

LIMITATIONS TO THE USE OF LAND AS SECURITY

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Uncertainty of Title

The nature of the title vested in the Right of Occupancy has always been a topic for debate these debates have been framed on determining whether it is a lease, a licence, or an absolute right. In *Street v. Mountford* it was held that for a lease to be valid there must be exclusive possession at a rent and for a term. But a holder of right of occupancy under the Act does not enjoy exclusive possession against the Governor. The Governor or any public officer authorised by him has unfettered access to the land comprised in any statutory right of occupancy or any improvements effected thereon for inspection at any reasonable hours in the day time. The easy revocability and the lack of prospective certainty of duration which are characteristics of a licence are absent in the right of occupancy as such it is not a licence because, unlike a licence, it is alienable, transferable and transmissible.

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 actual grant of statutory right, it is not indefinite in duration but rather it is for a term of years certain and is subject to the payment of rent to the Landlord (Governor). The intention of the lawmakers in introducing the Right of Occupancy system was to establish an entirely new interest in land. As part of the Right of occupancy system the Act introduced the issuance of a certificate of Occupancy by the Governor of a State. A certificate of occupancy is merely an evidence of a Right of Occupancy and does not on its own confer a title or interest in land. The Act has not provided any conclusive means of proving ones entitlement to a Right of Occupancy. The certificate raises a presumption of title.

In *Aziv. Registered Trustees of The Evangelical Churches*, the court held that the issuance of Certificate of Occupancy in respect of any land would not validate defects, if any in the title of the holder. It, therefore, held that a Certificate of Occupancy granted to one of the claimants who had not proved a better title was invalid. As such a Certificate of Occupancy may be set aside if it turns out that the holder had no right to the land; or in favour of a pre-1978 conveyance or deemed grantee of Right of Occupancy under Section 34 of the Act. Thus a Certificate of Occupancy issued pursuant to the Act only gives the right to use and occupy land, it neither confers nor is it necessarily an evidence of title.

The horror and hellish implication of this is that where the Certificate of Occupancy is set aside for any reason, the mortgagee who has accepted it as security realises that the certificate he is holding automatically becomes "a piece of paper having no value." Thus, where it is shown that another person has a better right to the grant, the court will if asked to do so set aside the grant. In *Ogunleye v. Oni*, the Supreme Court held that a certificate of occupancy issued pursuant to the Land Use Act only gives right to use and occupy land.

Requirement of Consent and its Attendants Problems

Each State in the federation has its own conditions and procedure for obtaining consent. Few, if any, of these can be said to be founded on the Act. Each Lands Officer fashions what he deems suitable. Thus, the hardship caused by the consent provisions limits the convenience of using land as security. The judicial construction of this section has burdened Nigerian judges like no other statutory provision in the area of real property. By Section 22(1) of the Act, the Governor's consent must be "first had and obtained." Thus in *Savannah Bank (Nig.) Ltd. v. Ajilo*, the Supreme Court held that consent must be obtained prior to the mortgage; any failure by a holder under Sections 34(2) or 36(2) of the Act to comply with the provisions of Section 22 would attract the full rigor of Section 26 of the Act and render a transaction or an instrument arising out of it void. However, this was an *obiter dictum* as the stage of obtaining consent was really not an issue before the court. In subsequent cases, the Supreme Court and Court of Appeal have been of the view that consent may be applied for at any time after a concluded transaction.

