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TITLE TO LAND IN NIGERIA: PAST AND PRESENT

By Solomon Akinboye Oretuyi

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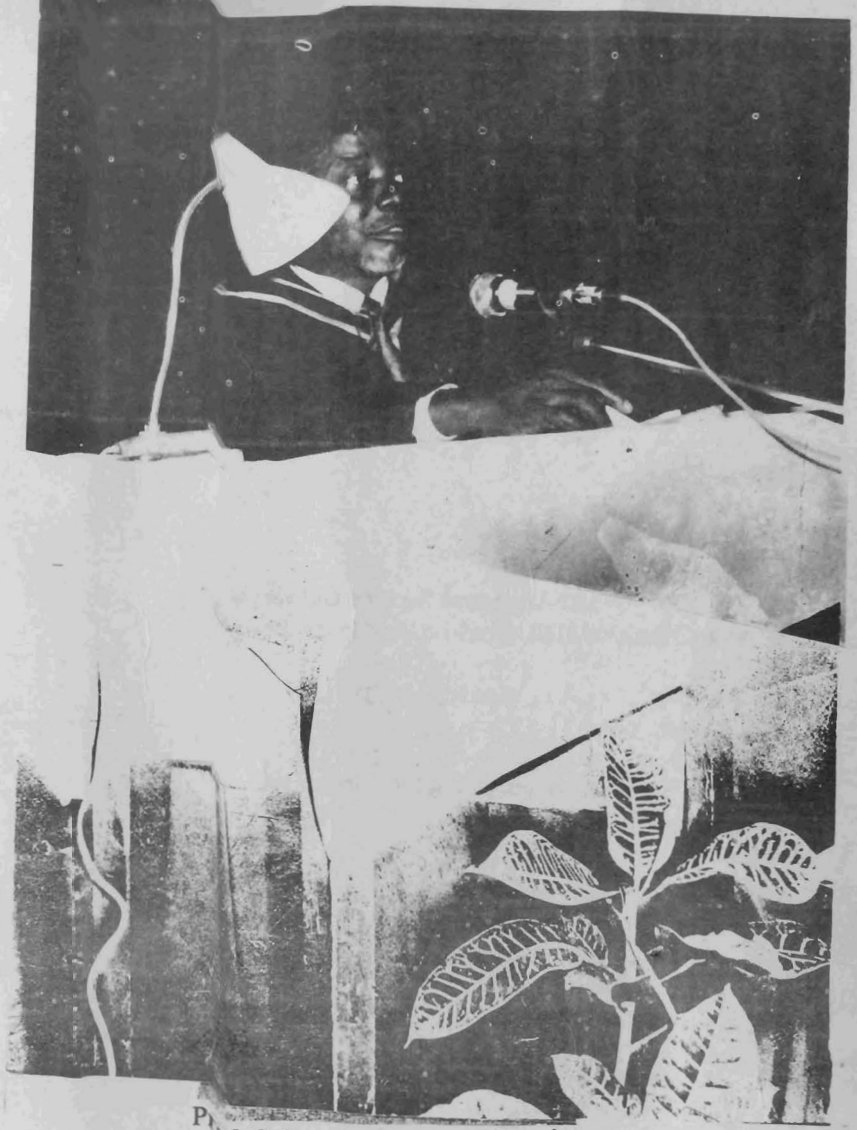

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Introduction

In this Inaugural Lecture I shall discuss title to land in Nigeria before and after March 29, 1978.

One characteristic of the land holding before 1978 was the dual system of land tenure. Under the dual system of tenure, some titles were held under English law while the majority of titles was under customary law. Dualism in tenurial system was a product of the introduction of the English legal system in Nigeria. Originally, all lands were held under customary tenure but with the introduction of the English legal system, lands held under customary tenure were converted to English titles by the use of English conveyancing formalities. It is pertinent to point out that the dual system of land tenure was peculiar to Southern Nigeria. In Northern Nigeria, all lands were brought under the control of the government by the Land Native Rights Proclamation of 1910. This Proclamation was repealed and re-enacted as Land and Native Rights Ordinance 1916. This was subsequently replaced by the Land Tenure Law 1962 which continues to apply subject to such modification as will bring it into conformity with the Act or its general intendment.[1]

What is land? Land to the lawyer is different from what it is to the economist. In law, land means "not only the surface of the ground but also everything (except gold or silver mines) on or over or under it". In ancient times land meant "whatsoever may be plowed and signified nothing but arable land but since the time of Lord Coke and now it comprehendeth any ground, soil or earth whatsoever"[2]. The location of land is outside the control of man and its main characteristic is that its supply is virtually limited.

What is title? Title is defined as "right to ownership of property with or without possession."[3] In law, however the word "title"

> ". . . has different meanings. In one sense, it may import whether a party has a right to a thing which is admitted to exist; or it may mean whether a thing claimed does in fact exist".[4]

The connection between law and land has been aptly put thus:

> "The law of a people is a reflector in a considerable way of its history, the location of the land, its terrain its products or what is capable of producing are the important factors moulding the economic of the people and ultimately, the course of its history and law. In short, land is

a constant around which variables in economic situation, changing social and philosophical values gyrate and produce variables in law".[5]

Before the Land Use Act 1978, title to land could be derived under the received English law and under customary law. It is essential to know under which system of law a piece of land is held for a number of reasons. First, there is the question of jurisdiction over the land. If the title is held under English law only the High Court has jurisdiction over it. But if the land is held under customary law both the High Court and the customary or native court has jurisdiction over it. Thus in *Dada v. Amoke*[6] it was held where a title to land depended on validity of a deed of conveyance, a customary court had no jurisdiction over the matter, as a deed of conveyance was a transaction unknown to customary law and that the determination of a deed necessarily entailed resort to the Land Instruments Registration Law, a law which no customary court had jurisdiction to administer or apply. A similar conclusion was reached by Fakayode, J. in *Soda v. Aderemi.*[7]

Secondly, the rules of limitation of action apply to land held under English tenure but not to one held under customary law. For instance, section 1(2) of the Limitation Law of Western Nigeria exempts land held under Customary tenure from its operations. In *Green v. Owo,*[8] the plaintiff bought a piece of land and had it conveyed to him under English law. The defendant overtly occupied the land for over 21 years. In an action for possession, the plaintiff contended that the land was held under customary tenure and his claim was therefore not barred by the Real Property Limitation Act 1874. It was held that the Act applied to bar his claim since he intended his transaction to be governed by English law.[19]

Thirdly, in an action for a declaration of title, the plaintiff must state under which law he is making his claim. If he asks for a wrong title he may be non-suited,[10] or his action may be dismissed, unless the court allows an amendment of his claim. Failure to ask for the correct declaration leads to greater expenses and a waste of time. Thus in *Alade v. Aborishade,*[11] an amendment of a claim for a declaration in fee simple to an absolute title under customary led to the making of an order for retrial *de novo.*

Title Under English Law — The Fee Simple

This is an aspect of the doctrine of estate. The term estate indicates an interest in land of some particular duration. It is a cardinal principle of English law that a subject cannot own land. He can only own it as an estate i.e. for some period of time. The fee simple is the largest estate known to English law. It is practically equivalent to ownership. "Fee" was originally used to indicate an estate of inheritance while the word "Simple" showed that the fee was one capable of descending to heirs generally and was not restricted to heirs of a particular class. "Absolute" is used to distinguish a fee simple which will continue for ever from one which may not do so e.g. a determinable fee.

A fee simple arises at common law when land is granted to a natural person, with the appropriate common law words of limitation "and his heirs" following the name of the grantee e.g. to X and his heirs. Words of limitation are words which in a disposition of property mark out the duration of the estate or interest to be taken by the grantee. The common law words of limitation had to be applied very strictly, as no alternative to or deviation from them was permitted or allowed. For instance, "heir" in the singular is insufficient and the word "and" cannot be replaced by "or". The words of limitation gave no estate to the heirs. They delimit in the sense of defining an estate to be given to a person already named, as opposed to conferring any interest on any other person.[12] The strict common law position continued until 1881 in transactions *inter vivos* when the Conveyancing Act 1981 came into force. Section 51 provided an alternative to the strict common law words of limitation by allowing the use of the phrase "in fee simple" e.g. To Y in fee simple.

