

**THE CONSENT PROVISIONS OF  
THE LAND USE ACT AND  
MODERN ECONOMIC REALITY:  
A NEED FOR REFORM**

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**THIS LONG ESSAY, AN ORIGINAL WORK, IS IN  
PARTIAL FULFILMENT OF THE REQUIREMENT FOR  
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## **DECLARATION**

I, **ZEBEDEE AREKHANDIA**, hereby declared that this long essay is entirely an original work both in form and substance and that it is not a copy right of anybody; therefore I own responsibility for any error of omissions therein.

.....

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## **CERTIFICATION**

We the undersigned certify that this long essay was written by AREKHANDIA ZEBEDEE of the Faculty of Law, University of Benin, Nigeria, in partial fulfilment of the requirement for the Award of Bachelors of Law (Hons.) Degree LL.B.

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## DEDICATION

This long essay is dedicated to millions of **STRUGGLING NIGERIANS** whom undermining their poor background by birth and the prevailing man-made economic hardship in Nigeria, have continue to struggle for improved life. I know Nigeria will be better for us someday.

## **ACKNOWLEDGEMENT**

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## **ABBREVIATIONS**

AC	-	Appeal Cases (England)
Afr LR (Commercial)	-	African Law Reports (Commercial)
ALL ER	-	All England Law Reports
ALL NLR	-	All Nigerian Law Reports
F.H.C.L.R.	-	Federal High Court Law Reports
F.S.C.	-	Northern Supreme Court Reports
N.N.L.R	-	Northern Nigerian Law Reports
N.W.L.R	-	Nigerian Weekly Law Reports
S.C.	-	Judgment of the Supreme Court
S.C.N.L.R	-	Supreme Court of Nigeria Law Reports
W.A.C.A	-	Selected Judgments of West African Court of Appeal
Anor	-	Another

CAP	- Chapter (in the Revised Editor of Laws)
G.R.B.P.L	- Chapter (in the Revised Editor of Laws)
Ibid	- in the same place, books, or source.
J.C.A.	- Justice of Court of Appeal
J.S.C.	- Justice of Supreme Court
L.F.N	- Laws of Federation of Nigeria
Ors	- others
Pg.	- Page
Pt.	- Part
Supra	- Above; referred to previously
v.	- Versus (between)

## ABSTRACT

This project work titled "The Consent Provisions of the Land Use Act and Modern Economic Reality: A Need for Reform" is an attempt within the academic platform, to examine the negative effects of the Consent Provisions of Land Use Act in the economic development of Nigeria, with a view of proffering solution to the problem.

This attempt becomes necessary because of the recent clamour by our political leadership of making Nigeria one of the most 20 industrialized nations of the world by the year 2020. While different reforms programs have been mapped out by the Nigeria Government in this regard, no serious attention is paid to reform the Land Use Act.

Undoubtedly, the entire Land Use Act needs reforms, but of most urgent is the reform needed in the consent provisions of the Land Use Act, which if properly done, will enable Nigerian businessmen, and individuals alike, have unhindered access to capital loan using their landed property as collateral for loan and bank overdraft. If land can be used as mortgage for loan, without passing through the difficult task of

seeking and obtaining consent as it is now, business men will have easy access to fund, which will in turn help their business growth.

Also, land is needed for agriculture, industry and housing development. These three areas are crucial to any country economic development. The easier it is for people to acquire land for agriculture, industrial and housing development, the better for Nigeria economic development. This will only be possible if the consent provision of Land Use Act is reform so as to remove the present difficulties in getting consent to transfer land and landed property.

As it is in the present, where landowners need six months and above to get consent required to transfer land and other landed property, the much-needed economic development in Nigeria will only be a mirage. The project will therefore examine the problems of consent provisions and its effects on the economic development of Nigeria and recommend the needed reforms that will make the consent provisions in line with modern economic reality.

In doing this, the project work will be divided into five chapters. Chapter one will focus on the land ownership system and transfer of land in the pre-Land Use Act Era. Reasons for the inclusion of the consent provisions in the Land Use Act will conclude chapter one. Chapter two will examine the consent provisions of the Land Use Act. Chapter three will appraise the judicial responses of the consent provisions of Land Use Act. Chapter four focus on the problems caused by the consent provisions and its effects on the economic development of Nigeria. Also to be examined here is whether the consent provisions have achieved its objective and whether owners of land and landed property complies with the consent provisions when transferring their interest in land. Chapter five which is conclusion will contain a comparison of land alienation in the Pre-Land Use Act Era and in the Land Use Act Era. A critique of the judicial interpretation of consent provisions will be attempted. The recommended reforms needed to bring the consent provisions in line with modern economic reality will conclude the project.

## CHAPTER ONE

### LAND OWNERSHIP AND TRANSFER OF INTEREST ON LAND IN THE PRE-LAND USE ACT ERA IN NIGERIA

#### LAND OWNERSHIP SYSTEM IN NIGERIA IN PRE-LAND USE ACT ERA

Before the advent of the Land Use Act in 1978, there exist in Nigeria a system of land ownership, which was indigenous to the various Nigeria communities. The two most distinct types of land ownership in Nigeria's Pre-Land Use Act Era, were; the community land ownership system and the family land ownership system. Individual ownership of land was subsumed under both communal and family land ownership<sup>1</sup>. This types of land ownership was in existence in both Southern and Northern Nigeria until the British proclamation of 1900 which vest ownership of land in the Northern Nigeria on the British crown, a situation that remain in force in the North and continue even when the Land Tenure Law<sup>2</sup> enactment becomes operative in 1963. With that proclamation in the North in 1900, the era of community ownership of land ceased.

