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Chapter 22

THE TAMING OF THE SHREW: REAL PROPERTY RIGHTS AND LAND REFORMS IN NIGERIA*

By
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Abstract

It is over three decades since the Land Use Act was promulgated to regulate land use (and land right) in Nigeria. The Act has wrested allodial property rights from previous land owners, substituting therefor some right of uncertain legal nature. Contrary to the letter and intendment of the Act, even federal agencies often find it difficult to obtain land allocation from state governors in whom the Act has vested and entrusted the land within the state territory. Also, capital accumulation for development, through landed security, has been impeded due to cumbersome perfection and realization requirements. These and other worrisome provisions of the Act often engender strident calls for land reform. The stridency of the reform advocacy has now reached a crescendo as the Nigerian legislature appears to be seriously considering amendment of the Act. This paper assesses the Act and proffers legal imperatives for a meaningful land reform in Nigeria.

Introduction

Interestingly, land reform was one the seven-point agenda of the late President Umaru Musa Yar'Adua administration, of which the present Goodluck Jonathan administration is a continuum¹. This is not surprising in view of the importance of land not only to Nigerians specifically but to man in general, as more elaborately highlighted below. What is rather surprising is how often the need for land reform

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has cropped up, and how equally often it has been easily waived aside. The principal statute regulating land right in Nigeria, i.e., the Land Use Act 1978, has been much criticized, much demonized, and yet it has remained as immutable as (or perhaps more immutable than!) the law of the Persians and the Medes². The reason may lie in the perceived constitutional complexity in amending the Land Use Act, or/and the potential curtailment of the vested property rights of the high and mighty.

It should be said that the heat generated by land reform is not peculiar to Nigeria. In Africa, generally, "when land reform enters the equation, it is a tricky business for those in power."³ However, in view of the pre-eminent position of a progressive land law regime to economic development, it is necessary that the bull be taken by the horns no matter whose ox is gored in the process. However, any meaningful land reform in Nigeria must entail a comprehensive overhaul of the albatross that the Land Use Act has become. Of course, taming the Shrew has never been an easy task, but Shakespeare's success at it is an encouragement that it⁴ can be done. To this end, this paper examines the rough edges of the Land Use Act and suggests ways of smoothening the same so as to do away with those mischievous provisions that give the Act its current bad name. A natural starting point is the very beginning: the meaning of "land" itself.

Land

Everyone knows what land is: the soil, the earth's surface, the ground. Technically though, land is not merely the earth's surface, but all the land down to the centre of the earth and up to the heavens⁵. The extension of "land" to the centre of the earth means that it also includes the natural prolongation of the land below the territorial sea, below the contiguous zone, and even below the Exclusive Economic Zone, in the form of continental shelf, extending 200 nautical miles (and sometimes more)

1. Dr. Goodluck Jonathan, the erstwhile Vice President to President Umaru Musa Yaradua, took over as President of the Federal Republic of Nigeria, following the demise of the latter in May 2010.
2. In fact even the law of the Persians and the Medes, though it could not be cancelled no matter how ill advised, could nevertheless be neutralized by the issue of a new law. See the explanatory note to Esther 1:19, at page 746 of *Life Application Study Bible*, King James Version, Tyndale House Publishers Inc., Illinois, 2004 edn.
3. See: Joshua Mmali (the BBC African Service Correspondent in Kampala) in *BBC Focus on Africa*, July September 2009 at page 20.
4. See: "The Taming of the Shrew", in *The Complete Works of William Shakespeare*, 18th impression (1978), The Hamlyn Publishing Group Ltd, London.
5. Bennett, J in *Re Wilson Syndicate Conveyance, Wilson v. Shorrock* (1938) 3 All ER 599 at 602.

into the sea⁶. Even off-shore production of petroleum depends on land as the indispensable take-off point, as the continental shelf is part of land. In this context, land constitutes a major part of the natural resources which nature has bestowed on Nigeria. This brings to the fore the issue of property rights of the littoral States and the people's right to the extended land territory below the sea. This extended meaning of land is the *raison d'être* for the clamour for resource control by littoral States in the Nigerian federation. Those against the clamour have argued that the Law of the Sea Convention 1982 (UNCLOS 3) does not apply municipally to federating States; it only applies to nation-States inter se. This is true. Even then, it is arguable that common law and statutory extensions of land would still avail. The same may be said of inter-state littoral boundaries.

Apart from the vertical extension, horizontally land includes fixtures⁷, ie things permanently attached or annexed to land, so that by the annexation to land they have lost their chattel nature and have become, in the eye of the law, part and parcel of the land. This is important, because it means that plants, economic trees, buildings and other permanent structures planted in or affixed to the land, become part of the land. This means, for instance, as will be explained fully later, that compensation payable upon revocation under the Land Use Act should be paid for the land as well, and not just for improvements thereon, which constitute only part of the land.

6. By Article 76 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS 111), "The continental shelf of a coastal State comprises the **sea-bed** and the **subsoil** of the submarine areas that extend beyond its territorial sea **throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles** from the baselines from which the breadth of the territorial sea is measured..." (Emphasis mine)
7. For the *locus classicus* on "fixtures", see *Holland v Hodgson* (1872) L. R. 7C.P. 328.