The position under Wills was slightly different because a will is ambulatory i.e. it starts to operate only from the testator's death when the devisor would no longer be around to correct any flaws or mistakes if a disposition fails. Unlike the position under a deed, gifts by Will were not construed with the same strictest as grants *inter vivos.* It was, however, necessary for the Will to show an intention to pass a fee simple. Before 1837, the onus was on the devisee to show from the terms of the Will, read as a whole, that a fee simple was intended to pass. After 1838 by the Wills Act 1837, Sections 28 and 34, the presumption was that the fee simple passes unless a contrary intention is shown in the Will. These provisions were enacted in Section 25 of the Wills Law 1958 of Western Nigeria. Thus the law in

Nigeria as regards gifts by Will was the same throughout the country although having their bases in different enactments.

As regards transactions *inter vivos*, the principles of common law and the Conveyancing Act 1881 remained operative in Southern Nigeria except the defunct Western Nigeria where the position was governed by section 85 of the Property and Conveyancing Law 1959 which provides –

> "A conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance."

The Origin of the Fee Simple in Nigeria

The unit of land ownership in Nigeria was the family and no individual member of the family had any separate and alienable interest in such land.[13] Alienation by sale began in Lagos around 1872. The first Ordinance to provide for the registration of instruments affecting land was promulgated in 1883.[14] When alienation by sale began the conveyances were usually couched in English terminologies under which family representatives purported to convey estates in fee simple to the vendees. The interpretation of such deeds had given rise to doubts about the precise nature of the interests acquired by the purchasers. On the one hand, there was the view that the employment of English conveyancing terminologies would convert land formerly held under customary law into a title under English law since such a transaction was unknown to customary law; on the other hand there was the view that land under customary law could not be converted into a title under English law by the mere use of English conveyancing terminologies. To effect such a conversion, it was argued, an enabling legislation was needed.

Judicial pronouncements far from being helpful, tended to make the confusion more confounded. This was hardly surprising in view of the fact that some judges treat titles to land under English and customary laws as one and the same thing. For instance, in *Amao v. Adebona*[15] Coker, J. granted the plaintiff/respondent a declaration of title under customary law and ordered that the Register to Titles be rectified to vest the fee simple in him. It is our view that this approach was wrong as the same piece of land cannot be held under two different systems of law and the same time.

Cases Supporting Conversion

In *Balogun Oshodi*[16], the plaintiff sought a declaration in fee simple to a piece of land which was part of the Oshodi family property. The Oshodi family divided its lands into 21 compounds and appointed a domestic to head each compound. In 1869 the Government issued series of crown grants to these heads. In 1913 one of the domestics purported to convey the fee simple in the land under dispute and his transferees claimed to be entitled to the fee simple as a result of the subsequent acquiescence by the family. In the course of his judgment, the trial judge, Berkeley, J. said:[17]

> "Among themselves a customary tenure was the highest which could pass . . . what happened after the cession of the territory or Lagos seems to have been that the Crown acquired the *dominium directum* but left the customary tenure undisturbed as between the natives of the territory. This acquiescence in a local form of land tenure among the natives would not operate to extinguish the *dominium directum;* and a fee simple tenure was lying dormant in this *dominium directum* I think the fee lay dormant and remained dormant so long as the native of the territory was dealing with the native of the territory under the communal system. But when these natives make use of such forms as conveyance and mortgage or when the family land is treated as private property and alienated to strangers the dormant fee revives in favour of the stranger."

The fallacy of this approach lies in the fact that the court regarded piece of land and being governed by two different systems of law at the same time. As it was correctly pointed out by Kingdon, C.J. there can only be one *lex rei sitae* at the same time in respect of the same piece of land.

The Privy Council commented on the possibility of conversion to fee simple as follows:[18]

> "To prevent misconception it seems desirable to state that the present decision is not based on any doubt as the possibility of a title equivalent to a fee simple being ob-

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tained as a result of sale of family land with the general consent of the family"

With respect, all the views expressed in the Supreme Court and the Privy Council on the question of fee simple were not binding since they were *obiter* and unnecessary for the decision. The issue for determination was whether the plaintiff had acquired any title to the land by knowledge and a long continued acquiescence of the responsible members of the Oshodi family. Since the Privy Council found that long and continued acquiescence had not been proved, the question of the types of title that would pass by such acquiescence did not arise for determination.

The dictum in *Oshodi v. Balogun* was applied by De Lestang, C.J. in *Coker v. Animashawun*,[19] wherein plaintiff sought a declaration of title in fee simple to a piece of land by virtue of an indenture dated March 28, 1958. In granting the said declaration the learned trial judge said:

> "English Common Law and Statutes of general application in force in England on the first of January 1900 apply in Nigeria alongside native customary law and it cannot be doubted that the fee simple exists in Lagos . . . For example the Registration of Titles Ordinance contains provisions for compulsory registration of the fee simple estate . . . I venture to suggest that just as in England a fee simple is created by the use of certain words in a document so in Lagos land held under native tenure may become fee simple when it is alienated by means of conveyances in English form expressed to convey a fee simple."

In our opinion De Lestang, C.J. was in error in his approach that because Parliament provided for the registration of fee simple it necessarily meant that such an estate could be created out of customary law by a deed of conveyance in English form. In fact, the mere registration of title under the Act does not cure a defect in title.[20] It follows therefore that if one registers an absolute title under customary law as a fee simple, it nevertheless remains an absolute title under customary law. Indeed, De Lestang, C.J. admitted that the two are not the same when he said:

> "Ownership of land by native law and custom is, as is well known absolute and in theory at least more extensive than a freehold estate in fee simple."

If one is more extensive than the other, how then can it be said that one becomes the other simply because English conveyancing terminologies have been used? It is true that a fee simple can be created in England by the use of the words of limitation, because the estate of such a person is a fee simple. Can a customary tenure be created in England by the use of customary conveyancing formalities? The answer is "no". Since the *lex situs* is the common law, a party cannot take his land out of the common law into an entirely foreign law by the use of some foreign conveyancing formalities.

The principle enunciated in the earlier cases seemed to have been extended further in *Oso v. Olayioye*.[21] The plaintiff sought a declaration of title in fee simple to a piece of land which originally belonged to the Oloto family. The land was allotted to one Wusamotu Shelle who sold it to a Mrs. Moore without a deed of conveyance but was in possession before she sold it to a Mr. Porter under a deed of conveyance. Alexander, J. granted a declaration in fee simple because Mrs. Moore "enjoyed and exercised the full rights of ownership". It is submitted that the fact that a person enjoys and exercises full rights of ownership does not necessarily mean that such a person's title is in fee simple. Indeed, the decision cannot be supported as it tends to imply that people having absolute titles to land under customary law do not enjoy and exercise full rights of ownership.[22]

Lloyd[23] describes the estate which passes on alienation by means of English conveyances as "freehold" and James and Kasumu[24] conclude from this that it is the fee simple because the fee simple and the leasehold are the only estate that can exist at law in Western Nigeria. With respect, the authors are wrong in their conclusion. Lloyd himself admits that the word "freehold" under Customary law and under English law are not the same when he said:

> "But the concept of freehold must be broadened so that the holder of such estate can deal with his land not only in the ways recognised by statute law but also those of customary law."

Before one can say that a fee simple validly passed on alienation by the employment of English conveyancing forms, it is necessary to answer the following two questions –

(i) When was the land first held in fee simple?
(ii) Who was the first holder and how did he acquire it?[25]

Cases Denying the Existence of the Fee Simple

In *Balogun v. Oshodi,* Kingdon, C.J. stated that land under customary law could not be converted to a fee simple by the use of English conveyancing terminology. He said:

> ". . . the whole idea of fee simple is so contrary to native law and custom that whether dormant or otherwise, it cannot exist side by side with native customary tenure in respect of the same land".

In *Nwangu v. Nsekwu,*[26] the Federal Supreme Court spoke on the matter thus:

> "It is a fact that there is no such thing as a fee simple under customary law . . . There had been many cases in this country in which the expression 'fee simple' has been misapplied in describing an absolute title to land subject to customary law."