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<sup>1</sup> Fekumo, JF. Principles of Nigerian Customary Land Law, Port Harcourt, F & F Publishers. 2002. 92.

<sup>2</sup> Cap 59, Law of Nortern Nigeria, 1963.

## COMMUNITY OWNERSHIP OF LAND

Under the community ownership of land, land was owed by the community generally. The head of the community who could be a Chief, King or an Oba holds and administer the land for the use and benefit of the natives: For example, under the Benin kingdom, the Oba owns the land and administers it for the benefit of the natives<sup>3</sup>. The right to allocate such land to individual members of the community resides in the Oba, hence the popular saying in Benin kingdom as regards proof of ownership of land, "I have Oba's approval".

This practice in Benin kingdom as stated above cut across most communities that have the community land ownership system. Under this system, even where a parcel of land in the community have been allocated to an individual member of the community, his interest in the land is only limited to his right to occupy the land, though for an unlimited period of

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<sup>3</sup> Momodu MK. Impact of Land Use Act on petroleum operation in Nigeria, in Adigun. O. (e.d) The Land Use Act Administration & Policy Implication; Proceeding of Third National Workshop, Lagos, UNILAG, Press, 1991, 105.

time. Such land in the general sense of it still remains the community land. In *Eze v. Igiliegbé*<sup>4</sup>, the West African Court of Appeal stated that the burden of proof is on the person claiming that land is not, or has ceased to be communal property to prove his claim.

## FAMILY OWNERSHIP OF LAND

For the purpose of this write-up, the definition of family as adopted by *Uwaifo JSC* in the case of *Efunwape Okulate v. Gbadamosi Awo Sanya*<sup>5</sup> will be preferred, which is to the effect that:

*a family is a body of persons who live in one house or under one head, including parents and their children, servants etc...the group consisting of parents and their children, whether living together or not.*

From the above definition of family therefore, a family ownership of land means the ownership of land by the direct children of the family founder, which they held as joint family land.

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<sup>4</sup> (1952) 14W.A.C.A 61

<sup>5</sup> [2000] 2 NWLR (Part 646), 530 at 542



Those who are entitled to the founder's land are his direct children excluding their mother who is not regarded as family member for the purpose of ownership of family land under our customary law<sup>6</sup>. Also, blood relations of the family founders do not share in the ownership of his land. In *S. J. Adeseye v. S. F. Taiwo*<sup>7</sup>, the Federal Supreme Court held that by the native law and custom of the Yoruba, the real property of a deceased person who died living children surviving him go to the children to the exclusion of other blood relations.

As it is under community ownership of land, the family head holds and administers family land on trust for the benefit of all members of the family. The family ownership of land is more practiced in most communities in Esan land of Edo State. For example, in Ebudin community<sup>8</sup>, land is owned by respective families who could lay claim of ownership to a parcel of land either through original or first settlement, gift or outright purchase.

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<sup>6</sup> As per Supreme Court in *Akinnubi v. Akinnubi* [1997] 2 N.W.L.R. (Part 486). 144 at 159

<sup>7</sup> (1956) 1 F.S.C. 84

<sup>8</sup> An autonomous community in Esan Central Local Government Area of Edo State

## SITUATIONS WHERE COMMUNITY OWNERSHIP AND FAMILY OWNERSHIP OF LAND OVERLAPPED

Under certain circumstances, communal ownership of land and family ownership of land overlapped, thereby making it difficult for a person to say with finality the type of land ownership that exist in such community. There are times when communal ownership of land transcend into family ownership there by making it possible for a particular land which hitherto was community land, to be regarded as the property of a particular family with all the right attached to ownership of land present therein. This happens when the original individual, whose parcel of community land was allotted, died and leave the land (either in developed form or undeveloped form) behind for his children.

In this scenario, the land is regarded as "family land" within the larger community ownership.

On the other hand, a hitherto family land, under a family ownership of land system, could transcend into system that prevails in the society.

This could happen in a situation where the community acquired family's land for the purpose of community project. Such acquired land is no longer regarded as family land but as community land. Also in a situation where a neighbouring community is struggling for the ownership of a parcel land with a family in another community, the community where that family is, (as it is in many cases) take the land dispute problem upon themselves, thereby calling such land community land before the whole world. This has led to inter-community war in most part of the country in recent times. Other many examples where family ownership of land could be disregarded for community land ownership abound.

### **Ownership of Land Under the Land Tenure Law of Northern Nigeria<sup>9</sup>.**

Since our focus under this head, is ownership of land in Nigeria in the pre-land use era, it is important we talk of the ownership of land in the Northern Nigeria as provided by the Land Tenure Law, since the said law came into existence before the Land Use Act. But even before the Land

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<sup>9</sup> Ibid 2

Tenure Law of 1963 in the Northern Nigeria, there exist a system of ownership of land that was peculiar to them and this system of ownership was said<sup>10</sup> to have been influenced by the principles of Islam, which was the dominant religion there. The land was seen as a gift from Allah to mankind and land was to be used by all with nobody having a permanent hold on undeveloped land. The Emir or Muslim ruler held land in trust for the community. This system of land ownership was similar to the community ownership of land in the Southern Nigeria.

By 1900, after the British colonial administration took control of the area, they issued a proclamation vesting all land in the area in the British crown. This was followed in 1910 by the Land and Native Rights proclamation, which not only reaffirmed the 1900 proclamation, but also sought to fully transfer the administration of land from the control of the Emirs to the colonial government. In 1916, the Land and Native Rights ordinance was enacted to declare all land in Northern Nigeria to be native

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<sup>10</sup> Ibid 3

land. The ordinance put the said native land under the control and management of the colonial Governor, who granted right of occupancy to native Northern Nigerians. The land held in trust for the natives was to be administered for the use and benefit of all the natives.