Importance of land

The land question has been recurring worldwide. This is not surprising in view of the importance of land to man⁸. Writing about Uganda, it is said that land is, "perhaps unsurprisingly", and since colonial times always has been, at the centre of the uneasy relationship between those in power and the country's 13 main ethnic groups⁹. Land provides the physical substratum for all social and economic interaction. Everyone - even the truly homeless - lives 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 impinges upon a vast area of social orderings and expectations, exerting a fundamental influence on the lifestyles of even the ordinary people. Quite apart from the residential dimension, land has a huge economic, commercial and industrial significance. It is the most important factor of production in industry as well as in agriculture, in the sense that business needs land for buildings, factories, stores, warehouses, etc. Professional practice needs land for offices, etc. Land is also vital in wealth creation and capital accumulation: it may be sold or used as security to raise money which is used for human, economic and national development. Given the present state of the Nigerian Stock Market, landed property remains the most accessible and dependable avenue of investment in the country. This creates a necessity for some control by the State with a view to ensuring that the opportunities for investment in landed property are as nearly equal for everyone as is practicable. In view, therefore, of its indispensability to man, it is necessary to periodically reform the law to ensure its easy affordability both to all Nigerians and to government for developmental purposes. Indeed, when put in its proper perspective, the right to property looms even larger than the right to life, because life itself must be on land. Land reform is therefore of immense significance in every respect.

8. See, e.g. J Davison, "Without Land We Are Nothing: The Effect of Land Tenure Policies and Practices Upon Rural Women in Kenya" (1987) vol. 2, *Rural Africana*, pp. 1-7; C P Sheoran, "Socio-Legal Aspects of Land Reform in India" (1983) vol. 9 *Indian Socio-Legal Journal*, 81.

9. See: Joshua Mmali (the BBC African Service Correspondent in Kampala) in *BBC Focus on Africa*, July September 2009 at page 20.

Right to property

"Property" refers to something which may be owned¹⁰. It is usually classified into two: real (or immovable) property or realty (which is land), and personal (or movable) property or personalty (which refers to chattels - and includes money and things in action and other intangible property). Right to property, or property right, in the present context, refers to land right or real property rights. The term "real estate" is often used as a synonym for and interchangeably with "immovable" or "real" property. The use of the term "real property" or "realty" in relation to rights in land has fallen into comparative disuse in Nigeria, and indeed in most common law jurisdictions, in preference for the increasingly common usage of "land". However, the term "real estate" still has tremendous historical importance and therefore should not be wished away. There is no doubt, however, that the legal basis for the use of the term subsists today: 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", ie a right to require that the land be returned physically into his possession, and this avails even today.

Property right, or right to property, is recognized by Section 43 of the 1999 Constitution¹¹, which states categorically that "every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria". This constitutional provision is said to have been deliberately inserted not only to guarantee property right, but also "to correct the effect of the application of the principle of indigeneity which requires people to identify themselves by the area and community from which they originate to be able to have any benefit from the area"¹². To make the right to property more meaningful, Section 44 of the Constitution goes further to prohibit compulsory acquisition of any right or interest in an immovable property without payment of compensation¹³.

10. L B Curzon, *A Dictionary of Law*, 1st edn, Macdonald & Evans.

11. Cap C 23, vol. 3 Laws of the Federation of Nigeria, 2004; *Okonkwo Timothy (alias Job) v. Oforka & Anor* (2008) 9 NWLR (Pt. 1091) 204 at 216 217, held no. 5.

12. Jadesola Akande, *Introduction to the Constitution of the Federal Republic of Nigeria 1999*, (2000 edn) at page 108.

13. For international instruments guaranteeing property right, see: Universal Declaration of Human Rights, adopted Dec. 10 1948, G. A. Res 217 A (111) Art. 17; African Charter on Human and Peoples Rights, adopted June 27 1981, entry into force October 21, 1986, Art. 14.

By acquiring property right, one becomes the owner of that property. Ownership, as we know it, is the greatest possible interest in property which a mature system of law recognizes¹⁴, and has its own standard incidents. These are: the right to possess (ie to have exclusive possession); the right to use; the right to manage (ie decide how and by whom it should be used); the right to the income from it; the right to the capital (ie the power to alienate); the right to security (ie his ability to look forward to remaining the owner indefinitely if he so chooses); the rights or incidents of transmissibility and absence of term, and liability to execution. It is an entirely different question whether property right as presently constituted in Nigerian law gives all these incidents.