In *Thomas v. Holder,*[27] the claim was for a declaration in fee simple of land formerly held under customary tenure. The West African Court of Appeal refused to grant the declaration but instead granted one under customary law because it found that the basis of the appellant's claim was clear in the proceedings in spite of the use of the words "fee simple" in the conveyances. The Court drew attention to the confusion which had arisen from attempts to engraft upon claims under customary law incidents and phraseology appropriate to English law. In *Oloto v. John,*[28] a claim for a declaration in fee simple to a piece of land which formerly formed part of Oloto Chieftaincy family land was abandoned after the Court had observed that fee simple was a concept of purely English law and that stool land was a creation under customary law. A declaration under customary law was granted. In *Johnson v. Ojobaro*[29] and *Suleman v. Johnson,*[30] claims of declaration of title in fee simple based on deeds of conveyances by the original owners whose roots of title were in customary law were dismissed. In dismissing a similar claim in *Boulos v. Cdunsi,*[31] Taylor, J. observed:

> ". . . the title held by Anikin was a defeasible title under native law and custom. Can such a defeasible title, defeasible by invoking native law and custom be converted into a fee simple under English law merely by a

> series of conveyances which refer to such law as being held in fee simple? No other evidence was led by the plaintiff of any other matter relied on by him as converting such tenure into a fee simple. I am of the opinion that such a conversion had not been proved."

It is submitted that the "other evidence" which can bring about the conversion is an enactment and since the plaintiff was unable to cite such a law, his claim was rightly rejected.

The Need for Reform

The decisions which held that land under customary tenure could be converted into a fee simple by the employment of English conveyancing terminologies created uncertainty in the law because such lands move in and out of English and customary tenures. Since the devolution of land is governed by the *lex situs,* a piece of land which had been converted into a fee simple, would on the death of the owner devolve on his children as family land and irrespective of the fact that the said land was acquired by means of an English conveyance.[32] A situation in which land moved in and out of two different types of tenure was not only chaotic but most unsatisfactory.

Ademola, C.J.F. commented on the problems in *Alade v. Aborishade* and expressed the view that a clarification of epithets used was desirable. Unfortunately, the Federal Supreme Court lost the opportunity to clarify the position in *Dabiri v. Gbajumo.*[33] The High Court granted a declaration in fee simple to the plaintiff/respondent. On appeal, it was contended that the declaration ought not to have been granted. The Federal Supreme Court accepted the contention and granted a declaration of title under customary law.[34]

The need for legislation to deal with the problem caused by the employment of English conveyancing terminology was highlighted in 1934 by the Privy Council. The Board pointed out that in view of the wide differences of opinion as to the exact nature of titles conveyed by the employment of English conveyancing terminology and the frequent actions to which the doubts gave rise, it was desirable to resolve the doubts by legislation.[35] Unfortunately, the advice was not heeded.

The problem was considered by the defunct Western Nigeria in 1962. The Ministry of Justice put proposals before the Law Revision

Committee of the then Western Nigeria Legislature for legislation which would provide:[36]

(i) that if the competent parties take part in the transaction land held under customary tenure may be conveyed, leased or mortgaged so as to create estates and interests known to English Law;

(ii) that if Nigerians enter into transactions in a form apt to create non-customary estates and interests and are competent to do so, the deed should have its normal effect according to statute law; and

(iii) how far statute law would apply when there are conversion from one system to another.

These proposals were not enacted into law. It is of interest to note that the Government does not rely on the employment of English conveyancing terminology as the basis of its land holding in fee simple. Statutes[37] specifically empower the acquisition of communal lands in fee simple notwithstanding any native law and custom to the contrary.

Right of A Fee Simple Owner

In general, the owner of a fee simple was an absolute owner and was free to dispose of it or deal with it in any way he likes subject to the general restrictions imposed by statutes on town planning, the environment etc.

Title Under Customary Law

The basic unit of land ownership is the family and no individual member of the family has any separate and alienable interest in such land.[38] The family as a unit owns the land. That is to say that ownership is vested in the family and all rights, title and interests are vested in the family. Family land implies co- ownership by all members of the family each member enjoying certain rights and privileges in and over the land. The family can dispose of the land. The family is a corporate body created upon the death of the founder holding an interest in land. The word has two primary meanings. First, it may be confined to the children of the person whose family is in issue.[39] Secondly, it may refer to all the descendants of a common ancestor.

Rights of Members of the Family

Every member of the family has certain rights in the family property. We shall now briefly examine some of these rights.

(i) *Right of Residence* – Members of the family have a right to reside in the family house. The primary objective for the creation of a family house is that it should be available as place of residence for the descendants of the founder.[40] While the males can of right bring their wives in, the females are not entitled to bring their husbands in as of right. A daughter who has left the house on marriage has a right to return to it on deserting or being deserted by the husband.

(ii) *Right of reasonable ingress and egress* i.e. the right to pass in and out of the family property. The view of Osborne, C.J. in *Lewis v. Bankole,*[41] that there was not general support for the right of ingress and egress for non- residing members of the family is difficult to support in view of the corporate holding and unity of possession of the family property.

(iii) He has a right to cultivate the farm land and to build on the town land allocated to him.

(iv) He has a right to have a voice in the management of the family property. The persons to be consulted are the principal members of the family and the occasions for consultation are limited to important dealings like mortgage, sale, gift and partition. These transactions are capable of destroying family property. Principal members are identified on the Idi-igi principle i.e. according to the number of wives as opposed to the Ori-ojori principle which is based on the number of children. The Idi-Igi principle i.e. *per, stirpes* has been held not to be contrary to natural justice, equity and good conscience.[42] Before applying the Idi-igi principle there must be evidence about the number of wives of the founder of the family.[43] It is the consent of the majority of the principal members that is required and not the consent of all the principal members.[44]

Legal Effect of Allocation of Land

Allocation of land to members is the responsibility of the head of the family. Allocation does not amount to an outright gift of family land. In other words, it does not pass ownership to the person to whom the allocation was made. All that such a person gets is a right

of user. Since allocation does not amount to ownership, the person to whom the allocation was made has no power to alienate the land.

The family head is the eldest male member of the family. On the death of the founder of the family, the proper person to assume the headship of the family is the eldest surviving son. After the death of the eldest son, the other sons of the founder and the grandsons succeed, the headship being kept always in the male line.[45] Usually, women are excluded from this position basically because women on marriage leave the family house to live with their husbands.

Since allocation does not amount to ownership, it follows that the persons to whom family land had been allocated have no power of alienation. Alienation in this context means sale, mortgage or lease. It is only the family that can competently dispose of such land. The legal consequence with respect to disposition of family land was laid down by the Federal Supreme Court, in *Ekpendu v. Erika*[46] as follows:

> "Briefly then the joint effect of the two decisions[47] is that a sale of family land which the head carries out, but in which the other principal members of the family do not concur is voidable, while a sale made by the principal members without the concurrence of the head is void *ab initio*"

However, a sale by a head of family who purports to convey the land as the beneficial owners is void on the principal of *nemo dat quod non habet*.[48]

A member of a family who makes an unauthorised alienation of allocated land may forfeit his interest since his action amounts to a misbehaviour and a denial of the family's title.[49]

Insecurity of Title Under Customary Law

The system of land tenure encouraged fraudulent practices where the same piece of land was sold to two or more persons. Coker observed thus:[50]

> "It is neither easy nor realistic to controvert the general belief among lawyers that conveyance in so far as it concerns family property is fraught with alarming dangers."

The West African Court of Appeal also highlighted the problem of the insecurity of a purchaser under customary tenure in *Ogunbambi v. Abowaba*[51]. The Court said:

> "The case indeed is in this respect like many which have come before this court, one in which Oloto family either by inadvertence or design sell or purport to sell the same piece of land at different times to different persons. It passes my comprehension how in these days, when such disputes have come before this court over and over again, any person will purchase from this family without the most careful investigation, for more often than not they purchase a law suit and very often that is all they get".[52]

The insecurity and unsuitability of customary tenure was also highlighted by Food and Agricultural Organisation of the United Nations, as follows:[53]

> "Neither is it suggested that traditional land tenures must be maintained as they are, since these tenures in many cases reflect traditional power structures which negate basic principles of growth and equity. They also provide a locus for a group, ethnic and other identities serving as serious obstacle to nation building and intra-national communities. Traditional land tenure systems are noted for different forms and faces, complex structures and institutions reflecting the stages of their individual social development."

