

THE LAND USE ACT

- Twenty Five Years After

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CHAPTER 13

LAND USE ACT AND SECURITY IN REAL ESTATE IN NIGERIA*

INTRODUCTION

In a way, it may be said that there is still dualism in the area of land law in Nigeria. We have, for instance, the continued application of the general, received land law principles such as that *quic quic plantatur solo solo cedit*, or that possession is nine tenths of the law, etc. At the same time, customary land tenure together with its incidents and customary law rules/principles still apply. These include the principle of communal land ownership, voidness of alienation of land without the chief's consent in the case of family or communal land, etc. On top of these two is the Land Use Act 1978¹ which, in regulating the allocation of rights and obligations in relation to "immovable" or "real" property or "real estate", has thereby separated land off as a subject of especial legal concern. In doing this, the Act of course has merely followed the practice of most developed systems of law in regarding land as having enhanced qualities of utility and indestructibility which justify its distinction from other more perishable forms of property.²

Since land provides the physical substratum for all social and economic interaction, land law is inevitably an expression of social status and an instrument of social engineering. Everyone, even the truly homeless – live somewhere, and each therefore stands in some relation to the land as occupier, holder, tenant, licensee, squatter, pledgee, chargee or mortgagee. In this way, land law impinges upon a vast area of social orderings and expectations, exerting a fundamental influence on the lifestyles of even the

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1 Cap. 202 Laws of the Federation of Nigeria (LFN) 1990

2 See, *National Carriers Ltd. v. Panalpina (Northern) Ltd* [1981] AC 675 at 691 A-B, per Lord Hailsham of St. Marylebone, 700 B-E per Lord Russell of Killowen.

ordinary people. Quite apart from the residential dimension, land has a huge economic significance in terms of providing security for capital, investment, business and agriculture.

It is in view of the incalculable significance of land that the Land Use Act was promulgated³ as the single law which particularly defines land rights and obligations and specifies conditions precedent for any alienation or encumbrance of land rights. The aim for imposing conditions is to restrain and control alienations of and encumbrances on land and thus enhance tenurial security.⁴ This contribution examines whether the Land Use Act has created the enabling environment for security in real estate in Nigeria. It will contend that the Act, on the whole, has been more, if not exclusively, concerned with defining the alienation of these rights, than with securing the rights. In the end, any security on these rights can only be as insecure as the rights themselves. Suggestions will be proffered to ensure security in real estate.

LAND USE ACT AND REAL ESTATE

“Real Estate” is used here as a synonym for and interchangeably with “immovable”, “realty” or “real property”. The term has fallen into comparative disuse in Nigeria, and indeed in most common law jurisdictions, in preference for the increasingly common usage of “land”. The term however still has tremendous historical importance and therefore should not be wished away. The use of the term “real property” or “realty” in relation to rights in land is precisely because early English law gave the dispossessed landowner not a mere right of money compensation in respect of his loss, but a right instead to recover his land by ‘real action’, i.e., a right to require that the land be returned physically into his possession.

³ The Act was originally promulgated as a Decree by the military regime (i.e. Decree No. 6 of 1978) but was, upon the exit of the military regime and taking over of government by civilian, re-designated Act, vide Section 1 of Adaptation of Laws (re-designation of Decrees, etc.) Order No. 13 of 1980.

⁴ This is quite apart from the generally known purposes/aims of stemming the tide of land profiteering and speculation and easing the burden on government when it needs land for development.

An estate, from the English doctrine of estates, is simply an interest, and because it concerns an interest in land or “realty”, it is called a real estate, to distinguish it from chattel interest.⁵ The use of the term “real estate” is preferred here because, as will be shown shortly, like in England where land is vested allodially in the crown, leaving the individuals with only an estate in the land, land in Nigeria is radically vested in the State Governor, and an individual can only have a right of occupancy in the land, a right which partakes of the character of a leasehold estate if actually granted by the Governor, or a freehold estate if deemed to have been so granted. It is this interest in real estate which is created under the Land Use Act that may today be given as security in Nigeria. Where an interest in real property is encumbered to guarantee the payment of a debt or discharge of an obligation, security is said to be thereby created.

THE OBJECT OF SECURITY: THE RIGHT OF OCCUPANCY

The individual’s ultimate real estate in Nigeria today is the right of occupancy. The Land Use Act does not define a “right of occupancy” but its precursor, the Land Tenure Law (of Northern Nigeria), defines it as “a title to the use and occupation of land...”⁶ The right is therefore clearly usufructuary. What is not so clear is the legal nature of the right: is it a lease, a license or a freehold? A creditor or obligee will certainly want to know the legal nature of what he accepts as security. This is of great practical importance because if it is a lease, for instance, a mortgage cannot be created to last longer than the lessor’s term⁷; and if it is a licence then it would not be alienable or transferable.

Before considering the nature of the right of occupancy, it is noteworthy that the Land Use Act creates two types of right of occupancy: customary and statutory; and both may be either actually granted by the Governor or deemed to have been granted

⁵ *Jackson v. Parker*, N.Y. 9 Cow, 73, 81.