The governing Law

As earlier stated, the law which regulates the allocation of rights and obligations in relation to immovable or real property in Nigeria is the Land Use Act 1978¹⁵. The Act has as its generally known aims, stemming the tide of land profiteering and speculation, easing the burden on government when it needs land for development, and enhancing availability and affordability of land to all Nigerians. The populist preamble to the Act declares its objective to be the assertion and preservation of land rights and tenures. Paradoxically, section 1 of the Act vests “all land comprised in the territory of each State” in the respective State Governor, thus divesting the individuals of their proprietary rights. The Act is said to have abrogated absolute property ownership by communities, families and individuals¹⁶, and replaced it with a mere permissive right of occupancy. Due to its radical and innovative provisions, the Land Use Act has been variously described, largely justifiably, as a “controversial and yet momentous legislation”, “one of the most enigmatic statutes in Nigeria”, and “the most impactful(sic) of all legislations(sic) touching upon land tenurial system of this country before and after full nationhood.”¹⁷ However, whatever views may be held, the Land Use Act remains for now the law governing land right in Nigeria. It is for this reason that one may correctly say that land reform in Nigeria of means a reform of the Act.

14. A M Honore, “Ownership”, in A. G. Guest (ed), *Oxford Essays in Jurisprudence*, 2nd edn., Clarendon Press, Oxford, Chapter V. (pp. 107-147) at p. 108.

15. Cap L5 Vol. 8 Laws of the Federation of Nigeria, 2004.

16. *Sule Shado v Mustapha Alao*, Unreported Suit No. CA/L/159/84 of 7/10/85. See further, under “Vesting” of land in the State Governor, below.

17. Per Irikefe, JSC in *Nkwocha v Governor of Anambra State (1984)* 1 SCNLR 634 at 653.

Reform or Repeal?

It may be argued that to talk of reforming the Land Use Act is to assume a conclusion: It assumes that the Act is still useful and merely needs a reform. One main achievement of the Land Use Act is the harmonization of land tenure systems in the country. Apart from that, most would agree that the Act has failed to achieve its declared objective as contained in its section 1, ie ensuring that land is “administered for the use and common benefit of all Nigerians”. The Act has enabled some Nigerians to acquire more land, or to take others' land, and others to be rendered landless. The recent demolitions and private acquisitions in the Federal Capital Territory (Abuja) are still fresh in our minds. The Act has failed to guarantee the right of Nigerians to land, and has not succeeded in settling boundary disputes and endless litigation over allodial or even usufructuary land rights. With the governor's unquestionable power to with-hold consent, delay consent, deny consent or even refuse consent, and with his power of revocation which is often misapplied, the Land Use Act, as it is, has not aided development. And, as recently disclosed by a traditional ruler, as far as rural areas are concerned the Land Use Act has woefully failed to have any effect: it has not successfully divested ownership of land from individuals, families and communities, who still hold, manage and dispose of land as they did before the Act¹⁸ a view supported by judicial authorities below. [Even with all these, however, one still holds the view that the Act only needs a reform, not a repeal, because to repeal the Act in its entirety would leave a lacuna which would be a fertile ground for confusion. In order to further the general purpose of the Land Use Act, which is that of ensuring availability, affordability and alienability of land, thus aiding development, reforms are imperative in certain areas.

Areas For Reform

Title of the Act

Indeed, it can be said that the Act needs reform from the very beginning of it (ie the title) down to the very end (ie the definition section). For instance, the Act, though titled the “Land Use Act,” does not concern

18. His Royal Majesty Edidem Robert James Obot (a paramount ruler), “The Traditional Institutions, Land Tenure Systems and Reforms,” at First Akwa Ibom State Summit on Land Reform, organized by Ministry of Lands and Town Planning, on 29 August 2008 at Ikom Hall, Uyo, Nigeria.

itself with land use; rather it is principally concerned with land transfer, ie transfer of the radical title from the erstwhile customary owners and vesting the same in the state governors, the conditions under which the holders of right of occupancy (whether customary or statutory) can transfer the right, consequences of a transfer without governor's consent, the conditions under which the holders of right of occupancy (whether customary or statutory) can transfer the right, consequences of a transfer without governor's consent, absolute prohibition of transfer of agricultural land in non-urban areas, etc. It is therefore doubtful if the title of the Act properly elicits its purport. An amendment is called for even in this regard. Maybe a "Land Transfer Act" may be considered.

"Vesting" of land in the State Governor

By section 1 of the Act,

... all land (sic) comprised in the territory of each State in the Federation are hereby vested (emphasis mine) in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians ...

In *Akinloye v Oyejide*¹⁹, the "vesting" was held to have the effect of transferring to the governor of the State the ownership of all land in the state. According to the court, the intelligible result of the vesting is to deprive citizens of this country of their ownership in land and vest same in the respective state governors. This view was approved in principle by Kayode Eso, JSC in *Nkwocha v Governor of Anambra State*²⁰. However, a different view was taken in *Savannah Bank of Nigeria Ltd v Ajilo*²¹, where the supreme court held that "the vesting in this instance is for administrative and management purpose", and "does not imply personal

19. Unreported, cited in B M Wifa, *Essays on Nigerian Current Legal Problems*, vol. 1 (1985), Govt Printer, Port Harcourt, pp. 79-85.

20. (1984) 6 SC 362 at 392, [1984] 1 SCNLR 634 at 647, [2001] FWLR (Pt. 48) 1386 at 1409.