Defect of the Dual System of Tenure

Conversion and reconversion of land from one system to another was a product of dualism. It introduced many complexities and uncertainties into the land tenure system. The traditional succession system led to fragmentation of tenures. Holders of absolute title under customary tenure were unable to raise money on the security of their lands because of the absence of title deeds. There was also a general insecurity of title under the dual system with adverse effect on economic development. Lloyd spoke on this as follows:

> "Having acquired the land a man is reluctant to develop it, being unsure of his rights to it. Valuable land lies unused because it is not clear by customary law who are the persons empowered to dispose of it".[54]

To eradicate the problems attendant upon dualism of tenure

Professor B. O. Nwabueze Advocates a system of integration which connotes a single national land law comprising of rules drawn from the two pre-existing systems but shorn of their objectionable features, their uncertainties and complexities.[55] Thus Professor Nwabueze could be regarded as a prophet that has foretold the coming of the Land Use Act.

THE LAND USE ACT 1978

Background to the Land Use Act

The Military Administration in its Third National Development Plan 1975-80 commented on the problem posed by land acquisition for development projects thus:[56]

> "With regard to land acquisition for Federal projects it is now clear that the burden is too great for any single ministry if it has to perform its other functions. Difficulties in land acquisition had been mentioned by virtually all public agencies as the most important single factor which frustrated the implementation of a number of their projects".

On individual ownership of land and speculation in urban land the Military Administration said:[57]

> "Furthermore, individual ownership of land and speculation in urban land has led to considerable increase in the price of land. This trend has been accentuated by the application of the principle of equivalence in land valuation. Moreover, fraudulent land transactions and endless legal tussle over title ownership have combined to stiffle housing development with consequential and significant escalation in the price of rented accommodation".

In the urban cities of the country acquisition, of land for development projects and building purposes became virtually impossible for individuals particularly the low and the middle income groups and small business concerns because the price had become so prohibitive.[58]

It was because of the problems highlighted above that led the Federal Military Government in April 1977 to set up the Land Use Panel. Brigadier Musa Yar'Adua, Chief of Staff, Supreme Headquarters justified the inauguration of Panel thus:

> "The need for establishment of this Panel arose from the recommendation of various commissions and panels set up to examine some aspects of the structure of our social and economic life. The problem had been foreseen and articulated in the Third Development Programme. Both the Anti-Inflationary Task Force and the Rent Panel Reports identified land as one of the major bottlenecks to development efforts in the country."

The Objectives of the Act

The promulgation of the Act was indeed unique. Unlike the other laws promulgated by the Military, its promulgation was announced personally by the then Head of the Federal Military Government in a radio and television broadcast on March 29, 1978. The belief before then was that it would not be promulgated since it appeared that the majority of members of the Panel did not recommend it. The Act has two broad objectives. First, to assert and preserve by law the rights of all Nigerians to the land in Nigeria. Secondly, to assure, protect and preserve the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenances of themselves and their families[59]

The Effect of the Land Use Act on Land Holdings

The effect of the Land Use Act was to nationalise all the land within a state and turn all land owners into "tenants". This objective of the land Use Act was emphasised in *Nkwocha v. Governor Anambra State & Ors.*[60] where Kayode Eso, J.S.C. who delivered the lead judgement held *inter alia*:[61]

> "The tenor of the Act as a single piece of legislation is the nationalisation of all lands in the country by the vesting of its ownership in the State leaving the individual with an interest in land which is a mere right of occupancy, and which is the only right protected in his favour by law, after the promulgation of the Act."

The Legal Status of the Act

The Land Use Act 1978 was one of the four Acts incorporated into the 1979 Constitution by the Military Administration.[62] The Act was very unpopular at its inception and there were threats by politicians to abrogate it in the 1978 political campaigns. This was the

rationale for its entrenchment into the Constitution. Section 274(5) of the Constitution provides that nothing in the Constitution shall invalidate these enactments and that their provisions shall continue to apply and have full effect in accordance with their tenor and to the like exent as any other provisions forming part of the Constitution and they shall not be altered except in accordance with section 9(2) of the Constitution. Section 274(6) of the Constitution provides:

> "Without prejudice to subsection (5) of this section the enactment mentioned shall hereafter continue to have effect as Federal enactments as if they related to matters included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution".

The Supreme Court has held in *Nkwocha v. Governor of Anambra State & Ors.* that the Land Use Act is not an integral part of the Constitution. The Court held:

> "... the Land Use Act is not an integral part of the Constitution. It is an ordinary statute which became extraordinary by virtue of its entrenchment in the Constitution, for if the Act has been made a part of the Constitution it would not have been necessary to insert the words of subsection 5 of Section 274 – 'Nothing in this Constitution shall invalidate' as the draftsman of the Constitution cannot make the Constitution to invalidate part of itself, nor would it be necessary to have in sub-section (6) of Section 274 that the Act shall continue to have effect as a 'Federal enactment' that is, a law made by the National Assembly, the Constitution itself not being a 'Federal enactment'. In other words, the Act which is a 'Federal enactment', shall continue to have effect as what it already is – a Federal enactment".[63]

The effect of this holding is that in the event of a conflict between the Constitution and the Land Use Act, the Constitution will prevail in spite of section 47 of the Act, which purports to override the Constitution. The Land Use Act not being part of the Constitution is subject to section 1(3) of the Constitution which provides:

> "If any other law is inconsistent with provisions of the Constitution, this Constitution will prevail and the other law shall to the extent of the inconsistency be void."

The Supreme Court declined to deal with the point in *Nkwocha v. Governor of Anambra State* on the ground that it was merely academic since the issue did not arise in the main proceeding in the Court of Appeal.

Who Owns the Land?

Section 1 of the Act vests all the land in a State in the Governor of a State and such land shall be held in trust for the use, and common benefit of all Nigerians. It is clear from this provision that the Governor of each State is the legal owner of all land comprised in his State except those which are vested in the Federal Government. He is not an absolute owner as such since he holds such land on trust for the use and benefit of all Nigerians. The claim by some politicians in the second Republic that the Federal Government was the owner of all land comprised in a State has no legal basis.[65]

A Nigerian as defined in the Constitution is a natural person and does not include a government.[66] In our view if the Act had intended to make the Federal Government the owner of all land comprised in each State it would have so provided in clear and unambiguous terms.

Management of Urban Land

For the purposes of management and control, land is divided into urban land and non-urban land. The determination of the urban and the non-urban land is done by the Governor by means of regulations published in the State Gazette.[67] Section 3 in particular empowers the Governor to designate by an order published in the Gazette urban areas for the purposes of the Act. The urban land is under the control and management of the Governor while the non-urban land is under the control and management of the Local Government. The Act establishes a Land Use and Allocation Committee for each State.

Although the Governor is empowered to determine the composition of the Land Use and Allocation Committee, the Act stipulates that it must include at least two persons who are estate surveyors or land officers of at least 5 years post-call experience and a legal practitioner. The functions of the Committee are:[68]

(i) to advise the Governor on any matter connected with the management of urban land;

(ii) to advise the Governor on any matter connected with the resettlement of persons affected by revocation of rights of occupancy on the ground of overriding public interest under the Act and

(iii) to determine disputes as to the amount of compensation payable under the Act for improvements on land.

The Nature of Interest Under the Act

The Act created a new interest in land called a right of occupancy which is a right to the occupation and use of the land. Every right of occupancy granted under the Act must be for a definite term.[69] In general a certificate of occupancy granted under the Act shall not exceed 99 years.[70]

Speaking about the nature of a right of occupancy Obaseki, J.S.C. in *Savannah Bank Ltd. v. Ajilo*[71] said that a statutory right of occupancy has the "semblance of a lease". In *Premchand Nathu. Co. Ltd. v. Land Officer,*[72] the Privy Council stated that it was "similar to leases in some respects but different in others". It is because of its similarity to a lease that the Act does not provide for creation of a lease in respect of right of occupancy. It only authorises the creation of a sub-lease or an underlease.

Statutory Right of Occupancy

This is a right of occupancy granted by the Governor in respect of land whether or not in an urban area. Upon the grant of a statutory right of occupancy all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished.[73] Under section 10 every express grant of a certificate of occupancy shall be deemed to contain the following conditions –

(i) that the holder binds himself to pay to the Governor the [illegible] found to be payable in respect of unexhausted improvements existing on the land at the date of his entering into occupation;

(ii) that the holder binds himself to pay to the Governor the rent fixed by the Governor and any rent which may be agreed or fixed on revision.