After Nigeria independence in 1960, the Northern Region Parliament passed the Land Tenure Law<sup>11</sup> vesting all land in the region in the Governor who, like the colonial Governor before him, was to hold the land in trust for the natives. They were also to administer the land for use and benefit of the natives. The Governor has the right to grant right of occupancy to any person.

The system of ownership of land in the Northern Nigeria under the Land Tenure Law of 1963 is similar to that introduced by the Land Use Act of 1978. This view was expressed by M. K. Momodu<sup>12</sup> in a paper presentation at the Third National Workshop held in Lagos, on the Land Use Act. This type of ownership of land in the Northern Nigeria before the Land Use Act in 1978

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<sup>11</sup> Ibid 2

<sup>12</sup> Ibid 3

is not of immediate relevance to us now. As regards the community land ownership and family land ownership, we have stated earlier that both subsumed the individual land ownership. This does not however mean that individual land ownership did not exist in Nigeria in the Pre-Land Use Act Era. It only means that the individual land ownership was a specific system of ownership within the two generally known land ownership (communal and family ownership) under our customary land law.

### **Is there Individual Land Ownership in the Pre-Land Use Era?**

Authorities abound to show that an individual member of a community or family who has been validly allotted land by his community or family retained the ownership of that land permanently to the exclusion of all others.

Although the individual ownership is a specific ownership within general ownership of the community or family, the individual has all the right of an owner to the exclusion of all other including the community

or family (as the case may be). In *Adewoyin v. Adeyeye*<sup>13</sup>, the Oni of Ife, in his testimony stated that once an Oni had allocated a portion of communal land to a native of Ife for farming, this carries with it the enjoyment of ownership rights to the exclusion of the community. This position was also adopted by the Supreme Court in the case of *Odofin v. Ayoola*<sup>14</sup>. Also, family land validly allocated to individual member by the family becomes the individual member's land to the exclusion of all others in the same manner above, as held by the Court in *Adewoyin (Supra)* and *Odofin (Supra)*. In *Kadiri Balogun v. Tijani Alamu Balogun*<sup>15</sup>, the West African Court of Appeal held that a partition of family land with the consent of all members of the family conferred on each member an absolute property in his partitioned portion.

The decisions in the above cases and many others unmentioned here, shown that an individual can own to the exclusion of all others, community or family land allotted to him. He can therefore use the land as he wishes,

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<sup>13</sup> [1963] 1 ALL NLR 52

<sup>14</sup> (1984) 11 S.C 72 at P. 94 – Per Karibi – Whyte J.S.C

<sup>15</sup> [1943] 9 WACA 78

including transferring the land to a third party without seeking the consent of the community or family that allocated the land to him.

## **.TRANSFER OF INTEREST IN LAND IN THE PRE LAND USE ACT ERA IN NIGERIA**

By this, we mean the alienation of land *intervivos*<sup>17</sup>. As it is now under the regime of Land Use Act, individual owners of land in the Pre-Land Use Act Era could transfer their interest in land to another person either permanently or temporarily. However, under the Land Use Act regime, individual owner of land could only validly transfer his interest in land to another person with the approval or consent of the Governor of the State where the land is situated. Our concern here therefore, is to ascertain whether an individual owner of land in the Pre-Land Use Act Era, needed the consent of the community or family that allotted a parcel of land to him, to validly transfer interest in that land to a third party.

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<sup>17</sup> Transfer of land by a person to another in his lifetime and not by will or in contemplations of imminent death.



An individual owner of land could transfer that land to another person in any of these ways:- by gift intervivos; out-right sale; pledges/mortgages, leases and tenancies, etc<sup>18</sup>. Is consent needed by the individual owner of land to transfer same to a third party under any of the following ways of transfer listed above during the Pre-Land Use Act Era? The answer to this question we now turn.

### **Transfer of Land by Gift Intervivos**

Under our customary land ownership system<sup>19</sup>, an individual owner of land can validly transfer land via a gift intervivos to a third party without the consent of the community or family that allotted the land to him in the first instance. This is so because the individual owner of land has right of ownership in the land to the exclusion of the community or family as held by the Court in *Adewoyin (Supra)*<sup>21</sup> With such right in the land, the individual owner can transfer the land validly without the community or family consent

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<sup>18</sup> Ibid 1

<sup>19</sup> Ibid 14

<sup>21</sup> Ibid 13

(depending on who allotted the land to him). In *Odemwingie Olabor vs John Imade*<sup>22</sup>, the Court of Appeal as per Uche Umo, J.C.A. (as he then was) held that the requirement to legitimize such gift intervivos of land under customary law is that, it should be done openly and in the presence of several witnesses. The Learned Law Lord did not mention the consent of community head or family head as a requirement for a valid transfer of land via gift intervivos by an individual owner.

### **Transfer of Land by Sale**

The position of law above that an individual owner of land can transfer same via gift intervivos to a third party without the consent of the community or family that allotted the land to him, applies *mutatis mutandis* to transfer of land by sale. This means therefore, that an individual can validly sell his land to a third party without the consent of the community or family that allotted the land to him. Being an exclusive owner of the "land", he enjoys all the

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<sup>22</sup> (Unreported) cited in Fekumo, JF, *Principles of Nigeria Customary Land Law*, Port Harcourt, F & F Publisher 2002. 208

right attached to exclusive ownership, including the right to sell the land to whomever he chooses.

