Law Journal, pp. 97-107.

78 Umezulike, I.A.: “The Concept of Trust under the Land Use Act 1978 – a Reality or An illusion?” (1992) JUSTICE, vol. 3 Nos. 9-10, pp. 98 -108.

79 *ibid*

words “in trust for”, when used in a statute such as the Land Use Act, sometimes denote a trust by virtue of office. As Lord Selborne, L. C. put it in *Kinlock v. Secretary of State for India in Council*,⁸⁰ such words (i.e., ‘in trust for’):

...are quite consistent with and indeed are the proper manner of expressing every species of trust – a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction of courts to administer, but as respect higher matters such as might take place between the Crown and public officers discharging under the direction of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense, they are matters within the jurisdiction of and to be administered by the ordinary courts of Equity; in the higher sense they are not.

English law thus recognizes that the phrase, “in trust for” accommodates both the “true trust’ as it is generally known, and the official or ‘political’ trust which, because the trustee is an officer representing the Crown, is a “trust in the higher sense” and therefore not justiciable in Equity. The trust in the higher sense as explained in *Kinlock v. Secretary of State for India* was later adopted in *Tito v. Waddell*⁸¹ where, after referring to the *Kinloch* case, Megarry V. C. said:

There is no magic in the word ‘trust’ ...the term ‘trust’ is one which may properly be used to described not only relationships which are enforceable by the courts in the equitable jurisdiction, but also other relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind, so familiar in this Division, are described by Lord Selborne L. C. as being ‘trusts in the lower sense’; trusts of the latter kind, so unfamiliar in this Division, he called ‘trusts in the higher sense’.⁸²

80 [1882] 7 App. Cas. 619 at 625-626, affirming earlier Court of Appeal judgment reported in [1880] 15 Ch. D.1

81 [1977] 3 ALL ER 129.

82 *ibid.*, at pp.220-221.

Megarry V. C. chose to call Lord Selborn's 'trust in the lower sense' a 'true trust', to emphasize that it is the conventional trust, but he still maintained the name 'trust in the higher sense' for the latter type of trust. This latter type has also been described as a 'political trust'

A "material factor" indicating that a trust in the higher sense has been created is the form of description given by the instrument to the alleged to be trustee. An impersonal description of him in the form of a reference not to an individual but to the holder of a particular office for the time being is indicative of a trust in the higher sense.⁸³

This means that the trustee is such by virtue of his office, e.g., the State Governor under the *Land Use Act*. It is submitted therefore that he Governor is properly and effectively made a trustee in the higher sense in the circumstance for the purpose of executing the higher directives and land policies of the Federal Government concerning land matters, as embodied in the *Land Use Act*. In so doing, the Governor is a representative of the Federal Government. A trust is thus created by the Act.⁸⁴

The second argument put forward for the view that the *Land Use Act* has not created a trust is that since at common law the word "vest" connotes an absolute right of ownership⁸⁵ and the Nigerian courts have also given it this meaning,⁸⁶ it is inherently contradictory

83 Megarry, V.C. in *Tito v. Waddell*, *op. cit.*, at p. 221. This is indeed a "material" but not a conclusive factor, for a person could leave a house for the Minister for the Environment on trust for it to be made available for a specific school, and that would be a trust in the lower sense which the beneficiary can enforce notwithstanding the impersonal description of the trustee. Megarry V. C. suggests, quite rightly, that apart from the "material factor" there should be a look at the instrument in question at a whole – its nature, effect and its context.

84 cf.: Umezulike, I.A., *op. cit.*, at p. 103 that "It must either be a 'strange trust' or 'no trust' at all. We think the latter is to be referred".

85 Umezulike, *op. cit.*, at p. 99. As to the original, changed, present and the diverse meanings of the word "vest", see: *Stroud's Judicial Dictionary*, vol. 5 (1974 edn.) at pp. 2938-9.