There is another type of statutory right of occupancy which is a deemed right of occupancy under section 34. It provides that where land in urban area is developed, it shall continue to be held by the in whom it was vested immediately before the commencement of the Act as if the holder was the holder of a statutory right of occupancy issued by the Governor under the Act. Under this provision a fee simple estate in an urban area is a deemed right of occupancy. With the promulgation of the Act, the fee simple owner ceased to be an absolute owner. His holding was converted to a deemed right for an indefinite period unless and until a grant for a definite term is made to him or the right is revoked.[74] Subject to the laws relating to mineral oil, mining and oil pipelines, the holder of a statutory right of occupancy has exclusive rights to the land, the subject of the statutory right of occupancy, against all persons other than the Governor.

Customary Right of Occupancy

A customary right of occupancy means the right of a person or community lawfully using or occupying land in accordance with tomary law and includes a customary right of occupancy granted by a Local Government under the Act.[75] In other words, there are two types of customary right of occupancy namely, those expressly granted by a Local Government under section 6 of the Act and those enjoyed by people who hold their title under customary law.

Under section 6 of the Act a Local Government may grant –

(i) customary rights of occupancy to any person or organisation for the use of land in the Local Government area for agricultural, residential and other purposes.

(ii) customary rights of occupancy to any person or organisation for the use of land for grazing purposes and such other purposes ancillary to agricultural purposes, as may be customary in the Local Government area concerned.

However, the Local Government cannot grant an area of land in excess of 500 hectares for agricultural purposes or 5000 hectares for grazing purposes except with the consent of the Governor.

Restrictions on Power of Alienation

Section 21 prohibits alienation of a customary right of occupancy by assignment, mortgage, transfer of possession or sublease or otherwise howsoever –

(i) without the consent of the Governor in cases where the property is to be sold by or under the order or any court under the provisions of the applicable Sheriffs and Civil Process Law; or

(ii) in other cases without the approval of the appropriate Local

Government.

Section 22 makes it unlawful to alienate a statutory right of occupancy by assignment, mortgage, transfer of possession or sublease without the consent of the Governor first had and obtained. But the consent of the Governor shall not be required:-

(i) to the creation of a 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

(ii) to the reconveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which the holder or occupier has mortgaged to that mortgagee with the consent of the Governor.

The Governor while giving his consent to an assignment, sublease or mortgagee may require the holder of the statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease in order that the consent given by the Governor may be signified by an endorsement therein.

The phrase "first had and obtained" does not mean that the parties are to obtain the Governor's consent before commencing negotiation. Some form of agreement between the parties before approaching the Governor for consent is inevitable. Thus Viscount Simmonds in dealing with a similar provision of the Kenya Crown Lands Ordinance in *Denning v. Edwards*[76] stated:

> "It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent, otherwise negotiations would be impossible. Successful negotiations end with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of the opinion that there was nothing wrong in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that the agreement was inchoate till the consent was obtained. After it was obtained the agreement was complete and effective."

This view was followed in *Bisichi Tin Co. (Nig) Ltd. v. Okonkwo*[77]

where the Jos High Court held in construing a similar provision under the Land Tenure Law 1961;

> "An agreement to alienate simply, not being an agreement to alienate if the consent is withheld is not made unlawful by the section which is silent as to agreements. The only effect of the section is to make any agreement to alienate conditional upon the necessary consent being obtained".

Any transaction or any instrument which purports to confer or vest in any person any interest or right over land other than in accordance with the provision of the Act is null and void.[78] The prohibition against alienation applies to all rights of occupancy granted by the Governor and the Local Government and those deemed to be granted under sections 34 and 36 of the Act. In *Savannah Bank of Nigeria Ltd. v. Ajilo*,[79] Ajilo was the owner in fee simple of a parcel of land at Oyekanmi Street, Itire Road, Mushin in Lagos State. The said land was mortgaged to Savannah Bank Ltd. on 5th September 1980, to secure a loan. When the bank wanted to sell the property Ajilo sought a declaration that the deed of mortgage was null and void because the Governor's consent was not obtained as required by section 22 of the Land Use Act. The trial judge granted the declaration.

The bank appealed and it was contended on its behalf that section 22 applied only to express grants under sections 5 and 6 and not to deemed grants under sections 34 and 36. In dealing with this problem Kolawole, J.C.A. reiterated the rationale for the promulgation of the Act thus:

> It must be borne in mind that the object of the legislature is to make the land in Nigeria available for the use and enjoyment of all Nigerians and the best approach to achieve the objective was to vest all land comprised in the territory of each State in the Military Governor of that State for the use and common benefit of all Nigerians. From the commencement of the Act all land in urban areas came under the control and management of the Military Governor and all other land came under the control and management of the Local Government within the area of jurisdiction of which the land is situated".

After stating that the court must construe the provisions of the Act in such a way as not to defeat the obvious ends it was designed to serve, Kolawole, J.C.A. rejected the contention on the ground that:

> "there cannot be two categories of rights of occupancy, one subject to the Act and the other outside its regulatory force. I am therefore of the view that the Act has created by virtue of sections 5 and 6 only statutory rights of occupancy and customary rights of occupancy and what is termed a deemed right is used in context of the Act to bring in other interests within the existing rights holder which would otherwise have been excluded. In other words, every holder of a right of occupancy whether statutory or otherwise is regarded as having been granted the right of occupancy by the Governor or Local Government for the purpose of control and management."[80]

The views of academic writers[81] that sections 21 and 22 do not apply to deemed grants under sections 34 and 36 were rejected by the Court of Appeal on the ground that they overlooked the history of the enactment, the mischief and defect for which the earlier law did not provide a remedy and the remedy which the Legislature had resolved and appointed to cure the disease.[82] Accordingly, Kolawole, J.C.A. concluded that sections 21 and 22 which prohibit alienation without the requisite consent apply to every rightsholder pursuant to section 34 or 36 of the Act. On appeal the Supreme Court affirmed the decision of the Court of Appeal.

It is generally believed that the consent provision in section 22 is a clog in the wheel of economic progress and also a veritable avenue for corruption. The undesirability of the consent provisions was highlighted by Obaseki, J.S.C. in *Savannah Bank Ltd. v. Ajilo* thus:

> "In my view and I agree with Chief Williams' expression of anxiety over the implementation or consequences of the implementation of the consent clauses in the Decree. It is bound to have a suffocating effect on the commercial life of the land and house owning class of society who use their properties to raise loans and advances from banks. I have no doubt that it will take the working hours of a State Military Governor to sign consent papers without going half way if these clauses are to be implemented.

> These areas of the Land Use Act need urgent review to remove their problem nature."

Power of Revocation

The Governor may revoke a right of occupancy for overriding public interest. Overriding public interest in the case of a statutory right of occupancy means –

(i) alienation by the occupier by assignment, mortgage, transfer of possession, sublease, or otherwise without the requisite consent.

(ii) the requirement of the land by Federal, State or Local Government for public purposes within the State.

(ii) the requirement of the land for mining purposes or oil pipelines or for any purposes connected therewith.

Revocation of a customary right of occupancy is governed by section 28(3) which in addition to the three conditions mentioned above provides for a fourth i.e. the requirement of the land for the extraction of building materials.

The term "public purposes" is comprehensively defined in section 50 of the Act. The particular purpose for which the land is required must be stated in the notice of revocation. In *Obikoya & Sons Ltd. v. Governor of Lagos State*,[83] the notice of revocation failed to state the particular public purpose and the said revocation was declared invalid. The Court of Appeal quoted with approval the judgement of Waddington, J. in *Chief Commissioner Eastern Province v. S. N. Ononye*[84] that:

> ". . . the notice merely states 'for public purposes' and I find it difficult to understand why the particular purpose is not stated. When the matter comes into Court it has to be admitted that there is no public purpose involved at all and the impression is liable to be conveyed, no doubt quite erroneously, that there was something ulterior in the failure to make the purpose public".

Moreover, any revocation for a purpose not provided for in the Act will be invalid. Thus in *Bello v. The Diocesan Synod of Lagos*,[85] where the land was acquired for the extension of a church, the Supreme Court held that the acquisition was invalid because it was not made for public purposes but had been made to fulfill the purpose of private institution.

Notice of revocation must be given to the holder.[86] Section 44 provides for mode of service on revocation. If notice is not given to the holder as prescribed by the Act the revocation is invalid.[87]

Is there a Right to Be Heard Before Revocation?