According to Landes, D .S.,<sup>24</sup>

*the various components of ownership can only exist in the person or persons of the possessor, who could use the object of ownership and dispose of it as he saw fit.*

Denman, D.R.,<sup>25</sup> lend his voice loud to this argument that an individual can transfer his land by sale to a third party without any restriction, when he said;

*Ownership of land should be accepted as a private affair as is the ownership of a house in a suburban street. Private property in goods and land is a basic freedom.... private property is the cradle of social liberty; destroy it and the foundations of our liberties are shaken.*

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<sup>24</sup> Landes, D.S. The unbounded Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to present. Cited in Adigun 10, the Land Use Act Administration & Policy Implication, Proceeding of Third National Workshop, Lagos, UNILAG Press 1991, 76.

<sup>25</sup> *ibid*

He argued further that a major attribute of property individual owned, is the right to transfer or alienate as he deems fit and this power to alienate is the basis of land markets and markets in goods and assets.

The above analysis shows that under our customary land ownership system, which was in practice in Nigeria before the enactment of the Land Use Act, an individual owner of land within the wider community or family ownership, can validly sell that land to another person without the consent of the community or family that allotted the land to him.

#### **TRANSFER OF INTEREST IN LAND BY PLEDGES/MORTGAGES AND LEASES/TENANCIES**

Under these types of transfer, the land is only transferred for a limited period of time with the transferor still retaining the reversion interest in the land. What the transferee actually has in the land is the right of occupation and possession, which is only for the limited period agreed in the transfer agreement.

As earlier stated, under transfer of land by gift *intervivos* and transfer by out-right sale, the individual landowner does not need the consent of the community or family that allotted the land to him, because of the reasons already given.

Finally on this head, the requirement of consent from the appropriate authority as it now under the Land Use Act<sup>27</sup>, was not a requirement for a valid transfer of land by an individual of his own land<sup>28</sup> in the Pre-Land Use Act Era. However, where a community land or family land was to be transferred by the community head or family head, the consent of other members of the community or family was a requirement for a valid transfer<sup>29</sup>, in any of the ways of land transfer already mentioned.

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<sup>27</sup> See Consent Provisions Under the Land Act, Caps LS LFN, 2004

<sup>28</sup> Even though the land was initially allocated to him by his community or his family as the case may be

<sup>29</sup> See *Ekipendu v. Erika* 4 FSC 79., *Adedubu & Anor v Makanjuola*, 10 WACA 33

## THE REASONS FOR THE INCLUSION OF THE CONSENT PROVISIONS IN THE LAND USE ACT

As we have stated above, under the communal and family ownership of land in the Pre Land Use Act Era, the individual allottee of land, can transfer such land without the consent of the community or family that allotted that land to him. But under the Land Use Act regime,<sup>30</sup> an individual allottee of land cannot transfer same to a third party without the consent of the appropriate authority. It is important to state here that just as the community or family owns land in the Pre-Land Use Act Era, so also the Government owns land under the Land Use Act regime. Our concern here is not the Land Use Policy and consent provisions under the Land Use Act<sup>32</sup>, but the reasons for the inclusion of the consent provisions in the Land Use Act, a provision that now limit the power of "individual owner of land" to transfer same to another under the Land Use Act regime<sup>33</sup>.

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<sup>30</sup> As will be seen later in Chapter two

<sup>32</sup> This will be the subject of analysis in Chapter

<sup>33</sup> Consent was not needed by an individual to transfer his own land under command and family ownership system

Chianu<sup>34</sup>, one of Nigerian leading scholars in land law, gave the following reasons for the inclusion of the consent provisions in the Land Use Act viz:

- a) It helps the State Government and Local Government Councils to keep a pulse on the movement of Land in favour of such grantees as large-scale farmers, industrialists, aliens and non-indigenes of the state where the land is situate.
- b) The consent provisions also assist Local Government Councils to ensure that such provisions as section 6 (which limits the size of land transferable for farming and grazing in non-urban areas) and section 36 (which prohibits altogether any transfer of land in non-urban areas which is not expressly granted by Local Government Council) are not flouted .
- c) It also helps the Governor to determine through applications for consent whether a landowner has complied with section 34(5) -(8)

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<sup>34</sup>Chinu, E. Law of Landlord and Tenant, Benin, Oliz Publishers, 1994, 144-145

(Which require any person with more than half a hectare of land in an urban area to surrender the excess to the Governor).

In addition to the reasons given by Professor Emeka Chianu above, the <sup>35</sup>consent provisions if effective, could have been able to check the activities of landowners who indulge in selling one land to more than one buyer at the same time. This is because, a landowner who sought for consent and got it, to sell a particular parcel of land to a buyer cannot apply for consent to sell the same land to another buyer, as records will show that he has already sold the same land to a previous buyer.

Have the consent provisions of the Land Use Act achieved these objectives? That will be one of our subjects of analysis in Chapter Four of this project work.



## .CHAPTER TWO

### EXAMINATION OF THE CONSENT PROVISIONS OF THE LAND USE ACT LAND USE ACT AND LAND USE POLICY IN NIGERIA

The Land Use Act was enacted as Decree No. 6 of 1978, which became effective on the 29<sup>th</sup> of March 1978. By virtue of the adaptation of laws, (redesignation of degree) order of 1980, the Land Use Decree No. 6 of 1978 is now popularly called Land Use Act<sup>37</sup>.

In the year 1975 and 1976, the Federal Military Government in a deliberate effort to unify Land Tenure System in Nigeria, set up the anti-inflation task force to study the incident of inflation and high cost of land and rent generally. In their separate reports, the two bodies identified the land tenure system as contributory to the inflation tendencies in Nigeria and as a major hindrance to rapid economic development of the country. The panels recommended as a way out of the problems, the vesting of all lands in the state.