86. *Nkwocha v. Governor of Anambra State & 2 Ors.* [1984] S.C. 362, Kayode Eso, JSC at pp. 392, 397.

to say that the land is "vested" in the Governor (meaning that he has radical, allodial title) and at the same time say that he is a trustee of the land. This argument appears to be misplaced, and one may perhaps say no more than that it is indeed usual that the trustee has the trust property vested in him.⁸⁷

The third argument is that the "trust" created by the *Land Use Act* is not a trust because neither can the beneficiaries enforce it nor the court supervise it.⁸⁸ This argument, which amounts to saying that the beneficiaries are not true beneficiaries as known in the law of trusts, may be met with the answer that since, as we have shown, the trust itself is not a normal trust, the beneficiaries need not have the same rights against the trustee as they would have if it were a trust in the lower sense, i.e., a normal trust. If, for instance, all Nigerians (as beneficiaries) had the right to sue the Governor/Trustee for an account, his liability to account to all Nigerians in his control and management of the land would open the flood gates to probably as many law suits against him as there are Nigerians.

In *Tito v. Waddell*,⁸⁹ the land owners of Ocean Island⁹⁰ had sued the Commissioners and the Attorney General of the Crown claiming, *inter alia*, that the commissioners as the trustees of the Banabans were in breach of their fiduciary relationship through conflict of interest and duty. The trust was claimed to have been created by the Mining Ordinance 1928⁹¹ whereby the resident Commissioner held on an express trust for the former land owners, moneys paid by way of compensation or royalties for phosphate mines. The court found that this was a trust in the higher sense and so the claim by the beneficiaries (landowners) failed. Also importantly, the court noted that to hold that the Banabans could sue in that case would unleash a deplorable avalanche of litigation. In Nigeria the *Land Use Act* bars suits against the Governor in the exercise of his trust

87 Hayton, D. J. (ed.), *op. cit.*, at p. 14. See also, Waters, D. W. M., *op. cit.* at p. 574 (which has been quoted in extenso above).

88 Umezulike, *op. cit.*, at p. 103.

89 *supra*

90 Banabas, located just South of the equator in the Western Pacific.

91 Section 6(2)

functions, particularly in his discretion as to grant or non-grant of statutory right of occupancy.⁹²

Governor's "vesting" and trusteeship means that all Nigerians have been divested of radical title to land. What the individual now has is a right of occupancy. As this is the only right left to the individual, it is obvious that this is the only right which he may offer as security. By the present land policy, the State Governor has control and management powers over the land and may grant statutory rights of occupancy to persons for all purposes.⁹³ Indeed, even the power of control and management over non-urban land which is statutorily bestowed on the Local Government does not exclude the concurrent power of the State Governor in respect of such lands.⁹⁴ As part of his land management functions, the Governor can routinely revoke the right of occupancy for a myriad of reasons, which include the omnibus "overriding public interest"⁹⁵ and the protean ground of "public purposes".⁹⁶ This aspect of revocation in the Governor's managerial power has serious impacts where the land has been used as security.

The Land Use Act 1978 embodies a policy of land control. Indeed, the whole essence of trusteeship in the Land Use Act is the ensure control. According to the Third National Development Plan, many projects in the Second Development Plan failed because of the difficulty of obtaining land in the urban areas. Private sector projects similarly suffered due to lack of land and capital which could have been obtained using land as a security.⁹⁷ The Land Use Act was contrived to solve his land problem, and it was the desire to permanently solve the problem that promoted the insertion of the Act in the Constitution⁹⁸ (of 1979, 1989, 1999). It can be said that the

92 Section 47(1) (b) of the Land Use Act.

93 Section 5(1)(a) of the Land Use Act 1978

94 Section 5(1) (a) and 6(3)(b), *ibid.*

95 Section 28

96 Sections 3 and 28(4)

97 Udo R. K.; *Land Use Policy & Land Ownership in Nigeria* (1990) Ebieakwa Ventures, Lagos, p.2.

98 See Report of the 1994/95 Constitutional Conference, vol.2 (1995) at p. 85.

Nigerian land policy as embodied in the Land Use Act accommodates the creation security.

LAND POLICY AND SECURITY

The point has already been made above that Nigerian land policy allows the creation of security. The policy of the *Land Use Act* is that the ultimate right which an individual (corporate or unincorporated) may have in land is the right of occupancy. This right of occupancy may be actually granted by the Governor, or "deemed" to be granted. In either case, the Act allows that the right be given as security. Sections 21 and 22 of the Act allow the creation of mortgages (both legal and equitable) and pledges ("transfer of possession").