⁶ Cap. 59 Laws of Northern Nigeria, S.1

⁷ It is improbable that the Governor will give his consent if the encumbrance is for a term exceeding the period for which the right of occupancy is to last.

by him. The Act provides that a granted statutory right shall be for a definite term.⁸ In other words, a granted statutory right is for a term certain. There is no requirement of a definite term for a deemed statutory right, a deemed customary right, or even for a granted customary right. Also, the Act requires that those who receive a granted statutory right should pay rent for the land,⁹ but there is no such payment required for a granted customary right¹⁰, a deemed statutory right or a deemed customary right. In every case, however, (i. e. in all granted and deemed rights), the grantee has “exclusive rights to the land the subject of the statutory right of occupancy against all persons other than the Military Governor”¹¹. These provisions give the right of occupancy much resemblance with a lease. Indeed, in *Majiyagbe v. Attorney General*¹² the court held that a right of occupancy under the Land Tenure Law of the then Northern Nigeria was in substance a lease. Abernathy, J. also took the same view when considering the nature of a certificate of occupancy under the Tanzanian Land Ordinance. He held that “the only substantial difference” between a lease and a right of occupancy was in name.¹³ It may be well to examine these views against the background of the requirements for a lease.

A good starting point is the hallmark laid down by Lord Templeton in *Street v. Mountford*¹⁴ that for a lease, there must be exclusive possession at a rent and for a term. On possession, we have stated above that the Land Use Act gives concurrent “exclusive rights to the land” to both the rights holder and the Governor. It is reasonable to think that the “rights to the land” includes (or means) right of

8 Section 8.

9 Section 5(1) (c).

10 A holder of granted customary right may only have a fixed term and pay rent if he applies (under s. 9(1)(b) for a certificate of occupancy. See also ss. 8 and 10(b).

11 Section 14

12 [1957] N.R.L.R. 158. See also, *Abioye v. Yakubu* [1991] 5 NWLR (Pt.190) 130 at 223, the Supreme Court said: “Rights of occupancy bear resemblance to leasehold interests. They can be assigned. They can be mortgaged and they can be underlet or sublet”.

13 *Director of Lands and Mines v. sohan* [1952] Tang. L. R. 631. also, the East African case of *Hanvicksdoff v. Dodd* [1960] E.A.R. 327 at 335.

14 [1985]2 All E. R. 289.

possession. It is noted that Lord Templeton talked of exclusive possession and not exclusive right to possession, for it is possible that one has a right to possession without having or being able to have the exclusive possession in fact. However, it means little if one has exclusive possession which is not as of right, for in that case he has no *right to exclude others* from concurrent possession.¹⁵ Thus, in Nigeria, though the Governor does not as a matter of fact interfere with the holder’s exclusive possession, there is no guarantee of his continued enjoyment of such throughout his period of occupancy since he is not enjoying it as a right possessed exclusively by him. The Governor has a concurrent right. In sum, if factual exclusive possession is what is needed in a lease then the holder has it; but if it is a right of exclusive possession - which we submit it is - then he has none, and therefore a basic requirement for a lease is lacking in a right of occupancy.

The second requirement for a lease as put forward by Lord Templeton is that it must be at a rent. In this regard, only the granted statutory right qualifies because here, rent is paid. However, it is now seriously doubtful whether it is a correct proposition of English law, and of Nigeria law, to say that rent is essential to create a lease. In the English case of *Ashburn Anstalt v. Arnold & Anor*,¹⁶ the Court of Appeal held that although in most leases there is a periodic rental payment, this is not essential to create a lease. And in Nigeria, it has been held that life tenancy is a lease notwithstanding that the grant may be rent-free.¹⁷ One may therefore conclude that the non-payment of rent in the case of deemed statutory right, granted customary right and deemed

15 Bright, S. & Gilbert G.: *Landlord and tenant Law: The Nature of Tenancies* p.127 (Clarrendon Press, Oxford, 1995) that “the reason why exclusive possession is necessary for right to exclude others from the use...”

16 [1988] 2 All ER 147. it is noted that *Ashburn Anstalt* has been overruled, but not on the point of rent (rather, on uncertainty of term). Also relevant is the Australian case of *Commonwealth Life (Amalgamated) Assurance Ltd v. Anderson* [1946] 46 S. R (NSW) 47 at 49, on the point that rent is not necessary for a lease.

17 *Onyechie v. Shadiya* [1966] 1 All NLR 48 at 15. In *Oshinfekun v. Lana* [1955-1956] W.R.N.L.R 93, Ademola, C.J. held that a tenancy is created not necessarily by payment of rent but by consensus between the parties.

customary right of occupancy does not prevent the rights from being a lease if they qualify on other grounds.

The third attribute of a lease is that it must not only be certain in retrospect but must also display prospective certainty of duration.¹⁸ This is normally referred to laconically as “term certain”, and means that the commencement, the duration and the terminal date of the lease must be ascertainable at the beginning of the lease. In the sixteenth century case of *Say v. Smith*,¹⁹ Anthony Brown, J. put it this way, “...every contract sufficient to make a lease for years ought to have certainty in three limitations, viz, in the commencement of the term, in the continuance of it and in the end of it: so that all three ought to be known at the commencement of the lease.”²⁰

It seems therefore unarguable that at common law, which also applies in Nigeria, one cannot run away from the requirement of certainty in a lease. An attempt was made to play down this requirement in the English case of *Ashburn Anstalt & Anor*²¹ where, in an agreement for the sale of land the vendor reserved the right to remain at the property after completion as licensee and to trade therefrom without payment of rent:

Save that it can be required by Matlodge Ltd. [the purchaser] to give possession on not less than one quarter’s notice in writing upon Matlodge certifying that it is ready at the expiration of such notice forthwith to proceed with the development of the property and the neighboring property involving, *inter alia*, the demolition of the property.