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<sup>37</sup> Cap L15LFN 2004

In 1977, the Land Use Panel was inaugurated by the Federal Government to formulate, amongst other things, a land policy for the country. Based on the report of this panel, the Government finally enacted the "Land Use Decree".

The Land Use Act was the first attempt, at least at a national level, to regulate the use and management of land in Nigeria. In the Southern part of the country, its effects have been far-reaching and indeed revolutionary. The absolute ownership of land previously vested in communities, families and individuals was by the Act taken away from them and same vested in the Governor of the state where the land is situate and such land shall be held in trust and administered for the common benefit of all Nigerians<sup>39</sup> . The highest interest in land that can now be owned by any person is a right of occupancy whether statutory or customary, which is only a possessory

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<sup>39</sup>Ekpu A. O. O. "The Role of the Local Government in the implementation of the Land Use Act: The Bendel State Experience" in Adigua, O. (ed.) The Land Use Act Administration and Policy Implication; Proceeding of Third National Workshop, Lagos, UNILAG Press, 1991, 42.

title<sup>40</sup>. One major incidents of ownership which is the right of alienation has been greatly curtailed by the Act by requiring that all dealing in land must have the prior consent of the Governor or Local Government as appropriate<sup>42</sup> as provided by sections 6(2) and 34 (5) of the Act, the amount of land that any single individual can own has been limited.

For the purpose of control and management of the land, the Act makes a distinction between urban and non-urban areas. Under section 2, the control and management of all land in urban areas is vested in the Governor of the state, while the Local Government takes charge of the control and management of Land in non-urban areas within its area of jurisdiction. These two authorities have powers to make grants of rights of occupancy either in recognition of pre-existing titles<sup>43</sup> or as direct and constitutive grants. These<sup>44</sup> powers are not strictly conterminous with their areas of authority as

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<sup>40</sup> See *Makanjuola v. Balogun* (1989) 3 NWLR (PE.103) 192 at 206, Per Wali, J.S.C

<sup>42</sup> See Section 21 and 22 of Land Use Act. Cap I5. LFN 2004, See Sections 34, 36

<sup>43</sup> See Section 34, 56

<sup>44</sup> See Section 5, 6

define by the distinction between urban and non -urban areas. The Governor has the power to grant a statutory right of occupancy even in respect of land in non-urban areas<sup>45</sup>.

The Land Use Act was intended, among others, to achieve the following objectives<sup>46</sup>, to:

- a) Provides a uniform land tenure system in the country.*
- b) Make land easily and cheaply available to all Nigerians and the government for development purposes.*
- c) Check the practice of land speculation, whereby some wealthy individuals indulged in a lucrative trade in land. These are no doubt laudable objectives. Whether the Land Use Act have achieved these objectives will continue to be a subject of academic debate in many years to come.*

#### ALIENATION OF CUSTOMARY RIGHT OF OCCUPANCY UNDER THE LAND USE ACT: WHO IS TO GIVE CONSENT?

Section 21 of the Land Use Act deals with the prohibition of alienation of customary right of occupancy except with requisite consent or approval. Section 21 provide as follow:

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<sup>45</sup> Ibid 2

<sup>46</sup> Ibid

21. It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever –

- a) Without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable sheriffs and civil process law; or*
- b) In other cases, without the approval of the appropriate local government.*

From the above provisions, it is the responsibility of the local government to grant consent to alienation of any customary right of occupancy except in cases where the property is to be sold by or under the order of a court, in which cases the consent of the Governor has to be obtained. The Act has made it unlawful to alienate a customary right of occupancy without the requisite consent<sup>48</sup>. This prohibition applies to both "actual" and deemed grants and any violation of it renders the attempted

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<sup>48</sup> See Section 21

alienation null and void<sup>49</sup>. The judicial interpretation of a violation of the consent provisions generally will be considered in chapter three of this project.

Any person who wants to alienate his interest in a land held by him under customary right of occupancy is of necessity required to obtain the needed consent to make such transfer valid. This is applicable to all kinds of transfer as mentioned under section 21 which includes; assignment, mortgage, transfer of possession, sublease or otherwise howsoever.

#### ALIENATION OF STATUTORY RIGHT OF OCCUPANCY UNDER THE LAND USE ACTS: WHO IS TO GIVE CONSENT?

This is provided for under section 22 of the Land Use Act as follow:

- (I) *It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained: provided that the consent of the Governor-*
- a) *Shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose*

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<sup>49</sup> See Section 26

- favour an equitable mortgage order the right of occupancy has already been created with the consent of the Governor*
- b) Shall not be required to the reconveyance or release by a mortgage to a holder occupier of a statutory right of occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Governor;*
  - c) To the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sublease containing an option to renew the same.*
- 2) The Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by endorsement thereon.*

From the provisions of section 22 above, there seems to be an interlocking element between it and section 34 (7) and (8) of the Act. For the purpose of analysis, let reproduce section 34 (7) and (8) which provides as follows:

- i. No land to which subsection (5)(a ) or (b)<sup>51</sup> of this section applies held by any person shall be further subdivided*

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<sup>51</sup> Section 34 (5)(a) and (6) of Land Use Act, Cap L5 2004

*or laid out in plots and no such land shall be transferred to any person except with the prior consent in writing of the Governor.*

- ii. Any instrument purporting to transfer any undeveloped land in a contravention of subsection (7) of this section shall be void and of no effect whatsoever in law and any party to any such instrument shall be guilty of an offence and liable on conviction to imprisonment for one year or a fine of N5,000.00*

These two sections show that for property in urban area, there are two concurred rules on consent. The scope of section 34(7) and (8) is limited to undeveloped land in excess of one half hectare held by a right holder before the Act came into force; whereas section 22 applies to all other alienation of statutory right of occupancy – whether in respect of land in non-urban area granted by the Governor, land in urban area deemed granted by the Governor under section 34(l) - (4)<sup>53</sup> or statutory right of occupancy over urban land granted by the Governor under his hand under section 5(1).