The Sections provide:

21. 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 Military 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.
22. It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise however without the consent of the Military Governor first had and obtained.

What the Act seeks to do is to control, regulate and be involved in the creation of securities. Thus, as a deliberate policy, the Local Government's *approval* must be obtained for securities over a customary right of occupancy, while the Governor's *consent must be sought and obtained to securities* over a statutory right of

occupancy.⁹⁹ In order to save the security transaction in cases where consent was not obtained, the courts have not outrightly nullified the security under section 26 of the Act but have instead sought to know whose duty it was to obtain the consent. This question was first posed in *Solanke v. Abed & Anor*¹⁰⁰ where the Federal Supreme Court was considering a similar consent provision in the Land and Native Rights Act 1916 (of Northern Nigeria). In that case, the court held that:

An occupier of land 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.¹⁰¹

The court asserted that “equity will not permit an action, that is a complaint by the (mortgagors) based on their own default to arise.¹⁰² By this equitable stance, the security transaction is saved from the rigour of the *Land Use Act*. Also, in *Adedeji v. National Bank of Nigeria Ltd. & Anor*, the appellant had by deed of legal mortgage dated 7th March 1980 mortgaged his property for a loan from the first respondent. The second respondent was an auctioneer who threatened to sell the property under the terms of the mortgage. The appellant argued that the deed of legal mortgage was null and void because the Governor’s consent was not obtained. Rejecting this contention, the Court of Appeal held that the duty of obtaining consent was on the appellant and so he could not be allowed to rely on his failure to declare the mortgage void. As Apkata JCA put it: “Apart from the principle of law involved ... it is morally despicable for a person who has benefited from an agreement to turn round

⁹⁹ See generally, Enefiok Essien, *Law of Credit and Security*, *op. cit.* pp. 165-174.

¹⁰⁰ [1962] All NLR (Pt.1) 230

¹⁰¹ *Ibid*, held No.4

¹⁰² *Oilfield Supply Centre Ltd v. Johnson* [1987] All NLR 446.

and say that the agreement is null and void”.¹⁰³ It is thus obvious that, but for the equitable intervention by the court, the Act would have, by the consent requirement, allowed the mortgagor to walk away from the security transaction which he voluntarily entered into and from which he had benefited.

Another aspect of the consent requirement in the Act which is inimical to security transaction is that the consent “shall” be “first had and obtained”. Again, the hardship in this statutory provision has been judicially mitigated by the realisation by the court that “consenting to a lease, mortgage, transfer of possession prior to the parties drawing up an agreement is analogous to buying a pig in the poke”.¹⁰⁴ The consent may therefore be effectively obtained subsequently, rather than prior to the security transaction.

There is also the double consent requirement in the case of family or communal land. One would have thought that since the *Land Use Act* came to unify all rights in land into a mere right of occupancy, and since all land is now vested in the State Governor, there would be no other consent other than that of the Governor in land transactions.

There is as well the frustrating pre-enforcement consent requirement in section 21 of the Act, which has already been reproduced above. Where the mortgaged property is a customary right of occupancy, when the power of sale has arisen and the conditions for its exercise as expressly agreed in the mortgage deed or as stipulated in the *Conveyancing Act 1881* or the *Property and Conveyancing Law 1959* (which ever is applicable) have been fulfilled, the *Land Use Act* lays down further consent or approval requirements to be met before the security can be realised by sale.

Paragraph (a) of section 21 does not apply to out-of-court sale which

¹⁰³ *Ibid* at pp. 226 – 227. Also: *Attorney General of the Federation v. Sode* [1990] NWLR (Pt.128) 500; *Adetuyi v. Agbojo & Anor* [1997] 1 NWLR (Pt.484) 705 at 717.