Thus in *Awojugbagbe Light Industries Ltd. v. Chinukwe*, the Supreme Court held that 'there is nothing unlawful in entering into or execution of a document of transfer before the Governor's consent is obtained as this procedure is expressly covered by section 22(2) of the Act. The legal consequence that arises is that no interest in land passes under the agreement until the necessary consent is obtained. Such an agreement so executed becomes inchoate until the consent of the Governor is obtained after which it can be said to be complete and fully effective. Where the consent is not obtained at all, it appears that the transaction will be rendered null and void under Section 26 of the Act, it provides, that 'any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of the Land Use Act shall be null and void.' The dictum of Kayode-Eso JSC in *Oil Field Supply Centre Ltd v. Johnsonis* also in point here. The Learned Justice observed that "certainly equity will not permit the company to benefit from their own illegality" Similarly, in *Adedeji v. National Bank*, the mortgage transaction was without the Governor's consent. Mr. Adedeji defaulted and in an attempt to prevent the enforcement of security he contended that the transaction was void. This contention was dismissed by the court as it was his duty to obtain the consent in question. In *Onamade and Ors. v. A.C.B.* the Supreme Court emphasised that no alienation of a statutory Right Of occupancy whether by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained shall be lawful. Similarly, in *International Textile Industries v. Aderemi* the court held in accordance with *Savannah Bank's* case that by virtue of Section 22 of the Act, the holder of a Right of Occupancy alienating or transferring his right of occupancy must obtain the consent of the Governor to make the transaction valid. If he fails, the transaction is null and void under Section 26 of the Act.

Section 22 demands the Governor to approve the transfer of a statutory right of occupancy, and under section 21 the Local Government Chairman is to approve where a customary Right of Occupancy is transferred. Section 45 of the Act provides that the Governor may delegate any of his powers to "the State Commissioner" presumably the one in charge of lands. The courts have been called upon to decide the value of a consent

document that a person other than the Governor or Commissioner signed. In *Union Bank of Nig. Plc. v. Orharghue*, the Court of Appeal upheld a Commissioner of Lands' writing to convey Governor's consent even where there was no delegation; and in *Nigerian Industrial and Development Bank v. Oladunmi Industries Ltd*, consent conveyed in a letter signed by an Acting Chief Lands Officer was upheld even though the Governor had delegated the authority to grant consent to the Permanent Secretary, Ministry of Lands. However, the consent question assumed an interesting twist in the Supreme Court decision in *Union Bank of Nig. PLC. v. Ayodare and Sons (Nig.) Ltd*. In that case, an Acting Chief Lands Officers signed the consent letter whereas the Governor had delegated the duty to the Commissioner for Lands. By a majority of 4:1, the Court applied the Agency principle of *delegatus non potest delegare* to annul the consent. The case now places a further burden on the secured creditor even where consent has been obtained, to make further inquiries to ensure that the "respective appropriate authority" properly empowered the consenting authority. Consent in itself is therefore not enough; the source of the consent is of great importance. In the words of the court, "the appellants should have checked the source of the consent before executing the deeds and parting with their money." A question arises here whether the Governor can be compelled to give Consent? It is regrettable that the answer is in the negative.

Revocation and Problems of Compensation

Under the Land Use Act, the right of occupancy may be revoked where the government wants to use the land for overriding public interest. The injudicious administration of the Land Use Act, particularly the revocation power has led to the great voices clamouring for the reformation of the Act. *Section 11* of Land and Native Rights Ordinance 1913 which was being construed has essentially the same verbiage as *section 22 of the Act*. The right of occupancy may be revoked before ever the mortgagee would have the opportunity of realising his security or exercising his power of sale or foreclosure of the mortgaged property; considering the fact that the legal date of redemption may still be subsisting and unexpired at the time of revocation. The compensation provision, under the Act is grossly inadequate and can be described as unjust. This is because under the Land Tenure Law, compensation was paid for the value of the inconvenience caused by the disturbance, and disputes were allowed to be referred to the High Court.

The Public Lands Acquisition Act also provided for compensation to be paid for the land and the unexhausted improvements thereon. Curiously, the Land Use Act promulgated much later provided that compensation is payable only on unexhausted improvements on land and no value and compensation is attached to the land itself. The jurisdiction of the court has also been ousted to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under the Act. In other words, what the Governor decides to pay as compensation is not a debatable issue.