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<sup>53</sup> As held by the supreme court in Savannah Bank of Nig. Ltd v. Ajilo (1989) 1 NWLR (PE 77) 305



In any alienation of interest in land covered by the provisions of section 22 and section 34(7) of this Act, it is the Governor that will give consent before such alienation can be valid in law. But there is a distinction between the legal consequences of not complying with the provisions of section 22 and 34 (7) (8). A transaction in contravention of section 22 is rendered void under section 26 which provides:

***Any transaction or any instrument, which purports to confer on or rest in any person any interest or right over land other than in accordance with the provision of the Act, shall be null and void.***

A contravention of section 22 only makes the transaction void, not illegal. The relief to parties in contravention of section 22 lies in the doctrine of restitution for the recovery of property transferred and the money paid tender the transaction to the parties respectively. In *African Continental Bank Ltd. v. Oladapo*<sup>55</sup>, a mortgage of chattels by way of bill of sale failed to comply with sections 8 and 9 of Bill of Sale Act, 1982. While the West African Court of Appeal upheld the contention that where a bill of sale is void in toto,

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<sup>55</sup> (1951) 13 W.A.C.A 285 – A Transaction though not in Land, had Similar implication

no agreement contained in it could be enforced, it held that the borrower was bound by an implied agreement to repay the money borrowed independently of the bill of sale.

On the other hand, a contravention of section 34 (7) (8) of the Land Use Act<sup>56</sup>, makes the transaction both void and illegal - a crime.

In *Solanke v. Abed*<sup>57</sup> Unsworth, F. J. quoting Maxwell on the interpretation of statutes<sup>58</sup> said of this type of provision:

*Where a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable only, but the penalty makes it illegal.*

A distinct point to note in the above analysis is that it is the governor that gives consent for the alienation of statutory right of occupancy and where such consent is not sought and given, the purported alienation is void at law.

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<sup>56</sup> Non-Compliance with the consent requirement

<sup>57</sup> (1962) NNLR 92,94

<sup>58</sup> 10<sup>th</sup> ed. P. 212

## EFFECTS OF SECTION 23 OF LAND USE ACT ON ALIENATION OF INTEREST IN LAND

Section 23 of Land Use Act provides thus:

- 1) *A sub-lease of a statutory right of occupancy may with the prior consent of the Governor and with the approval of the holder of the statutory right of occupancy, demise by way of sub-under lease to another person land comprised in the sub-lease held by him or any portion of the land.*
- 2) *The provisions of subsection (2) of Section 22 of this Act shall apply mutatis mutandis to any transaction affected under subsection (1) of this section as if it were a sub-lease granted under section 22 of this Act.*

Section 23 has substantially the same provisions with section 22 already discussed, save that it applies to alienation by a sub-lessee of a statutory right of occupancy holder. Failure to seek and obtain governor consent in the alienation of land which section 23 applies will be null and void as it is under section 22 discussed above.

## DEVOLUTION OF THE RIGHTS OF AN OCCUPIER UPON DEATH

As provided by section 24 under proviso sub (b) of the Land Use Act, a statutory right of occupancy shall not be divided into two or more parts on

devolution after the death of the occupier, except with the consent of the Governor. For a better understanding of this provision, the whole of section 24 will be reproduce below.

Section 24 of Land Use Act:

*The devolution of the rights of an occupier upon death shall –*

- a) In the case of a customary right of occupancy, unless non customary law or any other law applies, be regulated by the customary law existing in the locality in which the land is situate, and;*
  - b) In the case of a statutory right of occupancy (unless any non-customary law or other customary law applies) be regulated by the customary law of the deceased occupier at the time of his death relating to the distribution of property of like nature to a right of occupancy: provided that –*
    - a) No customary law prohibiting, restricting or regulating the devolution on death to any particular class of persons or the right to occupy any land shall operate to deprive any person of any beneficial interest in such land (other than the right to occupy the same) or in the proceeds of sale thereof to which he may be entitled under the rules of inheritance of any other customary law;*
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- b) A statutory right of occupancy shall not be divided into two or more parts on devolution by the death of the occupier, except with the consent of the Governor.*

The implication of proviso (b) of section 24 is that where an occupier of a parcel of land with statutory right of occupancy died, such land cannot be divided into two or more parts for the purpose of devolution without the prior consent of the Governor. Where this provision is contravened, the purported devolution will be null and void. Although there is no reported case on this provision, the decision in *Savannah Bank of Nigeria Limited v. Ajilo*<sup>60</sup> reached on the contravention of section 22 by mortgaging a property to a bank without Governor Consent, applies with the same force to this provision.