The court held that this reservation created a tenancy; that the

18 Sparks, P.: “Certainty of Leasehold Terms” 109 L.Q.R. (1993) 93-113 (1530) 1 Plowden, 269, vol. 75 E. R. 410.

19 *Ibid.*, at p. 272. These time frames of certainty were recently re-affirmed by the House of Lords in the case of *Prudential Assurance Company Ltd v. London Residuary Body* [1992] 3 All E.R. 504.

20 *op. cit.*

21 *op. cit.*

tenancy was for a term which would continue until Matlodge Ltd certified that it was ready to proceed with the development of the property. This decision was overruled by the House of Lords in *Prudential Assurance Co. Ltd. v. London Residuary Body & Ors.*,²² where Lord Templeman said, “in my opinion [Ashburn case was] wrongly decided. A grant for an uncertain term does not create a lease... That case, if it was correct, would make it unnecessary for a lease to be of certain duration”.²³ It may be said that the granted statutory right resembles a lease on the aspect of certainty of term since it is normally granted for a definite term.

The Supreme Court touched on this in *Savannah Bank Ltd. v. Ajilo*²⁴ where it said that “in terms known to interests in land, the quantum of a... right of occupancy remains unclear. *To the extent that it can only be granted for a specific term* under s.8 Land Use Act 1978, it has the resemblance of a lease”.²⁵ However, we have shown that the deemed statutory right, granted customary right and the deemed customary right have no such certainty of term and would thus fail as lease under common law. In saying so, one is not unaware of “running” leases, i.e., leases which last till terminated by notice on either side.²⁶ It may be noted, however, that under the Land Use Act termination of a right of occupancy is not on notice by “either side”. Only Governor has a right to terminate, not the holder. In any event, such running leases of uncertain duration, which had in fact been approved in the Ashburn case, *supra*, have been expressly disapproved by the House of Lords in the *Prudential Assurance case, supra*. Thus even if the right of occupancy were regarded as a “running” lease, it would still not be a lease at

22 *op. cit.*

23 *Ibid.*, at pp. 510, 511

24 [1989] 1 N. W. L. R. (Pt. 97) 305.

25 *Ibid.*, per Kaibi-Whyte, JSC at p. 309 (emphasis mine).

26 Partington notes that such leases are extremely common and pose a problem in legal analysis because they do not conform to the rule which requires a lease to be for a fixed term. It appears, however, that he was using “periodic tenancy” and “running leases” simultaneously, which is why he says that such leases are very common. Running leases, strictly speaking, are rather very unusual.

common law.²⁷

The ease with which a right of occupancy can be revoked is a further detraction from it being a lease. Section 28(1) of the Act provides that "it shall be lawful for the Military Governor to revoke a right of occupancy for overriding public interest". And under s. 28(4) the right can also be revoked if the land is required "for public purpose" by Government. The grounds of "public interest" and "public purpose" appear too nebulous and too elastic to be valid in an ordinary lease and cannot be compared to the lessor's right of re-entry upon forfeiture. Considering a similar revocation provision in a Tanzanian Land Statute, the Privy Council held in *Premchand Nathu Ltd. Land Officer*²⁸ that "The right of revocation conferred upon a Governor is a right which is quite unknown in the law of England and bears no resemblance to the lessor's right of re-entry upon forfeiture."²⁹

27 The requirement for certainty of term in leases does not affect periodic tenancies. The explanation as to how they satisfy the requirement for certainty is that each separate period is for a known maximum duration. As Lord Templeman put it in the *Prudential Assurance* case, *op. cit.*, at p. 510: "a tenancy from year to year is saved from being uncertain because each party has a power by notice to determine at the end of any year..." The same reasoning was adopted in the Australian case of *Commonwealth Life (Amalgamated) Assn. Co. v. Anderson* [1946] 46 S.R. (NSW) 57, where the court said at p. 60: "Whether the tenancy be from year to year, quarter, month to month or week to week, it is a tenancy for a definite term of a year, a quarter, a month or a week, as the case may be, with the superadded provision that is to continue for another definite term of the same period unless by proper notice to quit, it is terminated". This explanation may appear to ignore the fact that periodic tenancies are not seen as a series of separate and new tenancies but as one continuing tenancy: Lord Bridge, in *Hammersmith and Fulham LBC v. Monk* [1992] 1 All E.R.1 at 9. it may however, be argued that the fact that a periodic tenancy carries with it the automatic renewal of the term created does not deprive it of enjoying the characteristic of precise prospective duration much as a lease for a definite term does not lose its attribute of having maximum duration merely because it contains a covenant for renewal: Chianu, E. *Law of Landlord and Tenant*. (Oliz Publishers, Benin City, 1994) at p. 59. Alternatively, it may simply be said, as do Bright, S. and Gilbert, G., *op. cit.*, at p. 151, that the rule on certainty does not apply to periodic tenancies because there is no reason why it should: periodic tenancies are not objectionable in principle; either party can serve notice ending the relationship and fairness of the bargain is achieved by the power to end the relationship-in effect a renegotiation tool.