¹⁰⁴ *Awojubagbe Light Industries Ltd v. Chinukwe & Anor* [1993] 1 NWLR (Pt. 270) 485 at 510. Also: *Tragunima & Anor v. Uchendu & Anor* [1996] 2 NWLR (Pt. 428) 30 at 52; *Denning v. Edwards* [1961] AC 245; *Solanke v. Abed & Anor* [1962] All NLR (Pt. 1) 230

is based on express or statutory power. The paragraph does not also apply in cases where the court orders a sale following an application for such order by an equitable mortgagee whose mortgage was not under seal.¹⁰⁵ The equitable mortgagee in such case sells by way of exercise of his power of judicial sale and not under the *Sheriffs and Civil Process Law*. However, if he had not obtained the consent of the Governor to the creation of the mortgage (which consent automatically includes consent to the mortgagee to exercise his power as mortgagee) he would still need to obtain the Governor's consent before he can sell. This is so in spite of the court order for sale; but it is indeed doubtful if the court would make an order for sale if it is realised that the Governor's consent was not obtained to the creation of the mortgage.¹⁰⁶

In practice, land held under a customary right of occupancy is hardly mortgaged because it is situated in rural area and therefore has little attraction to mortgagees. The result is that the court has not yet had occasion to interpret this provision of the Act. However, the Land Tenure Law which applied in the Northern Nigeria before the Land Use Act had a provision similar to paragraph (a) of section 21. Section 27 of the Land Tenure Law provided that it shall not be lawful for any customary right of occupancy held by a native to be alienated without the consent of the Minister of Land and Survey in cases where the property is to be sold by or under the order of the High Court under the provisions of the *Sheriffs and Civil Process Law*. In *Danjara v. Bai*¹⁰⁷ the applicant bought a house which was the property of the respondent at a sale held by order of the Court, but the respondent refused to deliver up the house to him, whereupon he went to Court. The Court held¹⁰⁸ that where an immovable property is sold by order of the Court, the sale and transfer of the

105 An equitable mortgagee, if his mortgage is under seal, has a statutory power of sale and therefore does not need an order of court to sell. He also has the power if though the mortgage is not under seal, the power has been expressly conferred on him by the mortgagor.

106 *Jacobson Engineering Co. Ltd. & Anor v. United Bank for Africa* [1993] 3 NWLR (Pt. 283) 586 at 601

107 [1965] NMLR 455

108 *Ibid* at p. 456

property is governed by the provisions of the *Sheriffs and Civil Process Law*, and that the intention of the section 27 of the *Land Tenure Law* is that there shall be no transfer of property in the right of occupancy of any sort without the Minister's consent. Since, in this case, consent was not obtained to the sale, the purchaser had no right at all in the property.¹⁰⁹

We submit that the requirement of consent as a prerequisite for the enforcement of the mortgagee's power of sale should be abolished as it is a mere hurdle in the realisation of the security. Besides, the process of obtaining the consent may, apart from delaying the sale - which may mean the property being sold at a lower price if a slump in the property market sets in - increase the cost of enforcement. The mortgagee will be better protected against market forces if the requirement for consent to the sale is expunged from the Act.

A leaf should be taken from the *Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1994* which empowered the Failed Banks Tribunal to "make an order to levy execution on all properties of the debtor pledged as security for the loan"¹¹⁰ and also added that a sale of the landed property following the tribunal's order shall effectively "vest the property in the purchaser"¹¹¹ without requiring the consent under sections 21, 22 and 26 of the *Land Use Act*. This is undoubtedly because Government wanted to recover the loans or realise the landed securities expeditiously in the interest of the banks, their customers and the national economy, and Government realised that the consent provisions in the Land Use Act would prevent the intended expeditious recovery of the debts. This makes a particularly strong case for doing away with especially the pre-enforcement consent provisions in the Act.

At first sight, section 5(2) of the *Land Use Act* appears to provide some cold comfort to security. However, judicial interpretation of the section has poured cold water on security. The section provides

109 *Ibid* at p. 457

110 Section 13(2)

111 Section 15(2)

that upon the grant of a statutory right of occupancy by virtue of sub-section 1 of section 5, all existing rights to the use and occupation of the land which is the subject of the grant shall be extinguished. In spite of this provision, it is now common knowledge that a granted right of occupancy may be set aside in favour of a pre-existing right.¹¹² Indeed, the Supreme Court has stated categorically that “the right of an existing holder or occupier of a parcel of land is not automatically extinguished by the mere issue of a certificate of occupancy to another person”¹¹³ This makes the right of occupancy and the certificate of occupancy issued in evidence thereof very unsafe as security.