21. (1989) 1 NWLR (Pt. 97) 305

interest of the governor, but merely gives the governor power of superintendence in the sense of management and control". The same point was made in *Olorunfemi v Aшо*²², where the Act was described as "more of a management legislation". In the more recent case of *Adole v Gwar*²³ the supreme court was assertive that "the Act vests in the governor no more than administrative and management powers over land ... The Act has not done away with all incidents of land ownership known to the people prior to its promulgation".

Going by these decisions therefore, one is tempted to agree that the statutory "vesting" of land in the state governor may not be as radical in effect as it is often thought to be. However, the recent holding of the court of appeal in *Eleran v Aderonpe*²⁴ shows a present lack of unanimity on the effect of "vesting" in the Act. The court asserted that by the "vesting," **ownership** of land or title thereto is vested in the governor of the state under the Land Use Act. In view of the lack of unanimity, one hereby suggests that a more innocuous, less ambiguous word be substituted for "vested" in section 1 of the Act.

Extinguishment of existing rights

Section 5(1) of the Act gives the governor power to grant statutory right of occupancy to any person in respect of land in both urban and rural areas. Section 5(2) goes further to aver that "upon the grant of a statutory right of occupancy ... all existing rights to the use and occupation of the land ... shall be extinguished". Relying on this provision, the supreme court held recently, in *Olagunju v Adesoye*²⁵, that "it is now settled" that a statutory right of occupancy automatically extinguishes all existing rights in respect of the parcel of land over which it is granted²⁶. It is remarkable however, that the same Act, by sections 34 and 36, recognizes and preserves all existing land titles and ownership and yet by section 5(2) it says that a grant of statutory right automatically extinguishes those pre-existing rights. This obvious inherent contradiction needs to be corrected by statutory reform. I take the view

22. (1999) 1 NWLR (Pt. 585) 1 at 9.

23. (2008) 11 NWLR (Pt. 1099) 562 at 602-603

24. (2008) 11 NWLR (Pt. 1097) 50 at 76

25. (2009) 9 NWLR (Pt. 1146) 225, held no. 4 (at pp 265-266).

that those pre-existing land rights are converted into deemed rights of occupancy which cannot be extinguished simply by a grant of statutory right of occupancy over the same land to another person. As the supreme court earlier held in *Adole v Gwar*²⁷, once a statutory right of occupancy is issued when a deemed right exists and has not been revoked, the statutory right of occupancy becomes a worthless document because there cannot exist concurrently two title holders over one and the same piece of land. In the face of the two inconsistent holdings from the apex court, one is left free to pick and choose which one to follow²⁸, and I submit that the earlier decision is preferable.

My preference is not without reason. First, the earlier case of *Adole v Gwar* was neither cited nor referred to in the latter case, thus it cannot be said to have been overruled. Also, a statutory right of occupancy, even when it is evidenced by a certificate of occupancy, can still be revoked in favour of a pre-existing customary or common law right²⁹. This means that a statutory right of occupancy does not give its holder an indefeasible title because it does not have the effect of extinguishing pre-existing rights to the land. The third reason is that a deemed right of occupancy can only be properly revoked if and only if the revocation is done under section 28 of the Act for any of the reasons stated therein. Issuance of statutory right of occupancy is not a measure aimed at divesting holders of deemed rights of occupancy of their land without justification³¹. Also, one right of occupancy cannot just on the face of it extinguish another. Thus, section 5(2) of the Land Use Act is of no potency and is clearly antithetical to the vested pre-Land Use Act rights. The section should be expunged. As the supreme court held in the aforesaid earlier case, the only rights that are automatically extinguished following the exercise of the power of the governor under section 5(2) of the Act are existing rights to the use and occupation of the land such as the rights of licencees, mortgagees, etc, but not vested rights such as statutory rights of occupancy, actually or deemed granted, which are recognized by the Act itself. Our view is that instead of unnecessary

26. Ibid.

27. (2008) 11 NWLR (Pt. 1099) 562 at 590, 607-608.

28. *Dikenwonsih Ebiteh v Eriemeghen Obiki* (1992) 5 NWLR (Pt. 243) 599 at 618-619.

29. *Adobe v Omisola* (2005) 2 NWLR (Pt. 909) 149, held no. 4.

30. *Adole v Gwar*, above, at pp. 607-608.

31. *Adole v Gwar* above, at p. 591. Also: *Nigeria Engineering Works v Denap Ltd.* (2001) 18 NWLR (Pt 746) 726.

hair-splitting and legal niceties all in a bid to circumvent an odious statutory provision, the sub-section (i.e., 5(2)) should be completely jettisoned.