In *Obikoya & Sons Ltd. v. Governor of Lagos State,* the Court of Appeal held that the appellant whose right of occupancy was purportedly revoked on the ground that the land was required for public purposes of the State had a right to be heard before the revocation was effected on the ground that it was an act in prejudice of his property rights. This is based on the principle of *audi alteram partem* which gives a person affected a fair opportunity to correct or contradict statement which may adversely affect him.

It is submitted with respect that the Court of Appeal was in error in holding that there was a right to be heard in all cases of revocation. While there may be a right to be heard when the revocation is on ground of unlawful alienation, no such right can be claimed when the purposes of the revocation is the use of the land for public purposes or oil pipelines or mining. Revocation on grounds of unlawful alienation is punitive and it is therefore necessary to hear the holder before inflicting the prescribed punishment. Revocation on other grounds other than unlawful alienation is not punitive and is not based on misconduct. It is only in respect of the compensation payable for unexhausted improvements that the holder is entitled to be heard.

It was not the law that the Government was obliged to give a right of hearing to land owners in those days of private ownership of land before it could acquire land under the Public Lands Acquisition Act or Law for public purposes. It is difficult to believe that this position has been altered by the Land Use Act which vested ownership in the Governor while the individual has a mere right of occupancy.

Indeed, the introduction of the principle of *audi alteram partem* into the exercise of administrative act of revocation when the land is needed for public purposes will virtually defeat the objectives of the Land Use Act. The Act was promulgated because of the problems of acquisition of land for governmental projects. The requirement of the *audi alteram partem* is bound to be dilatory and will tend to give undue preference to the rights of the individual against the larger interest of the community.

Effect of Bad Faith On The Exercise of the Power of Revocation

In *Obikoya & Sons Ltd. v. Governor of Lagos State,* the appellant alleged bad faith because the revocation was done during the pendency of a suit. The Court of Appeal held that the revocation was done to safeguard the position of the Governor should the 1969 acquisition which was being challenged turn out to be invalid. Nevertheless, the Court held *obiter* that evidence of bad faith could render a revocation void.

In our opinion, the view of Nwokedi, J. in *Nkwocha v. Governor of Anambra State*[88] to the effect that evidence of bad faith is irrelevant in the exercise of the Governor's statutory power of revocation under section 28 is to be preferred for the following reasons: First, once a Governor has stated the exact public purpose for which the land is needed and has served the required notice, a plaintiff alleging bad faith will be put to strict proof and will be assuming a very heavy onus. Secondly, if it is shown that the revocation order is within the powers conferred by the Act and that all the requirements of the Act have been complied with, the court cannot interfere with the Governor's decision.[89] Thus in *Merchants Banks Ltd. v. Federal Minister of Finance,*[90] an allegation of bad faith was made against the Minister in revoking the banking licence of the appellant. The Federal Supreme Court held that the court could not inquire into the allegation. Unsworth, F.J. said:

> "In matters involving the exercise of statutory administrative power, the functions of the Court begin only if and when it is alleged that the powers have not been exercised in accordance with the statute creating it".[91]

Right to Compensation on Revocation

Where a right of occupancy is revoked under section 28, the holder or occupier is entitled to compensation for the value of his unexchausted improvements at the date of the revocation.[92] Improvements and unexhausted improvement means:

> "anything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of

long-lived crops or trees, fencing, wells, roads and irrigation or reclamation works but does not include the result of ordinary cultivation other than growing produce".[93]

Disputes as to the amount of compensation payable under the Act are to be determined by the Land Use and Allocation Committee.[94] The Commission has the necessary expertise to do the job since it is mandatory that two of its members must be estate surveyors or land officers at least five years experience. If the holder or occupier is dissatisfied, he can take the matter to the High Court for adjudication in spite of section 47 of the Act which purports to bar any court from inquiring into the question of amount or adequacy of any compensation paid or to be paid under the Act. Since the Act is not an integral part of the Constitution, its provisions are therefore subject to the Constitution.[95] Indeed section 47(1)(c) of the Act is in conflict with section 6(c) of the Constitution which provides that the judicial power vested in the courts by the Constitution:

> "shall extend to all matters between persons or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person".

Section 47(1)(c) of the Act also violates Section 4(8) of the Constitution which prohibits the enactment of any law that ousts or purports to oust the jurisdiction of a court of law or tribunal established by law. Consequently, in accordance with section 1(3) of the Constitution, sections 4(8) and 6(c) will prevail and section 47(1)(c) will be void to the extent of the inconsistency.

Where a right of occupancy of an occupier of a residential building has been revoked, he is not entitled to compensation, if the Governor or the Local Government has offered him an alternative accommodation. If the value of the alternative accommodation is higher than the amount of compensation, the excess shall be treated as loan to be repaid in the prescribed manner.[96] This provision is however discretionary and a party cannot insist on its enforcement if the Governor or Local Government opts to pay compensation. However, where land in respect of which a customary right of occupancy is revoked is used for agricultural purposes by the holder, the Local Government is obliged to allocate to such holder alternative land for use for the same purpose.[97]

The Act purports to exclude payment of compensation for empty undeveloped land. This provision may indeed be in conflict with Section 40 of the Constitution which provides for the payment of compensation if property is compulsorily acquired. Indeed, it is unjust not to pay compensation for undeveloped land which might have been acquired for valuable consideration before the promulgation of the Land Use Act.

The importance of land and the injustice in taking over undeveloped land without compensation has been highlighted as follows:

> "It seems unfair that Government should take over without compensation capital invested in land ownership when capital invested in other fields for example government loans, bonds, companies, shares, industries, or commercial business are left untouched. Land itself has become the very basis of commercial and industrial enterprise. It is the most important factor of production in industry as well as in agriculture. Business needs land for buildings, stores, warehouses, factories etc. Even professional practice such as law, medicine, pharmacy, general merchandise need land for openings, offices, clinics, shops."[98]

The Title of Customary Tenants

The interests of customary tenants before the Land Use Act were not usually in dispute. Customary tenants are people who are not members of the family but have, on application, been given family land to farm on the payment of yearly customary tributes. They hold their interest during good behaviour and they can lose their rights if they are guilty of some misconduct e.g. alienation without the family's consent, denial of family's title, failure to pay tribute etc. The Land Use Panel examined the problem of customary tenants and concluded thus:

> "It is our view and we recommend that this class of customary tenancy are unsuitable in the circumstances of present day Nigeria. In our opinion they should be abolished and we so recommend. If abolished such

tenant-communities should remain on the lands they occupy rent free exercising all rights of absolute ownership."

This recommendation was given effect in section 36(2) of the Act which provides:

> "Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this Act being used for agricultural purposes continued to be entitled to possession of land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government".

The intention of this provision is to make the Local Government the landlord of every tenant and to abolish the payment of rent by customary tenants. Rents are to be paid to the Local Government which is empowered to grant a customary right of occupancy and may impose a rent for the grant of such a right.

There are conflicting decisions of the High Court on the liability of the tenant for rent. In *Adeyemo v. Odegbile*[99] Olowofoyeku, J. upheld a claim by a landlord for payment of rent by a customary tenant. But the same judge in *Omirefa v. Ogundele*[1] rejected a claim against a customary tenant by his landlord for declaration of title, damages for trespass, and injunction to restrain further trespass and forfeiture. The genesis of the claim was the refusal of the customary tenant to pay rent after the promulgation of the Land Use Act. Olowofoyeku, J. rejected all the claims on the ground that they were clearly a negation of the position which section 36(2) of the Act has bestowed on the tenant. In *Alade v. Omomukuyo,*[2] Fawehinmi, J. rejected a claim for rent by the landlord against his tenant.

But pronouncement by the Supreme Court indicate that the objective of section 36(2) of the Land Use Act to abolish landlord and tenant relationship has not been achieved. In *Salami v. Oke,*[3] Obaseki, J.S.C. said:

> "The Land Use Decree (Act) was not intended to transfer the possession of the land from the owner to the tenant by whom the owner was in possession".

After making references to sections 40 and 50 as regards the

definition of "holder" and "occupier" Obaseki, J.S.C. said:

> "There is nothing in the provision of this subsection preventing a holder of a customary right of occupancy from granting customary tenancy and forfeiting the customary tenancy provided the provisions of the Land Use Act are strictly complied with".[4]

A further blow was struck at section 36(2) of the Act in *Onwuka v. Ediala.*[5] In dealing with definition of holder and occupier in section 50 Wali, J.S.C. said:

> "In my view the words holder or occupier mean the person entitled to customary right of occupancy, that is, the customary landowner other than the customary tenant".