28 [1963] A. C. 177.

29 *Ibid.*, at p. 189

The question may be asked whether the right of occupancy may still be a lease despite its not meeting the common law requirements for a lease. One writer has argued that the right of occupancy is "at least a form of statutorily created lease peculiar to Nigeria alone".³⁰ This view is supportable because the framers of the Act clearly intended the right to be in the nature of a lease out of which lesser interests could be created. This explains the frequent reference to "sub-lease" and "forfeiture" in the Act.³¹ Indeed, a statutorily created lease which is lacking in some common law attributes, such as certainty of term, but is nevertheless a lease cannot, after all, be said to be "peculiar to Nigeria alone." Section 105 of the Indian Transfer of Property Act, 1882,³² defines a lease as created under the Act thus:

A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically, or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

One may draw support from the Indian lease in perpetuity, having regard to the intention of the legislature, and conclude that the right of occupancy is a statutory lease, even if not a common law lease.

The right of occupancy has also been thought of as a freehold; but it is not a freehold because, as already stated above, the right holder has no exclusive right to possession, and in the case of the granted statutory right, it is not indefinite in duration but rather is for a term of years certain and is subject to the payment of rent to the

30 Osimiri, U.: "Mortgage Under the Land Use Act 1978 Is Not A Hazardous Business", *The Lawyer's Journal*, vol. 2 No. 1 (1991) pp. 65-79 at 67.

31 E.g., ss 18, 21, 23 and 28.

32 Cited in Main, K M.: *Land Law in East Africa*. Nairobi: OUP, 1967, p.9 (emphasis mine)

landlord (Governor). The deemed statutory right, granted customary right and deemed customary right however partake of some of the characteristics of a freehold because they are of indefinite term and without rent. Also, despite the easy revocability and the lack of prospective certainty of duration which are characteristic of a licence, the right of occupancy is not a licence because, unlike a licence, it is alienable, transferable and transmissible.³³

Unless it is accepted that the right of occupancy is in the nature of a statutory lease (thus giving effect to legislative intention – and this is our view) one would say that it is a right *sui generis*³⁴ because it partakes partly of a freehold and yet also takes on the semblance of a licence. Nigerian courts appear to take this view. In *L.S.D.P.C. v. Foreign Finance Corporation*,³⁵ the Court of Appeal held that “the right of occupancy is in nature a hybrid between a licence and a lease... on terms and conditions which upon breach by a right holder is subject to revocation by the governor.”³⁶

This view is supported by the Supreme Court in *Osho v. Foreign Finance Corporation*³⁷ where the court held that a right of occupancy is a distinct proprietary interest in land different from a lease. The interest in a right of occupancy which passes to a secured creditor by way of security is thus a propriety interest in land. Being a statutory lease, the security should not be longer than the term of the lease.

THE LAND USE ACT AND SECURITY

There are three major areas where the Land Use Act has had its greatest impact on real estate security in Nigeria. There is first, the requirement for Governor’s consent, which is an innovation at

33 The Land Use Act, Sections 21, 22, 24 and 34.

34 This was the view taken by the Privy Council in the Tanzanian case of *Premchand Nathu Ltd v. Land Officer* [1960] E. A. R.; [1963] 2 W L. R. 99; [1963] A. C. 177

35 [1987] 1 N.W L. R. (Pt.50) 413

36 *Ibid.*, at p. 444.

37 [1991] 4 N. W. L. R. (Pt.184) 157 at 197.

least in states constituting the former Southern Nigeria. The second relates to the (non-)entitlement to compensation upon revocation of a right of company. The third is the non-use of the certificate of occupancy as conclusive proof of title to land.

(i) The Consent Requirement.

One pervasive feature in the Land Use Act is the requirement of governmental consent or approval to any security in real estate. The Act provides:

S. 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.

S. 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 howsoever without the consent of the Military Governor first had and obtained.

Section 21 thus requires the approval of the Local Government for mortgagees and pledges (i.e. “transfer of possession”) of all customary rights of occupancy, while section 22 requires the consent of the governor for the same. As regards consent to an equitable mortgage, Section 22(a) provides that the Governor’s consent:

- (a) Shall not be required to the creation of legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor.”

This provision appears to give a discretion whether to ask for consent to an equitable mortgage since it seems to contemplate the possibility that an equitable mortgage might be created without consent.³⁸ On the other hand, Section 50(1) of the Act defines a mortgage to “include” a second and subsequent mortgage and an equitable mortgage while Section 22 (a) contemplates the possibility that, for an equitable mortgage by deposit of title deeds only, the Governor’s consent may not be necessary, probably because this type of mortgage is characterized by informality and is generally created in circumstances of urgency and so it would be impossible to wait till the Governor’s consent is obtained before it is created. It is submitted therefore that the Court of Appeal was in error when, in the case of *Jacobson Engineering Co. Ltd & Anor v. United Bank for Africa Ltd*,³⁹ it relied only on Section 22 and ignored paragraph (a) thereof, to hold that as from the inception of the Land Use Act equitable mortgage by deposit of documents of title can no longer be created unless the consent of the Governor is obtained.⁴⁰

As far as the consent requirement is concerned, two major areas of hardship call for concern. The first is where the consent is sought or obtained subsequent to entering into the security agreement. The second is where the consent is not obtained at all whether prior or subsequent to the transaction.