“De-entrenchment”

It may not be off the mark to argue that since land is so central and fundamental to the nation, land policies should be contained in a basic law of the country, thus putting it beyond the reach of temporary majorities in the legislature. This view, perhaps, informed the Land Use Act being entrenched in and incorporated by reference into the Nigerian constitution. Section 315(5) of the 1999 constitution provides in part that the Act “shall continue to apply and have full effect... to the like extent as any other provisions forming part of this constitution and shall not be altered or repealed except in accordance with the provisions of section 9 (2) of this constitution”. This entrenchment in the constitution has had the effect that:

- (i) There is a rigid procedure for amendment of the Act. The Act cannot be amended except in the same strict and rigorous method of amending the constitution: it cannot be amended through the normal legislative process. The normal legislative process for amending an Act requires that the proposal for amendment should be supported by a majority of members of the National Assembly³². The special procedure under section 9(2) requires that a proposal for the alteration of the Land Use Act should be supported by not less than two-thirds majority of all the members of the National Assembly and approved by a resolution of the Houses of Assembly of not less than two-thirds of all the states. This rigorous procedure has made it most difficult to amend the provisions of the Act to reflect the various suggestions and criticisms that have been made. The Act should be “de-entrenched” from the constitution. In any case, the insertion of the Act in the constitution was an exhibition of characteristic military arbitrariness. The 1978-1979 Constituent Assembly which midwived the 1979 constitution did not

32. See Section 56 of the 1999 constitution.

deliberate on the Act or any issue remotely related to it to warrant its inclusion in the constitution³³. It has therefore been rightly contended that since the Act was wrongly imported into the constitution, it should rightly be expunged therefrom³⁴.

- (ii) There has been a problem of interpretation as to the legal affect of the constitutional entrenchment of the Act: which, as between the Act and the constitution, has primacy over the other; which one prevails in the event of conflict? For example, Section 47(2) of the Land Use Act is inconsistent with Section 272(1) of the 1999 constitution. Section 47(2) of the Act provides:

No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act

This ousting of court jurisdiction conflicts directly with Section 272 of the constitution which guarantees unlimited access to court to ventilate all claims. Section 272(1) of the 1999 constitution provides:

...the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person (emphasis mine).

No wonder section 47 (2) of the Act has been judicially declared to be repugnant to section 272 of the constitution and therefore void *pro tanto*³⁵. For this reason too, I recommend that section 47(2) of the Land Use Act be expunged.

33. Report of the Presidential Committee on the Review of the 1999 Constitution, volume I (Main Report), February, 2001, para 19.3, at p. 65.

34. Ibid.

35. See, eg: *Ebuteh v Obiki* (1992) 5 NWLR (Pt. 243) 599 at 615-7; *Kaduna v Governor of Kaduna State & Anor.* (1986) 4 NWLR (Pt. 35) 361.

- (iii) There has been another aspect of the legal poser arising from incorporation of the Act by reference into the constitution: has the Act thereby assumed the same status with the constitution in the sense that it has become part and parcel of the constitution? This cannot be, because the constitution is the grundnorm, whereas the Act is not, and cannot become by incorporation or reference. The incorporation into the constitution only makes it an extra-ordinary legislation³⁶, but a legislation nonetheless. A sure way to do away with the legal puzzle is to remove the Act from the constitution.

Consent to a transfer/alienation

The general regime of the Land Use Act is the requirement of consent for any transfer or alienation of land right. Sections 21, 22, 23 and 26 of the Act are relevant in this regard. The requirement of governor's consent arose out of two reasons. Firstly, government's desire to control and regulate the transfer of land rights. Secondly, to ensure some form of security of land right, since the consent would not be granted to two claimants simultaneously. As it is contended more fully below, it is doubtful if these objectives have been achieved thirty years after the Act, or if it is achievable at all, in view of the fact that a certificate of occupancy, when granted, is merely a rebuttable evidence rather than an irrebuttable proof of land right. A certificate of occupancy gives no security to its holder because it is a certificate which really certifies nothing.

The Act creates two types of land rights: statutory right of occupancy **actually granted** by the governor, and customary right of occupancy **actually granted** by the local government. Those whose rights are not actually granted (ie who had held the land before the inception of the Land Use Act) are **deemed** to have been so granted by the governor or the local government as the case may be. We therefore have actual grantees and deemed grantees.

36 *Nkwocha v Governor of Anambra State & 2 ors* (1984) 1 SCNLR 634, (1984) 6 SC 362.

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12. Jadesola Akande, *Introduction to the Constitution of the Federal Republic of Nigeria 1999*, (2000 edn) at page 108.

13. For international instruments guaranteeing property right, see: Universal Declaration of Human Rights, adopted Dec. 10 1948, G. A. Res 217 A (111) Art. 17; African Charter on Human and Peoples Rights, adopted June 27 1981, entry into force October 21, 1986, Art. 14.

categories, with “A” being the Federal Capital Territory (FCT) and state capital, “B” being other cities, etc., and the fee graduated for that purpose, instead of leaving it to the discretion of an incumbent Governor.

Efficacy of Certificate of Occupancy

By Section 9 of the Land Use Act, the governor is empowered to issue a certificate of occupancy in any of three circumstances:

- (a) When granting a statutory right of occupancy to any person
- (b) When a person holding a customary right of occupancy applies for a certificate of occupancy, or
- (c) When a person is entitled to a statutory right of occupancy.

It is only the governor that can grant a certificate of occupancy. Local government can only grant a (customary) right of occupancy, with which the holder can then apply to the governor for a certificate of occupancy.