Criticism of the Act

The objectives of the Land Use Act have remained largely unfulfilled and title to land appears to be more insecure now than it ever was. The deficiencies of the Land Use Act were aptly summarised by Mr. Justice Augustine Nnamani who as Attorney- General was responsible for the drafting of the Act and its incorporation into the Constitution. He said:[6]

> "In the course of these . . . years it has become clear that due to its implementation not its structure or intendment, the objectives for which the Land Use Act was promulgated have largely remained unfulfilled, indeed they have been distorted, abused and seriously undermined. The lofty hope in the second stanza of the preamble – that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them provide for the sustenance of themselves and their families be assured, protected and preserved or in section 1 that all land be held in trust and administered for the use and common benefit of all Nigerians – has been nothing but a forlorn hope, a pipe dream. The limit of land allowed by section 34(5) and (6) of the Act has been totally ignored. The position today is that land is less available to the ordinary Nigerian than it was pre the Land Use Act thus holding most of the citizens to the unenviable state of perpetual tenants.

The allocation policy of the various governments, particularly during the civilian era has been scandalous. The Land Use and Allocation Committees which are supposed to make recommendations on these matters are no more than appendages of the Governors and merely endorsed lists approved by them. The civilian Governors who had vowed to repeal the Act before entering into office, grabbed it with both hands on getting into power. The result to be expected were allocations of land mostly to friends, relatives and party faithfuls. Land became indeed an item of patronage. Worse still the patronage was withdrawn as one Government succeeded the other.

Allocation of land by the previous administration tended to be revoked with attendant dislocation of the social and economic life of the community. Allocation of land was hardly made to the low income-earners. No government has yet earmarked a percentage of land available for allocation to this category of Nigerians as a deliberate policy. Nor has there been allocation of a percentage of land available for allocation to the community or family that previously owned the land now acquired by Government. The combination of factors arising from zeal attending the generating of internal revenue by State Government has put land beyond the reach of the ordinary Nigerian, and indeed very soon all Nigerians. A policy which expects all applicants to pay a non-refundable fee of ₦50 or more does not reckon with the minimum wage earned by millions of Nigerians; the ground rent charged for allocated land is indeed beyond the reach of most Nigerians except perhaps the commission agents and a few genuinely affluent citizens. Aspect of the Act which in implementation have brought untold hardship include the provisions relating to the issue of certificates of occupancy and grant of consent to alienate. Both can take years and the applicant is subjected to the vagaries of bureaucratic action with demands for survey plans, interminable fees, documents and a lot of to and froing. These cumbersome procedures have adversely affected economic and business activity and made in-

dustrial take- off a matter very much in the future."

Suggested Reforms

The major success of the Act is that it has provided a uniform land tenure for the entire country. In order to consolidate this gain and to make the operation and implementation of the Act achieve the objectives for which it was promulgated the following amendments are suggested –

(i) The Act should be removed from the Constitution so that amendments to it can be effected. Since the Act is subject to the cumbersome provision of amending the Constitution under section 9 of the Constitution, no meaningful amendment can be carried out to it in a civilian democracy. Because the Act has become an incident of political power, the threat of abrogation which necessitated its entrenchment in 1979 is no longer present.

(ii) The Land Use and Allocation Committees had been rendered impotent and their functions taken over by the Governors. Each Committee should be constituted into an independent Commission with safeguards for the independence and tenure of office of its members.

(iii) Title to land has become very precarious because of the misuse and abuse of section 28 of the Act. For instance, commercial banks are uncertain as to the value of certificate of occupancy which they are being asked to take as security for loans bearing in mind that these certificates can be revoked at the whims and caprices of Governors.[7] Section 28 should be amended to make it obligatory for the Governor to act on the advice of the Commission in (ii) above.

(iv) Since the Act has not abolished the institution of family ownership, families should be made to register the names of four members for the purposes of transactions in family land. Such a step will eliminate the problems of void and voidable titles and guarantee good title to family land.

(v) The consent clauses in section 21 and 22 should be amended. Only grants actually made by the Governor or the Local Government should require prior consent before alienation. Owners of deemed grants should be able to alienate without consent and such alienation should be

notified to the Governor's office for information only.

(vi) Section 36(2) which purports to abolish the relationship of landlord and tenant has failed to achieve the objective. The section should be suitably amended to abolish the relationship but the tenants should be required to make a once and for all lumpsum payment in return for retaining absolute ownership of these lands.

(vii) Payment of ground rents by holders or occupiers should be limited to rights of occupancy actually granted by the Governor and the Local Government and not to deemed grants. Moreover, charges in respect of land should be limited to development charges which can be paid in instalments.

(viii) In the urban areas, the cost of acquiring land from Government is so prohibitive that only a few affluent people can afford it. The cost of application form should be nominal and Government should as a matter of deliberate policy reserve a certain percentage of available land to middle and low income groups. A situation under which allottees are required to pay about ₦30,000 for a plot of land is clearly putting land out of the reach of most Nigerians.

(ix) Provisions which deny compensation to undeveloped land owners should be amended. While the Act recognises existing rights in land including rights in undeveloped land, it denies compensation for such lands when compulsorily acquired. The injustice becomes more apparent when it is realised that many of such lands were acquired for valuable consideration before the enactment of the Act.

(x) The Act appears to hinder economic progress because of the unwillingness of and inability of banks and other financial institutions to give out loans on mortgage. If a right of occupancy is revoked a mortgagee has no right to the compensation payable. The definition of "holder" or "occupier" in section 50 should be amended to include a mortgagee.

A thorough review on the lines suggested above is absolutely essential. Unless and until these reviews are effected the objectives set in the Preamble to the Act – that the right of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them provide for the sustenance of themselves and their families be assured, protected and preserved by law and section 1 – that all land be held in trust and administered for the use and

common benefit of all Nigerians – will remain largely utopian and illusory.

Conclusion

The Land Use Act which attempts to revolutionalise title to land is no doubt a complex legislation and its full import and implication will take some time to sort out. All issues relating to title to land cannot be settled in an inaugural lecture. It is hoped that some other person will take up the matter some time from where I have concluded.

Mr. Vice-Chancellor Sir, I wish to seize this opportunity to acknowledge the contributions others have made to my life, in particular the late Pa Paul Ijagbemi, my mother's maternal uncle. He was responsible for my education. But for him I will not be standing before this audience today to deliver an inaugural lecture. May his great and noble soul rest in perfect peace. To God and to him I owe everything in my life.

I thank you all for listening..

References

1. S. 48 *Land Use Act* 1978.
2. Stroud's *Judicial Dictionary of Words and Phrase* 4th ed. 1972 Vol. 3 pp. 1477-1478.
3. *The Concise Oxford Dictionary* 5th ed. 1963 p. 1360.
4. Per Coleridge, J. in *Adey v. Trinity* House 22 L.J.Q.B. 41.
5. A.A.O. Okunniga, The Land Use Decree and Private Ownership of Land in the *Proceedings of the 17th Annual Conference of the Nigerian Association of Law Teachers* p. 228.
6. (Unreported) suit No. AB/42/160 Abeokuta Judicial Division.
7. (Unreported) Suit No. HOS/27A/68 of 14th March, 1969.
8. (1937) 13 N.L.R. 43.
9. It is submitted that the decision of Alexander, J. in *Dosumu v. Ajumobi* (Unreported) Suit NO. LD609/65 of 19th Sept., 1968 in which he applied the Act to bar a claim under customary law was erroneous. The learned judge should have made use of the equitable doctrines of laches and acquiescence to bar the claim.
10. *Akilusi v. Akilusi* (Unreported) Supreme Court decision of 27th March, 1946.
11. (1960) 5 F.S.C. 167.

