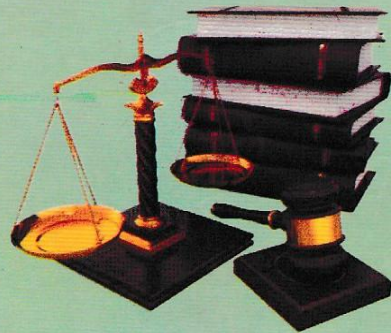




**UNIVERSITY OF UYO**



# LAW JOURNAL

PUBLISHED BY THE FACULTY OF LAW  
UNIVERSITY OF UYO

**UNIVERSITY OF UYO**

**LAW JOURNAL**

VOLUME 8, 2014

This Journal may be cited as:

*(2014)8 UULJ*

## **REVOCAION OF RIGHT OF OCCUPANCY FOR PUBLIC PURPOSE UNDER NIGERIAN LAND USE ACT: ROBBING PETER TO PAY PAUL?\***

### **Abstract**

*The Land Use Act 1978 governs land right in Nigeria. Under the Act, every piece of land in the constitutive States is vested the Governors of the respective States while individuals retain only a usufructuary right statutorily referred to as a "right of occupancy". The Act gives the State Governor the power to revoke the individual's right of occupancy for a number of reasons/purposes. Particularly, the Governor can revoke the right of occupancy for public purposes of the State or of the Federation. Where, however, such public purpose fails, it is only fair that the Governor should give back the land to the person(s) from whom the land was taken. It would in some cases not be clear when the public purpose can be said to have failed. While the land owners scream that the public purpose has failed and so the land should revert to them, the State Governments insist that the public purpose has not failed. This paper argues that even where the Government can no longer carry out the public purpose by itself, the purpose would still be public even if carried out by a private person, since the emphasis should be on the purpose, rather than the means by which the purpose is achieved. Accordingly, this paper argues that the public purpose cannot be said to have failed where what has failed is only the means of meeting that purpose and not the purpose itself.*

### **Introduction**

Title to land in Nigeria is presently governed by the Land Use Act, 1978.<sup>1</sup> Under the Act, the erstwhile radical title to land is automatically

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- (b) for use by any body corporate directly established by law or by body corporate registered under the Companies and Allied Matters Act as respects which the Government owns shares, stocks or debentures;
- (c) for or in connection with sanitary improvements of any kind;
- (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 planned urban or rural development or settlement;
- (h) for obtaining control over land required for or in connection with economic, industrial or agricultural development;
- (i) for educational and other social services.

It is instructive that prior to the Land Use Act, the Public Lands Acquisition Act, 1957,<sup>11</sup> had enumerated what constituted "public purposes" basically in the same terms as the Land Use Act.<sup>12</sup> What was included in the Public Lands Acquisition Act which is not included in the Land Use Act, or, at least, is not expressly so stated, is the requirement of the land "for or in connection with the laying out of any new township or improvement of any existing township or government station", and, requirement of the land "for or in connection with housing estate".

Though both the Constitution and the Land Use Act accord legal right to the government to compulsorily acquire land in any part of Nigeria for public purpose, the Constitution (the 1963, 1979 Constitutions, and the

1999 Constitution, as amended) also guarantees the individual's right to acquire and own land in any part of Nigeria. Accordingly, the Governor's revocation of an individual's right of occupancy must be according to law. No one, including the government, can deprive a holder or occupier of his land unless the land is acquired compulsorily in accordance with the provisions of the Land Use Act, and in that case notice of the revocation must not only be issued but must also be served on the holder, clearly indicating that the land intended to be acquired is for no other thing than for public purposes.<sup>13</sup> As Lord Cranwell, L.C. emphasized in *Galloway v. The Mayor and Commonalty of London*,<sup>14</sup> it has become a well-settled head of equity, that any company authorised by the legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing.<sup>15</sup>

Section 28 (6) of the Land Use Act states clearly that the revocation shall be signified under the hand of a public officer duly authorised in that behalf by the Governor and notice thereof shall be given to the holder personally.<sup>16</sup> Thus, it is not enough to publish the notice of revocation in a gazette.<sup>17</sup> The law therefore obviously imposes a duty on the acquiring authority to strictly adhere to the formalities prescribed by law in revoking a right of occupancy. In *Goldmark (Nig) Ltd v. Ibafo Co Ltd*,<sup>18</sup> the Supreme Court held that publication of the revocation/acquisition in a

<sup>13</sup> *Adole v. Gwar* (2008) 11 NWLR (Pt.1099) 562 held 11.