Section 9 (1) (c) of the Act clearly states that the certificate of occupancy is merely “evidence” of right of occupancy to the land. This means that the certificate of occupancy, despite the rigorous process before its issuance, does not **create** a right in land in favour of the person to whom it is issued; it only **evidences** such right. Accordingly, a certificate is not conclusive as to a person's right to land; it is a *prima facie* evidence and raises only a rebuttable presumption. It is for this reason that a certificate of occupancy can be set aside in favour of a proven better right, e.g., a conveyance which predates the Act, or in favour of a person who had held the land before the Act came into force and so is now a deemed grantee of a right of occupancy under Section 34 of the Act. As it is, the certificate of occupancy does not promote security of title to landed property; it is therefore antithetical to the use of land as security for loan for development. I recommend that the certificate of occupancy should be made to deserve that name. To make the certificate of occupancy truly a certificate, it is recommended that:

- (a) To the end of promoting security in land right, the Act should stipulate that the certificate of occupancy is conclusive proof of landed property right.
- (b) Modalities for issuance of the certificate of occupancy should be streamlined. As at now, the Act enjoins the governor to be “satisfied” that the applicant for a certificate of
- (c) occupancy over any land has a right thereto before he issues the certificate. 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 state governments 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 or caveat within the specified number of days, the governor then issues the certificate of occupancy to the applicant. As it is possible that the applicant may make false claim to a right so as to obtain a certificate (despite to stiff penalty in section 37 of the Act) it is hereby recommended that there should be a system of verifying the applicant's claim, say, by enquiries from occupiers of adjoining lands and obtaining legally admissible title documents where such exist. 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 licensed surveyor (presumably for further identification of the land, and to ensure the surveyor gets his fee!), and a photocopy of the instrument of title, e.g. a deed of assignment or a pre-March 1978 deed of conveyance. This last is the only requirement which can be regarded as legal evidence in proof of title. In some states, members of the state Land Use and Allocation Committee (which processes the application for 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 within an area which has been acquired by government for some developmental or other public purpose; it has nothing to do with proof of title.

Where all pieces of legal evidence as to proprietary right have been taken, by the time the application for grant of certificate of occupancy is advertised the advertisement would properly fix and public with notice of the application, with the result that where there is no objection or caveat and a certificate of occupancy is issued, it would be proof rather than mere evidence of a real property right. This would give the needed confidence in the certificate of occupancy as a useful document embodying right to property.

Compensation upon revocation

Section 29 of the Land Use Act provides for payment of compensation upon a revocation of right of occupancy other than as a penal measure. However, all that the holder is entitled to as compensation upon a revocation is the value of the unexhausted improvement on the land. He is not entitled to compensation for the land *per se*. Thus, if there are no improvements on the land, the holder of the right of occupancy gets nothing when his right thereto is revoked. It is somehow anomalous that the Act recognizes existing rights in land, which include rights in undeveloped land, and yet it denies compensation for such rights in undeveloped land when the land is forcibly taken away, on the pretext that no improvements exist on the land. Again, this is contrary to Section 44 of the 1999 constitution which guarantees right to compensation in respect of right or interest in property compulsorily acquired in any part of Nigeria. In the light of the foregoing, it is recommended that since the right of every citizen of Nigeria to acquire and own immovable property anywhere in Nigeria is a basic right under section 43 of the constitution, land whether developed or undeveloped is a property right and if the right is revoked or taken away compulsorily without any default by the holder, "prompt and adequate" compensation should be paid therefore.

41. *The Registered Trustees of the Apostolic Church v Olowoloni* (1987) 4 NWLR (Pt. 158) 514 held 4; *Ogunleye v Oni* (1990) 2 NWLR (Pt. 135) 745, (1990) All NLR 341; *Adedeji v Williams* (1989) NWLR (Pt. 99) 611.

42. See sections 34(3), 34(A) and 36(3) of the Act.

Adequacy of Compensation

The improvements on the land for which compensation is payable upon revocation are itemized in section 29(4) of the Act to include buildings, installations and the like, reclamation works, and crops. section 44(1) of the 1999 constitution contains no qualifying adjective to the expression "compensation" (e.g. "adequate" or "fair") to show quantum; paragraph (a) of section 44 (1) uses only the word "prompt," to emphasize urgency. "Compensation" has been interpreted to mean the "money value into which property might be converted in the open market." I submit that even empty, undeveloped land is highly marketable, especially if it is in a choice location, and therefore prompt and adequate compensation, reflecting the money value of the land, should be paid upon revocation.

Any dispute on the amount of compensation is referable to the Land Use and Allocation Committee, and by section 47(2) of the Act, no court has jurisdiction to determine the adequacy of compensation. The point has been made earlier that this provision of the Act is inconsistent with the 1999 constitution and is therefore void. The Act should therefore be amended by expunging sub-section 2 of section 47.