12. Megarry and Wade. *The Law of Real Property* 2nd ed. p. 51-52.
13. *Caulcrick v. Harding* (1926)5 N.L.R. 48; Millers Bros Ltd. v. Ayeni (1924)5 N.L.R. 40.
14. *Balogun v. Oshodi* (1931)10 N.L.R. 36 at 51. In *Attorney-General v. John Holt of Ors.* (1911-1914)1 N.L.R. 1 at 3. Osborne, C.J. expressed the view that alienation by sale began between 1852 and 1862.
15. (1966) N.M.L.R. 405.
16. (1931)10 N.L.R. 36.
17. At pp. 47-48.
18. (1936)4 W.A.C.A. 1 at p.6.
19. (1960) L.L.R. 71.
20. S.61 Registration of Titles Act Cap 181 of the 1958 of Laws of the Federation and S.26 Land Instruments Registration Law Cap. 56 of the Laws of Western Nigeria.
21. (1966) N.M.L.R. 329.
22. For a fuller discussion See – S.A. Oretuyi; "The Effect of the Employment of English Forms of Conveyances on Land Transactions in Nigeria" (1980) *Anglo-American Law Review* Vol. 9 No. 4/306- 315.
23. Report of the Committee to consider the Registration of Title to Land in Western Nigeria, Sessional Paper 2 of 1962 para. 27.
24. *Alienation of Family Property in Southern Nigeria* (1966) p.89.
25. Per Kingdom, C.J. in *Balogun v. Oshodi* at p. 56. For other cases where a fee simple declaration was granted see *Alade v. Aborishade* (1962) W.N.L.R. 74 where Morgan, J. followed the dictum in *Jegede v. Eyinogun* (1959) 4 F.S.C. 270 and wrongly equated the totality of family interest to the fee simple.
26. (1957) 2 F.S.C. 36 at 37.
27. (1946) 12 W.A.C.A. 78.
28. (1942) 8 W.A.C.A. 127.
29. (Unreported W.A.C.A. 228 of 7th December, 1950.
30. (1951) W.A.C.A. 213.
31. (1958) W.N.L.R. 169 at 170.
32. *Miller Bros Ltd. v. Ayeni* (1924) 5 N.L.R. 40.
33. (1961) 1 All N.L.R. 225.
34. On the principle of *Nemo dat quod non habet* the plaintiff/respondent should be incapable of conveying a fee simple by mere use of English conveyancing terminology since he did not have such a title.

35. *Oshodi v. Balogun* (1934) 4 W.A.C.A. 1 at p.7.
36. Report of the Committee to Consider the Registration of Title to Land in Western Nigeria, Sessional Paper 2 of 1962, para. 29.
37. Public Lands Acquisition Act Cap 167 of the Laws of the Federation of Nigeria 1958, S.3; S.7 Public Lands Acquisition Law Cap. 105 of the Laws of Western Nigeria 1959; S.3 Public Lands Acquisition Law Cap 105 of the Laws of Eastern Nigeria.
38. *Caulcrick v. Harding* (1926) N.L.R. 48, *Miller Bros v. Ayeni* (1924) 5 N.L.R. 40.
39. The founder of the family can extend the term by his Will to include other relations as in *Sogbesan v. Adebiyi* (1941) 16 N.L.R. 26 See also *Coker v. Coker* (1938) 14 N.L.R. 83.
40. *Coker v. Coker. supra.*
41. N.L.R. 81.
42. *Danmole v. Dawodu* (1958) 3 F.S.C. 56; *Taiwo v. Lawani* (1961) 1 All N.L.R. 703.
43. *Parakoyi v. Wonuola & Ors.* (1973) 1 W.S.C.A. 88.
44. *Adewuyin v. Ishola* (1958) W.N.L.R. 110.
45. *Iyang v. Ita* 9 N.L.R. 84.
46. (1958) 3 F.S.C. 79.
47. *Manko v. Banso* 3 W.A.C.A. 62; *Esan v. Faro* 12 W.A.C.A. 135.
48. *Akerele v. Atunrase* (1969) 1 All N.L.R. 201; *Solomon v. Mogaji* (1982) 11 S.C. 1; *Coker v. Oguntola* (1985) 2 N.W.L.R. (Part 5) 87.
49. *Onisiwo v. Gbamgboye* (1941) W.A.C.A. 1.
50. G.B.A. *Coker Family Property Among the Yorubas* (1966) at p.317.
51. (1951) 13 W.A.C.A. 222.
52. *Ibid.* at p.223.
53. Land Reform Land Settlement and Cooperatives 1981 No. 112.
54. Report of the Commission Appointed to consider Registration of Title Land in Western Nigeria 1959 para. 2.
55. B. O. Nwabueze, *Nigerian Land Law* 1972 p.621.
56. Third National Development Plan 1975-80 Vol. 1 p. 398 para. 9.
57. At para. 2.
58. A. A. Adelakun, *Implementation of the Land Use Act. Report of*

a National Workshop on the Land Use Act 1980. p.124.

59. This is contained in the Preamble to the Act.
60. (1984) 1 S.C.N.L.R. 634.
61. At p.652. The contention of Prof. Omotola in 1986 Vol. 3 *Journal of Private and Property Law* 1 that the Act does not amount to an expropriation i.e. nationalisation of land cannot stand in view of the Supreme Court's pronouncement on the point.
62. The others are the National Youth Service Corps 1973; The Public Complaints Commission Act 1975; and The Nigerian Security Organisation Act, 1979.
63. Per Kayode Eso, J.S.C. at p. 652. The Court consisted of 7 justices. Five other justices concurred. Only Nnamani, J.S.C. dissented on the point. He held that Act was an integral part of the Constitution. He was the Attorney-General who drafted the Act and its incorporation into the Constitution.
65. See S. A. Oretuyi; "Public Take Over of Land-Federal and State Government Rights Over Land – The Conflict" in *The Land Use Act;* Report of a National Workshop pp. 74-79.
66. See Sections 23-25 of the Constitution.
67. See O.Y.S.L.N. 15 of 1978.
68. See. 2(2)
69. See. 8.
70. See Regulation 3 Land Use Regulation of Oyo State 1978 and Regulation 22 of the Land Use Regulations 1978 of Kwara State.
71. (1989) 1 S.C.N.J. 169 at 184.
72. (1963) A.C. 177 at p.190.
73. See. 5.
74. Per Nnaemeka-Agu, J.C.A. in *Obikoya & Sons Ltd. v. The Governor of Lagos State & Anor.* (1987) 1 N.W.L.R. 385 at p.406.
75. S.50 (1).
76. (1961) A.C. 245 at 253-254.
77. (1961) N.R.N.L. 60 at 61.
78. S. 26.
79. (1987) 2 N.W.L. 421.
80. At p. 434.
81. See J. A. Omotola, *Essays on Land Use Act 1978* Pp. 27-28; R.W. James, *Land Use Act: Policy and Principles* P. 104.
82. At pp. 433-434.

83. (1987) N.W.L.R. 385.
84. (1974) 17 N.L.R. 142.
85. (1971) 1 All N.L.R. (Part 1) 247. See also *Ereku v. Military Governor, Mid-Western State of Nigeria;* (1974) 1 N.L.R. (Part 2) where the land was acquired and given to a private company and the acquisition was declared invalid.
86. S.28(6)
87. *Obikoya & Sons Ltd. v. Governor of Lagos State. Supra.*
88. Unreported Suit No. E/167/81 of 28th May 1982. Nnaemeka-Agu J.C.A. disagreed with this view.
89. See Re: *Falmouth Clearance Order 1936: Application of Halse* (1937) 3 All E.R. 308.
90. (1961) 1 All N.L.R. 598.
91. At p. 599. See also Re *London County Council Order 1938* (1946) 2 All E.R. 484 at 490 per Croom-Johnson, J.
92. S. 29.
93. S. 50.
94. S.2(2)(c).
95. Section 47(2) was held inconsistent with the Constitution in *Kanada v. Governor of Kaduna State* (1986) 4 N.W.L.R. (Part 35) 361 by the Court of Appeal, Kaduna Division. It is hoped that the Supreme Court will have no opportunity to pronounce on the matter in due course.
96. S.33.
97. S.6(6).
98. Adedapo Adeniran, *The Futility of the Land use Decree* 1978.
99. (Unreported) suit No. HIF/29/99 of 6th March 1989.
1. (Unreported) Suit No. HIF/53/87 5th June, 1989. The judge held that the holding in *Onwuka v. Ediala* (1989) NWLR (Part 96) 182 was on an *obiter dictum* and was therefore not binding on him.
2. (Unreported) Suit No. HOD/19A/81 of 14/6/82.
3. (1987) 4 N.W.L.R. 1.
4. At pp. 13-14.
5. (1989) 1 S.C.N.J. 102.
6. *Land Use Act – 11 Years After,* an address presented to the Nigerian bar Asso. Ikeja Branch on 3rd March 1989.
7. (1982) N.C.L. Rev. 249-250.