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<sup>60</sup> [1989] NWLR (Pt.77) 305

## CHAPTER THREE

### JUDICIAL RESPONSES TO THE CONSENT PROVISIONS OF THE LAND USE ACT

#### INTRODUCTION

In the preceding chapter, we examined the consent provisions of the Land Use Act as it affects alienation of interest in land by a landowner who has either statutory right of occupancy or customary right or deemed statutory right of occupancy. In this chapter, our focus will be an x-ray of the attitude of the Nigerian courts in the interpretation of the consent provisions of Land Use Act as it affects the alienation of interest in land by a landowner. To be considered here include: the types of land alienation in which consent is required, the type of right of occupancy to be alienated, in which consent is required, at what stage of the land alienation transaction is the consent needed, who is to obtain the needed consent for the land alienation, does the consent obtained have retroactive effect on the land alienation transaction, and what is the effect of failure to obtain the needed consent

to alienate the land. The way the Nigerian Courts have answered this questions, we now turn.

## **.TYPES OF LAND ALIENATION IN WHICH CONSENT IS REQUIRED**

As provided by section 21 and section 22 of Land Use Act<sup>62</sup> any alienation of land by assignment, mortgage, transfer of possession, sublease or otherwise howsoever is caught by the consent provisions of the Land Use Act. It follows therefore that any land owner in Nigeria that wants to alienation his interest in the land by way of the aforementioned must obtain the consent of the appropriate authority<sup>63</sup>. Where the landowner failed to obtain the needed consent, such alienation will be null and void. In *Savannah Bank (Nigeria) Ltd. v. Ajilo*<sup>64</sup>, the land alienation was by way of mortgage, and the mortgagor failed to obtain the consent of the Governor needed for the alienation of land, whose statutory right of occupancy was covered by section 34 of the Land Use Act. The Supreme Court held that the alternation by way of mortgage was null and void. Also, in *Awojugbagbe Light Industries*

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<sup>62</sup> Cap L5 LFN, 2004

<sup>63</sup> Governor's consent for statutory right of occupancy and customary right of occupancy which is to be alienated by Court order; and Local Government Council's consent in all other customary right of occupancy

<sup>64</sup> (1989) 1 NWLR (Part 77) 305

Ltd. v. Chinukwe and NIDB<sup>66</sup> a case that arose from mortgage of land, the consent of Governor was said to be a necessity to a valid mortgage of land.

The decision of the court in the above two cases apply mutatis mutandis to any alienation in land by way of assignment, transfer of possession, sublease or otherwise howsoever, without the consent of the appropriate authority. Flowing from the above therefore, is that even transfer of possession by periodic tenancy is caught by the consent provisions. Although up till date no reported case has been decided on failure to obtained needed consent for alienation of interest by way of periodic tenancy, it has been stated that going by the rate at which the litigious spirit is permeating our society, it will not be out of place to expect a case on this point very soon<sup>67</sup>.

#### **.TYPES OF RIGHT OF OCCUPANCY TO WHICH THE CONSENT PROVISION APPLIES**

The Nigerian Courts have in their interpretation of the consent provisions of the Land Use Act held that, a landowner with statutory right of occupancy, deemed statutory right of occupancy and customary right of

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<sup>66</sup>(1995) NWLR (Part 390) 379

<sup>67</sup> Chianu, E. Law of Landlord and Tenant, Benin, Oliz Publishers, 1994, 145



occupancy, who wants to alienate his interest in such land must obtain consent from the appropriate authority. It follows therefore that the consent provisions apply to statutory right of occupancy under section 21 of Land Use Act, deemed statutory right of occupancy under section 34 (1) (4) and customary right of occupancy under section 22.

Failure to obtain consent by a landowner when alienating his interest in any of the above right of occupancy will render the transaction void. The earliest Supreme Court case on this point of law is the case of Savannah Bank (Nigeria) Ltd. v. Ajilo<sup>69</sup>.

In that case, the respondent mortgaged the land he acquired prior to the Land Use Act to secure a loan, which was granted to a company, where he had majority shares.

When he defaulted, the mortgagee sought to sell the property. He commenced proceeding in the High Court to restrain the mortgagee from selling on the ground that the mortgage was void, the Governor's consent

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<sup>69</sup> Supra at No.3

not having been obtained to it. The case was argued on the narrow but technical contention that since the mortgagor acquired his land prior to the Land Use Act, there was no need for consent to validate the mortgage.

Since the mortgagor acquired his land prior to the Act, the applicable section is 34-a transitional provision which states that all such landowners are deemed to have been granted a statutory right of occupancy by the Governor. Section 34(1)-(4) relates to land in urban area, which was developed before the commencement of the Act: A careful reading of the section shows that nothing is said about consent with reference to this type of right of occupancy. Section 34(5) - (8) relates to land in urban area, which was undeveloped before the Act came into force. For this class of land, section 34(7) provides that alienation can only be affected with the prior consent in writing of the Governor; and section 34 (8) imposes a punishment of one-year imprisonment or a fine of N5,000 for any contravention of section 34 (7) .

The contention of counsel for the mortgagee is that the mortgaged property comes within section 34 (1) to (4) being a developed land, and that no mention of consent is made with reference to such land. The Supreme Court however held that section 22 of the Act governs all statutory rights of

occupancy: whether expressly granted by the Governor under section 5 (1) (a) or deemed granted under section 34 (1) - (4) .

Put clearly, all that Ajilo's case decides is that the Governor's consent is required for the alienation of all types of statutory right of occupancy. By implication to all customary right of occupancy where the consent of Local Government Council is required. Although this decision was reached on a case where the alienation was by mortgage, it also apply to other types of alienation such as assignment, transfer of possession, sublease or otherwise.