Subrogation: Definition of "holder"

Under the Land Use Act, where a right of occupancy is revoked so that government may use the land for public purpose⁴³ or for extraction of building materials or for overriding public interest⁴⁴, the "holder" and occupier shall be entitled to compensation for the value at the date of the revocation of their unexhausted improvements⁴⁵ on the land. By Section 50(1) of the Act, the word "holder" does not include, in fact expressly excludes, the mortgagee. This exclusion is a bit curious for the following reason:

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 property 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

43. Sections 28(2)(b) and 28(28)

44. Section 28(3)(a) and (c)

45. Section 29(1) and (2)

protect his security if it is in jeopardy⁴⁶, and may obtain an injunction restraining a judgment creditor from taking possession of the land as against the mortgagor⁴⁷. 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 property 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. The statutory exclusion of a mortgagee from the definition of an "holder" may have the effect that though the mortgagee has the right to (and in fact does) preserve the improvements on the property, which are security for his credit, 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*⁴⁸ where, under the Land Ordinance⁴⁹, compensation for improvement on land upon a revocation of a right of 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:⁵⁰

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 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

46. *McMahon v North Kent Iron Works & Co.* (1881) 2 Ch. 148 at 150.

47. *Legg v Mathieson* [1860] 2 Giff 71, vol. 66 ER 31.

48. [1970] EA 177

49. Cap. 133 (of Tanzania)

50. [1970] EA 177 at 185.

*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 a very considerable amount and bears no relation to the right to use and occupy the land*⁵¹.

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. 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 is not arguable 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 or encumbered by the mortgagee by the fact of mortgage. To say therefore that the right to the improvements (and therefore the compensation therefor) bears no relation to the right to use and occupy the land is to distinguish between six and half a dozen.

There is no reason why the mortgagee should not be regarded as subrogated to the position of the mortgagor so that his right having transmuted into the compensation money, he becomes entitled to it. Persuasion for this view may be found in *Ranken v East India Docks Co*⁵², 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)*⁵³, where

51. Duffus, V P dissenting on the issue of non-transmutation. See page 189 of the report

52. 12 Beav. 298, vol. 55 ER 1075.

land subject to mortgage was taken compulsorily by the railway company under an Act of Parliament. Rowlatt, J said that "...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 the mortgagor could have demanded in respect of the mortgaged property"⁵⁴. Definitely, if mortgaged lands are compulsorily taken under an Act the compensation for the lands will become subject to the security⁵⁵, because the mortgage of a lease of property must carry along with it everything which would be awarded in respect of the property⁵⁶. The Australian judicial approach is also very instructive. In *Syme v The Commonwealth & Anor*⁵⁷, Latham, CJ said⁵⁸:

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.

To avoid doubts and as a proactive step, it would be welcome if the Land Use Act is amended to provide for payment of compensation to "persons interested in order of priority."⁵⁹ That way, the mortgagee will have a prior right to the compensation money. Also, the part of the definition which excludes a mortgagee should be amended to include him.

53. [1914] 3 KB 259.

54. *Rex v Middlesex (Clerk of Peace)*, above, at page 264.

55. R L Ramsbotham, *Coote's Treatise on the Law of Mortgages*, 9th edn, vol. 1 at page 816.

56. *Pile v. Pile, ex parte Lamberton*, (1876) 3 Ch. D. at 39, per Hall, V.C.

57. [1942] 66 C.L.R. 413

58. At page 421.

59. See also: Enefiok Essien, "Land Use Act and Security in Real Estate in Nigeria", Chapter 13 pp. 279-300 in I O Smith (ed.), *The Land Use Act Twenty Five Years After* (2003), University of Lagos; Enefiok Essien, "Land Policy and Security in Nigeria" Chapter 3 pp. 42-70 in I O Smith (ed); *Secured Credit in a Global Economy* (2003), University of Lagos; Enefiok Essien, *Law of Credit and Security in Nigeria*, (2000), Golden Educational Publishers, Uyo, Nigeria.

The Federal Executive Bill On Land Reform⁶⁰

Recently the federal executive sent a bill to the National Assembly aimed at "alter[ing] the provisions of the Constitution of the Federal Republic of Nigeria, 1999, by amending the Land Use Act Cap. L 5 LFN 2004..." A few comments may be made on the bill. The bill seeks to amend sections 5, 7, 15, 21, 22, 23 and 28 of the Land Use Act. Essentially, it seeks to expunge the imposition of penal rent where there is a mortgage, legal charge⁶¹, or pledge (i.e. transfer of possession) without the governor's consent, or revocation of a holder's right of occupancy (and thereby taking away the collateral) where there is mortgage or pledge without governor's consent⁶². It does away with the need for consent for encumbering customary and statutory rights of occupancy⁶³. The bill appears to agree with the view that unlike an assignment, mortgages, pledges and legal charges are merely encumbrances on land rather than alienation. Thus, the bill seeks to restrict the requirement for governor's consent to cases of assignment only.

The executive proposals are absolutely commendable and the passage of the bill into law would sing the *nunc dimittis* of consent requirement to collaterals creation and realization⁶⁷. However, the executive proposal, if passed into law, will only address the question of governor's consent and will still leave untouched the myriad problems inherent in the Act and have been pointed out above. One would have expected that all the problems raised in the Land Use Act would be sorted out once and for all in the government-sponsored bill.

60. See further, Enefiok Essien, *Secured Transactions Law: The Power of Collateral in Nigeria*, 24th Inaugural Lecture of the University of Uyo, Nigeria, presented on May 7, 2009.