In *Savannah Bank (Nig) Ltd. v. Ajilo*⁴¹ the Supreme Court observed that consent must be obtained prior to the mortgage. However, this was an *obiter dictum* as the stage of obtaining consent was really not an issue before the court. In subsequent cases the courts have consistently adopted a liberal approach so as to give business

³⁸ For the view that this paragraph as it stands is “unequivocal” that consent is required for an equitable mortgage, see: Ezejifor, G.: “The Consent requirement of the Nigerian Land Use Act” [1998] vol. 42 JAL 101-109 at 103.

³⁹ [1993] 3 NWLR (Pt. 283) 586

⁴⁰ The court held, at page 602 that the law that a deposit of title deeds by way of security created an equitable mortgage “has changed since the promulgation of the Land Use Act 1978”. c.f. *Okuneye v. First Bank of Nigeria Plc* [1996] 6 NWLR (Pt. 475) 749 where the Court of Appeal held that no consent is required to create an equitable mortgage by deposit of title documents.

⁴¹ [1989] 1 NWLR (Pt. 97) 305

efficacy to business transactions. Thus, despite the mandatory statutory stipulation that the security “shall not be lawful” unless Governor’s consent is “first had and obtained”, the courts have held that this “means no more than that the (security) agreement entered into will remain inchoate until the governor’s consent thereon is sought and obtained”.⁴² A similar decision had in fact been taken earlier by the Privy Council with respect to a similar provision for prior consent in the Kenyan Crown Lands Ordinance. In *Denning v. Edwards*⁴³ the Privy Council reasoned that some form of agreement was inescapably necessary before the Governor was approached for his consent, since otherwise negotiations would be impossible; and that the agreement remained inchoate until the consent was obtained, and upon obtaining the consent the agreement became complete and effective. What this means is that the security transaction is upheld while the consent requirement is retained but as a “routine affair”,⁴⁴ for to act otherwise would greatly inhibit landed security transactions. As an alternative approach however, one would suggest that the parties could draft and execute the security instrument but with a clause that it shall not take effect yet but rather, should be conditional on obtaining the Governor’s consent and shall take effect when such consent is obtained. Where the consent is not obtained at all, the security transaction is clearly caught by the statutory consent requirement: it is rendered null and void under section 26 of the Act. Even here, the courts have by deft judicial activism given the statute a human face. Instead of nullifying the transaction, the courts have sought to know whose duty it was to obtain the consent. The one question the courts have asked has been: was it the mortgagor/chargor/pledgor’s duty to have obtained the consent? The answer has invariably been in the positive because he is the “holder”⁴⁵ under the Act. In *Adedeji v. National Bank of*

⁴² *Awojugbagbe Light Industries Ltd. v. Chinekwe & Anor* (1993) INWLR (Pt. 270) 485; *Iragunima v. Uchendu* (1996) 2 NWLR (Pt. 428) 30

⁴³ [1961] A. C 245. Also: *Solanke v. Abed & Anor* [1962] All NLR (Pt. 1) 230

⁴⁴ Omotola, J. A.: “Interpreting The Land Use Act” Vol. 1 The Journal of Nigerian Law, (1992) p. 108

⁴⁵ A “holder” in relation to a right of occupancy means “a person entitled to a right of occupancy”: Section 50(1) of the Act. The Act expressly excludes a mortgagee from the definition of a ‘holder’

*Nigeria Ltd & Anor*⁴⁶, the appellant had by deed of legal mortgage dated 7/3/80 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 Akpata, 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 and say that the agreement is null and void".⁴⁷ It may therefore be said that the consent requirement in the Land Use Act has in principle done no harm to security transactions. The problem lies first in the delay by Governors in granting consent when sought. This problem is compounded by the fact that the grant of consent by the Governor cannot be assumed: it is not automatic.⁴⁸ The second is that while it is obligatory to obtain the Governor's consent to a landed security transaction, there is no corresponding 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 in the event of refusing to give his consent. As the law stands, it is not clear that there is anything an applicant can do if the Governor refuses to give his consent to a landed security transaction.⁴⁹ It would be welcome if the law expressly

required the governor to give or refuse his consent within a "reasonable time". By this, the Governor would still have some freedom of action since no definite time is stipulated within which he may give consent, but it would allow the court to interpret when delay to give consent is unreasonable; a knowledge of this power in the court would ginger up the Governor to act timeously one way or the other.

The third problem may be posed as a question: Where the Governor refuses to give his consent to a landed security transaction, should he not give reasons for his refusal? The Land Use Act appears to have "proceeded on the assumption that the Governor is a good man"⁵⁰. This may well be true, but since experience lends credence to the aphorism that "power tends to corrupt and absolute power corrupts absolutely",⁵¹ it is necessary that there should be a provision that in the event of the Governor refusing to give his consent to any landed security transaction, he should give his reason(s) for the refusal. This will help to check a refusal on political, non-legal grounds; for, it has been demonstrated more than once that even the State Chief Executive (i.e., the Governor) is capable of taking the law into his hands.⁵²

The requirement of the Governor's or of the family's consent to the creation of landed security may be justified by the need to monitor and regulate such encumbrances, some of which may ultimately result in title passing to the mortgagee, e.g. in the case of a mortgage, if it is not redeemed and the mortgagee remains in possession for twelve years.⁵³ It is however difficult to justify the

46 [1989] 1 NWLR (Pt. 96) 212

47 *Ibid* at pp. 226-227. also: *A-G of the Federation v. Sode* [1990] 1 NWLR (Pt. 128)500; *Adetuyi v. Agbojo & Anor* [1997] 1 NWLR (Pt 484) 705 at 717; *Solanke v. Abed & Anor* [1962] ALL NLR (pt. 1) 230 held no. 4.