Restrictive Definition of Holder

Another major limiting provision under the Act as it affects mortgage transactions is the definition given to a "holder" of a right of occupancy. A "holder" in relation to a right of occupancy means, "a person entitled to a right of occupancy." Section 50(1) of the Act defines "holder" as a person entitled to a Right of Occupancy and includes any person to

whom it has been validly assigned or has validly passed on the death of the holder but does not include any person to whom it has been sold or transferred without a valid assignment nor a mortgagee, sub-lessee or sub-under-lessee. Under Section 29 of the Land Use Act, the holder of a right of occupancy is entitled to compensation at the date of revocation for the value of his unexhausted improvement on the land. The unpalatable effect of this is that although the mortgagee may have been preserving his interest in the mortgage security, the right of occupancy and improvements there on; although he may even be ensuring periodic payment of stipulated rents, once the Right of Occupancy is revoked, his security is gone and cannot attach automatically to the mortgagor's interest in any changed form. So, whereas, the mortgagor may be entitled to compensation for the value of his exhausted improvements on the land, the mortgagee cannot lay claim to such compensation money. Moreover, a mortgage is a form of conveyance and therefore disposes of, transfers or passes all the estate, right, title, interest, claim and demand which the conveyancing parties respectively have power to convey in, to or on the same land. Flowing from the foregoing, it is clear therefore, that the conveyance of land would also operate as assignment of the right to receive compensation therefrom. The Supreme court endorsed this view long ago in *Atunrase v. Federal Commissioner for Works and Housing* where the issue was a claim for compensation money under the Public Lands Acquisition Act. The Law Lords, considering the effect of Section 63(1) of the Conveyancing Act 1881, were unanimous in holding that the conveyance by the original owner/vendor passed all his estates and interests to the purchaser and this necessarily includes receiving the compensation money. Thus, it is submitted that the mortgagee should be subrogated to the position of the mortgagor in equity for the purpose of receiving compensation for unexhausted improvements in respect of the revoked Right of Occupancy, so that his rights having transmuted into the compensation money, he becomes entitled to it. Persuasion for this view may be found in *Rex v. Middlesex* where land subject to mortgage was taken compulsorily by a Railway Company under an Act of parliament. Rowlatt, J. stated that it 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 mortgagors, and should be unable to demand all the compensation which their mortgagors could have demanded in respect of the mortgaged property.

Non-transferability of Non-urban land

The non-alienable nature of rights in non-urban land makes it difficult for the owners of such land to even secure credits using such lands as collaterals. This has been a stumbling block especially in the creation of agricultural charges. The evidence of title to land being part of the problems flowing from the non-alienable nature of rights leaves the owner of land in non-urban areas with no means of taking benefit from his property. This also is a roadblock to the much needed diversification of the economy.

Problems of the Act to Creditors

It was thought that the laudable objectives of the Act would lead to the provision of a uniform land tenure system in the country, make land easily and cheaply available to all Nigerians and the government for developmental purposes, protect the inalienable rights of every Nigerian to partake of the factors of production and check the practice of land

speculators, whereby some wealthy individuals indulged in shoddy but lucrative trade in land. However, events unfolding in subsequent years betrayed these aspirations of its provisions. Land has become painfully unaffordable to the suffering masses. Private sector participation in Housing, Agriculture and Industrialisation cannot be accomplished with the unqualified limitation in the quantum of parcel of land to access, and the rigidity of the consent provisions. General implementation of the Act has undermined its laudable objectives, and the Governor's powers to make Regulations under the Act have been grossly abused to the detriment of Nigerians.

Potential housing developers encounter numerous constraints. Applicants for Certificates of Occupancy have to provide completed application forms, non-refundable prescribed fees, current three year tax clearance certificate, land site/survey plan; agreement of sales of land which must be duly stamped and registered; an affidavit by the Vendor and customary Right of Occupancy in the case of non-urban lands. In cases where the developer has partially or fully developed the land, a valuation certificate is required before granting the Certificate of Occupancy. These procedures are too cumbersome. Going through all these rigmorole stages before a Certificate of Occupancy can be granted has made it impossible for the problems of access to land rights on equal basis to be solved. There is also undue delay in the issuing of Certificates of Occupancy due to the deliberate efforts of some unscrupulous ministry officials who may want to be bribed before processing the forms of applicants. The great discrepancies between the number of applicants for allocation of plots for all uses and those eventually approved and issued certificate of occupancy to date are manifestations that the implementation of the obvious revolutionary lofty objectives for which the Act was promulgated, are faulty.