<sup>14</sup> (1866) L. R. IHL 34.

<sup>15</sup> *Ibid.*, at p. 43.

<sup>16</sup> *Olateju v. Commissioner for Lands & Housing, Kwara State* (2010) 14 NWLR (Pt.1213) 297, held 3.

<sup>17</sup> *Ibid.*

<sup>18</sup> (2012) 10 NWLR (Pt. 1308) 291 at 356. See also: *Ononuju v. A-G Anambra State* (2009) 10 NWLR (Pt.1148) 182.

<sup>11</sup> Cap. 167 vol. v, Laws of the Federation of Nigeria 1958. The Law was first enacted as Public Lands Acquisition Ordinance No. 9 of 1917.

<sup>12</sup> See Section 2 of the Public Lands Acquisition Act.

gazette does not constitute sufficient notice; there must be personal service of same on the person. In the words of the court:<sup>19</sup>

Much as in certain other situations, publication in the Gazette constitutes constructive notice to the whole world, ... constructive notice is not enough. The law insists upon actual notice of the intention to acquire. So, anything short of that amounts to non-compliance with the express provisions of the laws.

The Act also specifically underscores personal service. By Section 44 (a), (b) and (c) of the Land Use Act, any notice required to be served on any person shall be effectively served on him –

- (a) by delivering it to the person on whom it is to be served; or
- (b) by leaving it at the usual or last known place of abode of that person; or
- (c) by sending it in a pre-paid registered letter addressed to that person at his usual or last known place of abode.

Section 28 of the Land Use Act dealing with revocation/compulsory acquisition is clearly expropriatory; it encroaches on the land holder's proprietary, constitutionally guaranteed<sup>20</sup> rights and therefore must be construed "*fortissimo contra preferente*", that is, strictly against the acquiring authority but sympathetically in favour of the person whose proprietary rights are being taken away. It is against this background that one should consider the question of what happens where the public purpose which prompted the revocation subsequently fails.

### Where Public Purpose Fails

Before dwelling on what happens where the public purpose fails, there is the antecedent question of when "public purpose" can be said to have failed, i.e., what amounts to failure of public purpose. Generally, where the intended public purpose is no more, or can no longer be carried out, the public purpose can be said to have failed. If the compulsory acquisition of the land/revocation of the right of occupancy is in order to build a stadium, but after the acquisition Government changes its mind and decides to build a hospital instead, it would be incontestable that the land is still used for public purpose, and therefore the revocation is still valid. On the other hand, where the public purpose is abandoned and instead the land is re-allocated to or taken over by a private person who then uses the land for his/her own private purpose or personal interest, public purpose would be said to have failed. In such case, the land would revert to the person from whom it was compulsorily acquired. This is because it is unlawful for the Governor to revoke a holder's right of occupancy only to grant it to another private person for private purpose under any guise.

In *Goldmark Nigeria Ltd v. Ibafor Company Ltd*<sup>21</sup> the respondents were in possession of some parcels of land and were exercising ownership right including fencing them until when by Government Notice No. 601 of 22nd June, 1976, the Federal Military Government purportedly acquired the said parcels of land for public purpose and in particular for the use of the Nigerian Ports Authority. The respondents later discovered that rather than use the lands for its own purposes, the Nigerian Ports Authority had leased out the said lands to private individuals and companies who used the parcels of land for their businesses such as the selling of sand and other businesses which were totally private and which had nothing to do with the purpose for which the lands were purportedly acquired. The court held that the use of the land did not constitute use for public

<sup>19</sup> (2012) 10 NWLR (Pt.1308) 291 held 12. See also: *Lateju v. Fabayo* (2012) 9 NWLR (Pt.1304) 159, held 3, 4.

<sup>20</sup> See Section 44 of the 1999 Constitution, as amended, which guarantees right to property.

<sup>21</sup>(2012) 10 NWLR (Pt.1308) 291 (SC)

purpose under the Public Lands Acquisition Act, Cap. 167, a precursor to the Land Use Act, 1978.

The same decision was reached in *Chief Commissioner, Eastern Provinces v. Onenye & Ors*,<sup>22</sup> where it was held that the acquisition of land by the then Central Government of Nigeria in Onitsha for the purpose of granting a lease of it to a commercial company was not a public purpose within the Public Lands Acquisition Ordinance (Cap.88). Waddington J. asserted:<sup>23</sup> "by no stretch of the imagination can I see how the grant of a lease to a commercial company could be brought within the range of this definition of "public purpose".