48 See further: Enefiok Essien, *Law of Credit and Security in Nigeria* (2000) pp. 175-177.

49 In *Queen v. Minister of Land and Survey, ex-parte The Bank of the North Ltd.* (1963) N.N.R 58, interpreting a similar consent provision (s.11 of the Land and native Rights 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. S. P. J., held that s.11 conferred a 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. See also: *Qudus v. Military Governor of Lagos State* [1973] CCHC/6/7/73 at 61.

50 Olawoye, C. O.: "Statutory Shaping of Land Law and Land Administration up to the Land Use Act", in Omotola, J. A. (ed.): *The Land Use Act* (Report of a National Workshop) (University of Lagos Press, 1982) pp. 14-22 at p. 21.

51 *per* Lord Acton (1834-1902) in a letter to Bishop Mandell Creighton, 3 April 1887. See *Life and Letters of Mandell Creighton* (1904) p. 372.

52 Eso, JSC called it "executive lawlessness" in *Government of Lagos State v. Ojukwu* [1986] 1 N.W.L.R. (Pt. 18) 621 at 634. Here, the State Government attempted to forcefully eject the respondent from a building which the Government claimed was its own. The court granted an injunction against the unlawful use of force to gain possession.

53 The Real Property Limitation Act 1874, s. 7; *Federal Administrator-General & Ors. v. Cardoso & Ors.* [1973] 1 ALL N.L.R. (Pt.11) 169 at 171 (S.C).

requirement for consent under paragraph (a) of s. 21 of the Land Use Act (i.e., for judicial sale of a customary right of occupancy) even when the security may have been created with the consent of the Governor.⁵⁴

Equally there does not appear to be any compelling public policy reason for the requirement for pre-enforcement consent of the Attorney-General in cases where the landed property is in the occupation of, or use by, a Government functionary. These consent provisions should be removed as they are mere frustrating hurdles in the mortgagee's way to realizing his security. As is now globally agreed, collateralization of credit exposure should be encouraged and not inhibited by excessively expensive or impossible realization procedures.⁵⁵

(ii) (Non-) entitlement to Compensation.

Part of the pre-enforcement rights of the secured lender, say a mortgagee, is the general right to preserve the security. In the case of the holder of security in real estate in Nigeria, that right is to preserve the right of occupancy. Such preservation may include the mortgagee ensuring the periodic payment of stipulated rents, etc., so that the right of occupancy may not be revoked. The mortgagee may take steps to protect his security if it is in jeopardy⁵⁶ and may obtain an injunction restraining a judgment creditor from taking possession of the land as against the mortgagee.⁵⁷

From the fact of the mortgagee's right to preserve the mortgaged property and the fact that the mortgage security entitles him to look up to the mortgagor's right in the real estate for repayment of his debt, it ought to follow that should the mortgagor's interest in the land change, the mortgagee's security would automatically

attach to the mortgagor's interest in the changed form. Under the Land Use Act, where the right of occupancy is revoked so that government may use the land for public purpose⁵⁸ or for extraction of building materials or for overriding public interest,⁵⁹ "the holder and the occupier shall be entitled to compensation for the value at the date of the revocation of their unexhausted improvements"⁶⁰ on the land. We earlier made the point that the meaning of "holder" and "occupier" under the Land Use Act does not include the mortgagee. This may have the effect that though the mortgagee has the right to (and in fact does) preserve the improvements on the land, which are security for his debt, yet on revocation of the mortgagor's entitlement to the improvements, i.e., his right of occupancy, the mortgagee has no right to the compensation money into which the improvements may be said to have transmuted.

There is as yet, to my knowledge, no judicial pronouncement on the point in Nigeria. However, the issue arose in the Tanzanian case of *Manyara Estates Ltd. & Ors. v. National Development Credit Agency*⁶¹ where, under the Land Ordinance,⁶² compensation for improvements on land upon a revocation of a right occupancy was only payable to the "occupier". The court held that the mortgagee was not in the position of the occupier and therefore was not entitled to receive the compensation, and that the charge created by the mortgage did not attach to the compensation into which the right of occupancy had been converted.