However, as a matter of policy a deemed customary land right cannot be mortgaged at all in view of the absolute prohibition in section 36(5) of the *Land Use Act*. This is supposedly to check the activity of land speculators who “swoop on hamlets and villages buying up their lands sometimes at a pittance” only to sell later at “fantastic profits” to others. However, since security over land is merely an encumbrance on the land rather than a sale of it, it is not clear why a deemed customary grantee of land should, as a matter of land policy, be disallowed from using it as security.

CONCLUSION

The point has already been made that by the present Nigerian land policy as embodied in the *Land Use Act 1978*, the creation of security over land is allowed, or at least recognized. But as is well known, security does not mean much if its ultimate realisation is not facilitated. Certain provisions in the *Land Use Act* suggest that our present land policy largely disregards landed security realisation.

The first is the issue of the Governor’s consent to the security creation, the lack of which may eventually adversely affect the realisation of the security. Happily the courts have consistently adopted a purposive and equitable interpretation of this issue.

¹¹² *Teniola & Ors. v. Olohunkun* [1999] 5 NWLR (Pt. 602) 280, held 10

¹¹³ *Ibid*, held no. 12.

However, since the Act makes it obligatory that the Governor’s consent be obtained to any encumbrance of a right of occupancy, there should be a corresponding statutory obligation on the Governor to give his consent when applied for, or to give it within a reasonable time, or not to unreasonably withhold his consent, or to give his reasons for his refusal of consent. To keep mum of this is to increase the dilemma of the secured lender. As the law stands there is nothing an applicant can do if the Governor refuses to give his consent to a real security transaction.

In *Queen v. Minister of Land and Survey, ex-parte The Bank of the North Ltd*,¹¹⁴ interpreting a similar consent provision (section 11 of the Land and Native Right Ordinance 1916, under which it was unlawful for an occupier to alienate his right of occupancy or any part thereof by sale, mortgage, etc. without the consent of the Minister first had and obtained) Reed, Ag. SPJ held that section 1 conferred discretion on the Minister to grant or withhold consent and that it did not impose a duty on him, and since an order of mandamus did not lie to compel the exercise of a discretionary power conferred by statute, it did not lie to compel the Minister. It is recommended that the *Land Use Act* be amended to expressly require the Governor to give or refuse his consent within a “reasonable time”. This would still give the Governor some freedom of action but at the same time would allow the Court to intervene when delay is unreasonable.

One of the major arguments against the policy of dualism was that it led to uncertainties of titles. The attempt to solve this problem led to the system of registration of titles, which ceased with the inception of the *Land Use Act*, under which there are no more titles to register. The trusteeship policy of the *Land Use Act* has not introduced the desired certainty. This is because the certificate of occupancy (which is issued to the holder of a right of occupancy) is not a conclusive proof of right to the land; it is a mere rebuttable evidence of a right, and therefore in proper cases may be set aside (and has in many cases been set aside) in favour of a proven prior better right. This

¹¹⁴ [1963] NNLR 58. See also: *Qudus v. Military Governor of Lagos State* [1973] CCHCJ/6/73 at 61

lack of certainty is unhelpful to security transactions; it makes security very precarious.

The policy that a pledge of land is perpetually redeemable is another area where security is adversely affected. As noted by the Court of Appeal in *Iwuchukwa v. Anyanwa & Anor*¹¹⁵ this is one area of the law where a “firm decision ...by the highest tribunal of this country is overdue”. The policy of perpetual redeemability of a pledge means that the pledgee cannot realize the security by sale, for to do so would put the land beyond redemption by the pledgor. This deprives a pledge of much use as security.

The express exclusion of a mortgagee from the definition of a holder¹¹⁶ also creates security problems, as it disentitles the mortgagee from receiving compensation directly or by subrogation in the event of revocation of a right of occupancy.

In sum, Nigeria’s land policy contemplates creation of security but places too many hurdles particularly with regard to security realisation. These drawbacks should be addressed. It is high time law makers took a close look at the Act with a view to re-directing its policy thrust and making it security-friendly.

115 [1993] 8 NWLR (Pt.311) 307 at 319

116 Section 51 of the Land Use Act 1978