61. Section 5(1)(f)

62. Section 28

63. Sections 15(b), 21, 22.

64. See generally, Enefiok Essien: "Land Reforms Agenda of the Federal Government: The Legal Imperatives," a paper presented at the First Akwa Ibom State Summit on Land Reforms, organized by Ministry of Lands and Town Planning on 29 August 2008 at Ibo Hall, Uyo, Nigeria.

65. *Nkwocha v Governor of Anambra State & 2 ors.* (1984) 1 SCNLR 634, (1984) 6SC 362. See also cases cited in the next footnote.

66. See: *Osungwu & ors v Onyeikigbo* (2005) 16 NWLR (Pt. 950) 80 at 94 lines E-F; *Babalola v Obaoku-Ote* (2005) 8 NWLR (Pt. 927) 386 at 404 lines F-G; *Odetayo v Bamidele* (2007) 17 NWLR (Pt. 1062) 77, held no. 1; *Lemboye v Ogunsiji* (1990) 6 NWLR (Pt. 155) 210. Also, section 47(2) of the Act which purports to oust the jurisdiction of courts conflicts directly with Section 272 of the constitution which guarantees unlimited access to court, and has therefore been judicially declared to be repugnant to section 272 of the constitution and void pro tanto. See: *Ebitoh v Obiki* (1992) 5 NWLR (Pt. 243) 599 at 615-7; *Kadunna v Governor of Kaduna State & Anor* (1986) 4 NWLR (Pt. 35) 361.

67. Section 56 of the 1999 Constitution

The executive bill however gets off on the wrong foot in both its heading and in its recital. The heading says it is “A Bill for an Act to alter the provisions of the Constitution... by amending the Land Use Act...” This is obviously wrong and misleading because what is sought is not an alteration of the constitution in any respect, but simply an amendment or alteration of the Land Use Act. The error is traceable to the popular misconception that the Land Use Act is part and parcel of the constitution. The recital in the proposal says: “WHEREAS the Land Use Act by the provisions of Section 315(5) of the Constitution is part of the Constitution.” Nothing can be further from the truth than this. The reference to the Land Use Act in Section 315(5) of the 1999 constitution does not make the Land Use Act “part” of the Constitution, such that one can say that by amending the Act one is thereby amending the constitution. Section 315(5) of the constitution merely says that the Land Use Act “shall continue to apply and have full effect... to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of Section 9(2) of this Constitution.” Courts have held in a plethora of cases that the entrenchment of the Act in the constitution only makes the Act an extra-ordinary statute and does not make it part and parcel of the constitution⁶⁵. Accordingly, where any provision of the Act is inconsistent with a provision of the constitution, the Act is void *pro tanto*⁶⁶. This would not be so if the Act were “part” of the constitution. The only thing achieved by the constitutional entrenchment of the Act is that it makes the amendment of the Act very rigid, just like amending the constitution. The Act cannot be amended except in the same strict and rigorous method of amending the constitution: it cannot be amended through the normal legislative process. The normal legislative process for amending an Act requires that the proposal for amendment should be supported by a majority of members of the national assembly⁶⁷. The special procedure under section 9(2) requires that a proposal for the alteration of the Land Use Act should be supported by not less than two-thirds majority of all the members of the national assembly and approved by a resolution of the houses of assembly of not less than two-thirds of all the states. This rigorous procedure has made it most difficult

to amend the provisions of the Act. In fact even the executive bill may have a very rough ride in the national and state assemblies. This is because the executive proposal only singles out governor's consent in order to facilitate the creation and realization of collaterals, leaving untouched the numerous other problems thrown up by the Act. When one considers that this would be the first amendment of the Act for over 31 years of its existence, one realizes the need for a once-and-for-all amendment. The first realistic step to amending the Act should be its removal from the constitution, so that future amendments, be it piece-meal or holistic, would be easy. A removal of the Act from the constitution would amount to an amendment of the constitution, but an amendment of the Act itself does not amount to an amendment of the constitution.

The last comment on the executive proposal is on the ambivalence of its short title. The bill ends with, “This Act may be cited as the Land Use Act (Amendment) Act 2009 or the Constitution (First Amendment) Act 2009.” My view is that the first title is proper, while the alternative is a clear misnomer because it is not the constitution which is being amended.

Conclusion

Prior to the Land Use Act, right to (and use of) land in northern and southern parts of Nigeria was controlled by different systems of law: the Land Tenure Law in the northern part of Nigeria and traditional communal ownership in the south. The Land Use Act can be justifiably credited with unifying the law in this regard. The Act was the first national effort at reforms of the land tenure in Nigeria. It is a complete code regulating the rights of the people in respect to land, which the governor of the state holds in trust. Despite the shortcomings which have been pointed out above, which are by no means exhaustive, there can be no argument that the Act is an indispensable catalyst for development and will be the more so after the suggested reforms have been made. However, apart from the reforms which have been suggested, there is also much need for honesty and transparency in implementation and the political will to give effect to the letter and spirit of the Act as would be amended.