According to Sir Charles Newbold, P.⁶³:

The charge created by the mortgage of a right of occupancy is a charge over the right to use and occupy public land. This is

58 The Land Use Act, 1978. Ss. 28(2)(b) and 28(3)

59 Section 29(1) and (2), *ibid.*

59 Under s. 28(3)(a) or (c), *ibid.*

60 Section 29(1) and (2), *ibid.*

61 [1970] E.A. 177

62 Cap. 133 (of Tanzania)

63 [1970] E.A. 177 at 185

54 Which, includes consent for the mortgagee to exercise his powers.

55 Randall D. Guynn, "Moderizing Securities Ownership, Transfer and Pledging Laws" (a Discussion Paper on the need for International Harmonization) Capital Markets Forum, International Bar Association, England, (1996) p.41

56 *Mc Mahon v. North Kent Iron Works Co.* [1881] 2 Ch. 148 at 150

57 *Legg v. Mathieson* [1860] 2 Giff 71, vol. 66 E. R. 31

purely a usufructuary right; thus the charge ceases to exist when the subject matter of the charge ceases to exist, as there is no *res* to which an action in rem can apply. As the charge ceases to exist when the right of occupancy is revoked it cannot continue to apply to anything ... I do not consider that the right of occupancy on revocation can be said to be transmuted into money payable for the unexhausted improvements as this money may vary from little or nothing to very considerable amount and bears no relation to the right to use and occupy the land.⁶⁴

The reason given by the court for holding that the right of occupancy (and therefore the security) does not transmute to compensation payable on revocation is open to objection. We submit that even if the compensation “varies from little or nothing” or is of “very considerable amount”, the mortgagee’s interest will be only to the extent of the amount secured by the mortgage and any surplus will be payable to the mortgagor. Also, it seems a mere hair-splitting to say that it is the right to use and occupy land (i.e., right of occupancy) that was mortgaged and that this “bears no relation” to the improvements on the land for which compensation is paid. It cannot be argued that improvements on the land (e.g., buildings erected or economic trees planted thereon) are borne out of the exercise of the right of using and occupying the land, and that the right to use and occupy these improvements are what are normally transferred to the mortgagee by the fact of mortgage. To say therefore that the right to the improvements (and therefore to the compensation therefor) bears no relation to the right to use and occupy the land is to make a distinction without a difference.

We submit therefore that the mortgagee should be regarded as subrogated to the position of the mortgagor so that his right having transmuted into the compensation money, he becomes entitled to

64 Duffus. V.P., dissented on the issue of non-transmutation. See p.189 of the report.

it⁶⁵. This, it is submitted, is the most equitable approach to the question, otherwise the mortgagee’s right to preserve the security and his security generally over a right of occupancy will be of little or no value. It is hoped therefore that if the question arises the Nigerian court will hold that the mortgagee has a right to the compensation money despite the restriction in the meaning of “holder” in the Act. A leaf should be borrowed from the Australian judicial approach that:

When compensation is paid for a deprivation of interest which diminishes the mortgagee’s security, the compensation is regarded as representing the security *pro tanto* and it must be paid to the mortgagee or preserved to meet his claims under the mortgage...[because] in such a case, as Kekewich J. said in *Law Guarantee and Trust Society Ltd. v. Mitcham and Chem Brewery Co. Ltd.* [1906] 2 Ch. 98 at p. 103: The property... is not what it was. Something has been taken out of it.⁶⁶

To avoid any doubts, however, it would be welcome if the Act is amended to provide for payment of compensation to “the persons interested in order of priority”⁶⁷. That way, the mortgagee will have a prior right to the compensation money. In the absence of

65 Persuasion for the view may be found in *Ranken v. East India Docks Co.* 12 Beav. 298, vol. 55 E. R. 1075 where, upon the land being taken over (under an Act of Parliament) by the defendant Railway Company, the court ordered that compensation should be paid to the mortgagee to whom the land was security. The same decision was reached in *Rex v. Middlesex (Clerk of Peace)* [1914] 3 K. B. 259 where land subject to mortgage was taken compulsorily by the Railway Company under an Act of Parliament. There Rowlatt, J. said at p. 264:... it certainly is a startling proposition that the mortgagees who have precisely the same land in their hands as security should be in a worse position than their mortgagor, and should be unable to demand all the compensation which their mortgagor could have demanded in respect of the mortgaged property...”. See also, Ramsbotham, R. L.: *Cootie’s Treatise on the Law of Mortgages*, 9th edn., vol.1, (Stevens & Sons Ltd., London, 1927) at p. 816 – that if mortgaged lands are compulsorily taken under an Act the compensation for the lands will become subject to the security; *Pile v. Pile ex parte Lamberton*, (1876) 3 Ch. D at 39, per Hall, V. C.: “The mortgage of a lease of property ... must carry along with it everything which would be awarded in respect of the property.”

66 *Syme v. The Commonwealth & Anor* [1942] 66 C. L. R. 413 at 421, per Latham, C. J. In this case, the mortgaged land was taken over by the Government of Australia under the National Security Act 1939- 1940.

67 “Priority” is beyond the scope of this work.

legislation, it is advisable that the mortgagee includes a covenant in the mortgage deed that in the event of the right of occupancy being revoked the mortgage debt shall be secured additionally on any compensation payment due to the mortgagor in respect of the unexhausted improvements, or that the mortgagor shall hold such payment on trust for the mortgagee, to the extent of the mortgagee's claim on the secured debt, or that the debt is additionally secured on any alternative land right which might be granted to the mortgagor in lieu of compensation.

(iii) Certificate of Occupancy

The Land Use Act does not stipulate any *conclusive* means of proving one's entitlement to a right of occupancy. It however, provides for what amounts to *evidence* of one's entitlement. This is the certificate of occupancy, and its issuance by the State Governor is provided for in Section 9 of the Act.