This has slowed down or reduced the rate of housing development. There have also been instances where land has been used as a potent weapon to fight political opponents. In some cases, there have been deliberate refusal to process a political opponent's application. These delays led many who would have invested in housing development purposefully, to divert their resources to other profitable ventures. The requirement for Governor's consent for land transactions in every state has posed the greatest obstacle to use of landed property as collateral. The Governor also imposes other conditions for grant of the consent which varies from State to State. Even when all conditions have been met by an applicant for consent, the file can stay on the Governor's table or office for more than three years for no justifiable reason.

The Problem of Land Accessibility for Security

Land accessibility is a challenge in some parts of Nigeria in terms of high cost and delays. While some access land through direct purchase at high prices from private land market, others come into possession through direct government allocation and a small percentage access land through leasehold transaction. It takes between two to ten years to obtain government allocation. This negates one of the objectives of the Land Use Act which is to make accessibility of land easier to the citizenry. There is bureaucratic delay in the processing of application for allocation of land, issuance of Certificates of Occupancy and

registration of properties. Allocation criteria are exclusionary and only a very small proportion of middle to upper income earners have access to land. If Nigeria is to meet the challenges of competing effectively in an increasingly globalising world, it is thus imperative that it gives very urgent and sustained attention to promoting its land reform program in all its ramifications to address the present challenges to land accessibility.

The Problem of Land Availability under the Act for Security

Another outcome of the Land Law is that while the State frequently expropriated land to support significant investment projects prior to 1978, the Land Law emphasised allocation of land to the common man to meet subsistence needs and address social issues, and induced significant expropriation and re-distribution of land by the State that continues to some extent today. The size of the primary market for state land grants differs among the Nigerian states depending on many factors, including the amount of vacant and uncommitted land controlled by the State and its willingness to continue to expropriate new land. Figures on Nigerian land transactions are difficult to find, but some estimates suggest that today direct government land allocations based on expropriation may account for less than 1 percent of transactions in and around the larger cities. A significant component of the state land grant system is the State land "schemes" or land development projects carried out by State development agencies and which are a form of land allocation separate from direct grants to citizens. Land schemes can be for residential, commercial/industrial, and mixed use. State development agencies plan and install infrastructure and then directly allocate the land on to final users through a variety of mechanisms, but primarily by application to the governor or local government. Auctions and other competitive allocation procedures have been used by some States for residential land schemes, but they are uncommon. The main constraint on applications is that no person should receive more than one land plot from the State, but there is no limit on the number of plots that family members can acquire and waivers of the restriction are common.

The Problem of Land Affordability under the Act for Security

Land appears to be available to citizens and businesses in Nigeria, however, various degrees of scarcity may exist depending on location, and land may be relatively expensive. Although scarcity and high prices may hamper access to land in some highly developed areas of the country. Inadequate infrastructure—electric power, in particular,—and scarcity of serviced land; widespread and increasing informality in the land market caused by cumbersome administrative procedures and high official transaction fees; and an insufficient number of reliable land titles, another result of the conversion procedures of pre-1978 rights. Cumbersome transaction procedures, high transaction fees, and an insufficient number of reliable land titles can arguably be traced to certain aspects of the Land Use Act. Land transaction fees may be more of an issue than administrative procedures. While high transaction fees are not necessarily related to the content of the Land Law, they may be related to the sense of the law that land is a national and not a personal asset. Fees typically include registration fees and stamp duties each equaling 2-3 percent of the asset value, capital gains of 2-3 percent of net land sale proceeds, and a transfer fee that can range from 8-30 percent of the value of the property, depending on the state. Total fees for a sale of rights

can range from 15 percent to over 30 percent of the land value. By international standards, most of these fees are high, and there are indications that they contribute to a high level of land market informality as Nigerian citizens and businesses seek to avoid payment.

Problems of Security Enforcement

The expansion of trade and development of industry in Nigeria has made imperative, the need to effectively allocate resources, especially capital to those sectors of the economy that requires it, the objective of course being to promote growth and development in such sectors and economy generally. However, there is also the need to secure the repayment of such capital or to provide a “fall back” situation or window through which such capital can be recouped in the event of default by the debtor, the mortgage as a form of security arose to fill that need.