In the case of *Ereku v. Military Governor of Mid-Western State & Ors*<sup>24</sup> the revocation was in favour of a private "person", though allegedly for public purpose. The main issue here was whether, since the objects stated in McDermott Overseas Inc. (a private company) were in consonance with the declared objectives of Government to advance the industrial and economic development of the State, the revocation from private individual and leasing of same to the private company was in accordance with public purpose of Government under the Public Lands Acquisition Law. The Court held<sup>25</sup> that an acquisition by the Government of the Mid-Western State for the private need of a private corporation or person is unlawful since by no stretch of the imagination can one say that the enterprises of the McDermott Overseas Inc., beneficial though it might be, can be regarded as being for "public purpose of the State". The court added that, Section 2 of the Public Lands Acquisition Law clearly contemplated acquisition for the public purpose of the State and not any private enterprise that might incidentally be of benefit to the community or a section of it.

<sup>22</sup> (1944) 17 NLR 142.

<sup>23</sup> *Ibid*, at p. 702.

<sup>24</sup> (1974) All NLR 695.

<sup>25</sup> *Ibid*, at p. 701.

In *Osho v. Foreign Finance Corporation*,<sup>26</sup> the evidence showed that the right of occupancy of the plaintiff was revoked on the pretext of overriding public interest, but in reality the land was thereafter granted to the 3<sup>rd</sup> defendant, a private person, for its private business. In invalidating the revocation the court said:

With the exception of revocation on ground of alienation under section 28(2)(a) or for the requirement of the land for mining purposes under 28(2)(c), the Governor has no right to revoke the statutory right of an occupier and grant the same to a private person for any other purpose than those specified by section 28(2) of the Act.

Similarly, in *The Administrator/Executors of the Estate of General Sani Abacha (Deceased) v. Eke-Spiff*,<sup>27</sup> the respondent was allocated a plot of land at Diobu G.R.A., Port Harcourt, Rivers State, by the Government of Rivers State. The Building Lease was registered in his name at the Lands Registry, Port Harcourt. He submitted a building plan for approval but up to the institution of the suit his plan had not been approved. Later, he discovered that his right of occupancy had been revoked without any notice to him, and the same piece of land was re-allocated to Major General Sani Abacha.<sup>28</sup> The Supreme Court held that, "certainly the re-allocation of the land to Major General Sani Abacha cannot be assimilated to an action taken in the overall public interest".<sup>29</sup> In the court's view:

By re-allocating the same plot of land to Major General Sani Abacha after revoking the right of occupancy of the plaintiff, the 1st and 2nd defendants cannot be said to have satisfied the provisions of Section 28 (1) and (2) of the Land Use Act which states as follows: "It shall be

<sup>26</sup> (1991) 4 NWLR (Pt. 184) 157

<sup>27</sup> (2009) 7 NWLR (Pt.1139) 97 (SC)

<sup>28</sup> Major General Sani Abacha was the Head of State of Nigeria and Commander-in-Chief of the Armed Forces of Nigeria.

<sup>29</sup> (2009) 7 NWLR (Pt.1139) 97 at 131.

lawful for the Governor to revoke a right of occupancy for overriding public interest.<sup>30</sup>

After holding that the revocation in this case “was not carried out in the overall interest of the public”,<sup>31</sup> the court concluded:<sup>32</sup>

Failure to serve on the 1st plaintiff/respondent the notice of revocation smacks of some fraud. Let me say it loud, it is not only unconscionable to take away a piece of land already allocated and now re-allocate same to someone else without serving a notice of revocation on the earlier allottee and not paying that person compensation. It is also very unlawful and unconstitutional to so do. The court always has an undoubted jurisdiction to relief(sic) against every species(sic) of fraud. The fraud here is an unconscientious use of the power arising from the circumstance or condition of the parties. The 1st plaintiff, a former Permanent Secretary of the Government of Rivers State has since retired, no longer at the corridor of power. The person to whom the plot was later re-allocated was a weighty man of authority.

The court was equally unsparing in the later case of *Olateju v. Commissioner for Lands & Housing, Kwara State*<sup>33</sup> where it said:

Times without number, State Governments are fond of using the Land Use Act to deprive legitimate owners their use vide the Land Use Act, however it is very sad that after the acquisition, this same acquired land that was acquired for public purpose will now be turned into

<sup>30</sup>*Ibid*, at page 130 Lines C – D.

<sup>31</sup>*Ibid*, at page 132 Lines A – B.

<sup>32</sup>*Ibid*, at Lines B – D.