The fact that a certificate of occupancy is merely evidence of a right of occupancy carries with it two implications. Firstly, that the right in land must exist before the grant of the certificate of occupancy or at least arise simultaneously with the grant – such as where the right is granted with an accompanying certificate in evidence of it. The second implication is that the certificate of occupancy is not conclusive as to a person's right to the land, it is not a proof of right but merely raises a rebuttable presumptive right.⁶⁸ Accordingly, the certificate of occupancy can be set aside if it turns out that the holder had no right to the land.⁶⁹ It can also be set aside in favour of a conveyance which pre-dates the Land Use Act or in favour of a person who had held the land before the Land Use Act came into force and so is now a deemed

68 *The Registered Trustees of the Apostolic Church v. Olowoleni* [1987] 4 N.W.L.R. (Pt.158) held No. 4 (SC); *Ogunleye v. Oni* [1990] 2 N.W.L.R. (Pt. 135) 745, [1990] All N.W.L.R. 341, held no. 4 (SC): "A certificate of occupancy is prima facie evidence and raises a presumption that the holder is in exclusive possession and has a right of occupancy over the land... This presumption is however rebuttable.

69 *Adedeji v. Williams* [1989] 1 N.W.L.R. (Pt.99) 611.

grantee of right of occupancy under s. 34 of the Act.⁷⁰ This point was clearly made by Nnaemeka Agu, JSC when he said:

Indeed a certificate of occupancy properly issued under section 9 of the Land Use Act ought to be a reflection and an assurance that the grantee has to be in occupation of the land. Where it is shown by evidence that another person had a better right to grant, the court will have no alternative but to set aside the (first) grant if asked to do so...

Where the certificate of occupancy is thus set aside, a creditor who had accepted it as security for his debt suddenly discovers that the certificate in his hand is "a piece of paper having no value".⁷¹ It is the fact that the certificate of occupancy is not conclusive of a right that makes it a precarious and sometimes illusory security for a creditor.

It is not clear why the Certificate of Occupancy should not be conclusive proof of a land right. One reason, perhaps, may have to do with the modalities for its issuance. The Act enjoins the Governor to be "satisfied" that the applicant for a Certificate of Occupancy over any land has a right thereto before he issues the certificate,⁷² since the certificate is intended to be evidence of the right. The Act however fails to specify how the Governor will set about satisfying himself, or what matters will fall for consideration. In practice, all that the State Governors do at the moment is to advertise the application for a certificate of occupancy in a newspaper (generally, in the State-owned newspaper circulating within the state), and where there is no objection after, generally, twenty one days, the Governor issues the certificate to the applicant. As it is possible that the applicant may make false claim to a right so as to obtain a certificate, it is suggested that there

70 *Sir Adetokunbo Ademola v. Amaf & Ors.* [1982] OGSLR p.273, reported in Omotola, J. A.: "Cases on the Land Use Act", *op. cit.*, p. 132 and at p. 97 of (1984) 1 & 2 JPPL. See also, Sholanke, O.O., "Case Note" J.A.L., vol. 36, No. 1, (1992) at p. 86; *Ogunleye v. Oni* [1990] 2 N.W.L.R. (Pt.135) 745; *Registered Trustee of Apostolic Church v. Olowoleni* [1990] 6 N.W.L.R. (Pt. 158) 514

71 *Per Belgore, JSC in Ogunleye v. Oni, op.cit.*

72 Sections 34(3), 34(9) and 36(3) of the Act.

should be a system of verifying the applicant's claim, say, by enquires from the occupiers of adjoining lands and obtaining legally admissible title documents where such exist.⁷³ In this way, by the time the application is advertised, all the ground work would have been done and the effect of the advertisement would be to fix the public with notice of the application, with the result that when there is no objection and a certificate is issued, it would be proof rather than mere evidence of a right of occupancy to the Land. This will give the needed confidence in the certificate of occupancy as a useful document for securing credit. Without such confidence, what will prevail is a situation where the creditors require combined securities, i.e., landed property and, in addition, non-landed real securities like share certificates and stocks and insurance certificates.⁷⁴ This diminishes the value of land (and landed interests) as security for credit.

It is strongly believed that if the Land Use Act is amended in the three areas suggested in this contribution, quite a lot more confidence would be instilled into security in real estate in Nigeria.

73 Right now, what most State Governments generally require are: passport-sized photograph of the applicant (presumably for identification purposes), three years current tax clearance certificate (purely revenue collection for the government), a survey plan of the land certified by a licenced surveyor (presumably for identification of the land) and a photocopy of the instrument of title, e.g., a deed of assignment or a pre-1978 deed of conveyance. This last is the only requirement which can be regarded as a legal evidence in proof of title. In some states, members of the State Land Use Allocation Committee (which processes the application for the grant of a certificate of occupancy) go on land inspection (of course, after the applicant has paid the "inspection fee"), but this, again, is merely for the purpose of further identifying the land and determining its location, i.e., whether in the urban or rural area, or whether it is in an area which has been acquired by Government for some development purpose; it has nothing to do with proof of title.

74 "Banks Shun Buildings As Collaterals", *Daily Times*, July 30, 1992; Enefiok Essien: "From Mortgage to Insurance in Search of Security: A Tale of Two Cities" Vol.3, *University of Uyo Law Journal*, (1999) pp. 1-14.