<sup>33</sup> (2010) 14 NWLR (Pt.1213) 297, held 5 (at page 328 D – F), *per* Denton–West, JCA.

jamboree and it would be shared among same sets of individuals. This is just like robbing Peter to pay Paul. The Land Use Act was not enacted for this purpose of selfishness and greediness but for the public use or purposes.

It is clear from the foregoing, the circumstances when public purpose is said to have failed. It is also so far clear, from case law, that where the public purpose fails, the land, or right of occupancy thereof, reverts to the rights holder, rather than being re-allocated to another private person. This, we submit, is so even where the holder had been paid full and satisfactory compensation or had been comfortably re-settled. The Government can only retain the land for another public purpose, and not re-allocate it to another private person for private use. The term “private person for private use” is used here advisedly, because there is the ancillary question of, who carries out the public purpose? If public purpose is the end, does it, or should it, matter what means is used to achieve that end? To put it in context: Where Government is unable to use the land for public purpose, can Government re-allocate the land to private persons to develop it for the same public purpose intended by Government?

The case of *Federal Government of Nigeria v. Akinde*<sup>34</sup> is very instructive. The plaintiffs/respondents contended that in 1976 the appellants informed them that their land had been acquired along with other lands in the neighbourhood. They claimed that they were not served with acquisition notice before they were driven away from the land and their buildings demolished, after which the appellants divided the land into plots and sold them contrary to the appellants’ reason for the acquisition which was for the construction of Law Cost Housing Estate. The central issue was whether the acquiring authority could divert land acquired for public

<sup>34</sup>(2013) 7 NWLR (Pt.1353) 349.

purpose to any other use upon failure of the purpose for which it was acquired, and whether sale of the acquired land under the site and services scheme of the appellants met the purpose of the acquisition.

From the facts of the case, the land was acquired for Federal Government Housing Scheme. Owing to financial constraints, the appellants introduced Sites and Services Scheme which entailed the demarcation of the land into plots allocated to interested members of the public for a token amount, a different purpose. Can it be said that the change of procedure from direct construction to allocation of plots to individuals to carry out the construction themselves means a conversion of the purpose of the acquisition for a different purpose? The trial court answered in the positive. The Court of Appeal disagreed, holding:

With all due respect to the learned trial Judge, I am of the humble view that change of procedure from direct construction by Government to allocation of plots duly demarcated to interested members of the public for direct construction by the allottees meets the purpose of the acquisition. Even after direct construction by the Government, the houses are sold to interested members of the public.... In either case, it fits within the definition of public purpose in Section 2 of the Public Lands Acquisition Act, as amended. If the learned trial Judge accepted the acquisition for Federal Government Housing Scheme as a valid public purpose within the law, there is no basis for holding that the change of procedure made it no longer a public purpose.

The view taken by the appellate court is expressly that a definition of public purpose includes instances where land is acquired from private individuals or communities, laid out into plots and subsequently re-

allocated to corporate organisations or private individuals under an industrial or housing scheme. In this sense, a purpose which is for the benefit of an individual could still qualify as public purpose where the individual benefits, not as an individual but in furtherance of a scheme of public utility. Before proceeding, it should be pointed out that the Public Lands Acquisition Act, Cap. 167, section 2(i) thereof, expressly included compulsory acquisition of land for or in connection with "housing estate", and 2(h) provided for compulsory acquisition "for or in connection with housing estates, economic, industrial, or agricultural development...". The Land Use Act, on the other hand, does not include development of housing estates in its enumeration of public purpose. However, this does not mean that the construction or development of housing estate is excluded from, and therefore cannot be, a public purpose, since the enumeration of public purposes in the Land Use Act is not intended to be exhaustive.

Also, the *Akinde Case* has implications beyond the development of housing estates. It has the implication that the Government can compulsorily acquire a holder's land, revoke his right of occupancy and then re-allocate the land to another private person who would then undertake any of the public purposes listed in section 51 of the Land Use Act. Ordinarily, as shown above, revoking an individual's right of occupancy only to re-allocate to another individual is unlawful. The twist here is that the individual to whom the land is re-allocated is using it for public purpose as prescribed by Government. In other words, the end is public purpose, though the means is private person rather than government. It is arguable that so long as the public purpose is achieved it does not matter who achieved it; the object of the revocation is met. On the other hand, can it not be said that the private re-allocatee does not stand to gain (financially) even more than the initial owner by the fact of the re-allocation? First, no businessman would acquire land from government to develop an estate and hand over to government without any personal financial gain. Second, where the housing estate is