#### **AT WHAT STAGE OF THE LAND ALIENATION TRANSACTION IS CONSENT NEEDED**

The questions here are; should consent be obtained before the parties enter into an agreement for the alienation of interest on land, or before the deed of alienation is executed or at any time later? The Supreme Court has the opportunity to answer this question in the case of *Awojugbagbe Light Industries v. Chinukwe and NIDB*<sup>71</sup> In that case, the appellant was granted a

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<sup>71</sup> [1995] 4 NWLR (Part 390) 376

loan of N215,000 by the second respondent. As security for the loan, in 1980 the appellant's managing director mortgaged his property at Ibadan to the second respondent. The Governor's consent was not obtained to the mortgage until 1985. As a result of appellant's default, the mortgagee appointed the first respondent, its receiver, and the latter took over the mortgaged property *vi et armis* (by force and arms). The appellant sued the respondents for trespass to land and sought a declaration that the mortgage was void, not having complied with the consent provisions of the Land Use Act. The contention was that the Governor's consent ought to have been obtained prior to the execution of the mortgage deed. Reliance was placed on section 22 of Land Use Act.

The Supreme Court was unanimous in holding that notwithstanding the phrase "without the consent of the Governor first had and obtained", parties can lawfully execute a deed of mortgage so long as the understanding is that the Governor's consent shall subsequently be obtained. Iguh JSC said:

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*Section 22 (1)... does not cover purported alienation or alienation, which the parties did not intend to become immediately effective until necessary approval by the Governor, is obtained. It does however cover and strike at transaction, which effectively purports to enable a mortgagee ... of the right of occupancy to exercise his rights there under without the prior consent of the Governor<sup>73</sup>.*

From this decision of the Supreme Court in Awojugbagbe's case above, it is now settled that a landowner can obtain Governor's consent after the alienation of his interest in land provided that the landowner intended to obtain the needed consent later after the transaction. Even the Land Use Act envisages this kind of situation where parties must have prepared and executed land alienation Documents before applying for consent. For example, section 22 (2) of the Act provides thus:

*.The Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under sub section (1) of this section may be signified by endorsement thereon.*

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<sup>73</sup> Ibid No.7 at Page 4

Even earlier before the Land Use Act came into effect, the Privy Council had held in *Denning v. Edwards*<sup>75</sup> that "some form of agreement is inescapably necessary before the Governor is approached for his consent". This case and the provision of section 22 (2 ) must have influenced the Supreme Court in reaching the decision they reached in *Awojugbagbe's* case above and we strongly believe that the decision was rightly reached. Even when there was any reason for us to disagree (but there is no reason to do so), the Supreme Court decision that consent of the Governor can be obtain after the alienation of the interest of landowner in his property remain the authority on this point.

#### **.WHO IS TO OBTAIN THE NEEDED CONSENT FOR THE ALIENATION OF INTEREST IN LAND BY LANDOWNER**

It becomes necessary to ask this question because almost all the cases decided by the courts in which the consent provisions of the Land Use Act have been interpreted were initiated at the trial court by the landowner. Is it the land owner who alienated his property that is to obtain the Governor consent? If yes, why is it that the landowner who failed in his duty to acquire the needed consent, that will be the one telling the court to set outside the

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<sup>75</sup> [1961] AC. 245 at P. 253

alienation which he has fully benefited from, leaving the victim<sup>77</sup> to suffer as a result of his intentional failure. The court had the first opportunity to decide who is supposed to obtain the needed consent for the alienation of interest in land in the case of *Solanke v. Abed*<sup>78</sup>. In that case, the Federal Supreme Court held that equity will not favour the holder of a right of occupancy who has not done equity and he will not be allowed to take advantage of his own wrong. In that case, a right holder under the Land Tenure Law transferred his interest in the land without obtaining the needed consent for the transfer as required by the law. He later alleged that the transferee was in illegal possession since the needed consent was not obtained by him (transferee), whose duty was to obtain the consent. The court rejected this argument and held that the right holder who transferred the property was estopped from alleging that the transferee was in illegal possession because it was his (transferor) duty to obtain the consent.

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<sup>77</sup> The mortgagee, Leasee, assignee etc

<sup>78</sup> (1962) I.S.C N.L.R 371

Although this decision was reached on a law other than the Land Use Act, the Supreme Court has been consistent in applying the decision in cases with similar facts and holding that it is the duty of the land owner who wants to transfer his interest in land to obtain the needed consent from the appropriate authority. Other courts in Nigeria have followed suit. In *Emmanuel O. Adedeji v. National Bank of Nigeria Ltd. & Anor*<sup>81</sup>. The main issue for determination by the Court of Appeal was whether a party who is charged with obtaining consent under the Land Use Act 1978 to a mortgage deed but failed to do so, can turn around to challenge the validity of the deed, in order to erode his obligation there under, on the ground that the required consent of the Governor was not obtained. Following *Solanke v. Abed*, it was held that appellant could not rely on his own wrongful act to defeat the claims of the respondent. The Court of Appeal went beyond the

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<sup>81</sup> (1989) 1 N.W.L.R (Part 96) 212



principle in *Solanke v. Abed*, and in a brilliant show of judicial dexterity and enterprise, Akpata, J.C.A stated<sup>82</sup>

*Apart from the principle of Law involved in the case (i.e. The Solanke case), it is morally despicable for a person who has benefited from an agreement to turn around and say that the agreement is null and void. In pursuance of the principle that law should serve public interest, the courts have evolved the technique of construction in bonam partem. One of the principles evolved from such construction in the interpretation of statutes is that no one should be allowed to benefit from his own wrong. (Nollus Commodum Capere Potest de Juria Sua Propria) As Widgery L.J...said, In *Buswell v. Goodwill* (1971) 1 A; E. R. 418 at P. 421, "The proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one which the court would wish to endorse". The effect is usually that the literal meaning of the enactment is departed from where it would result in wrongful self-benefit.*

Since it is the landowner alienating his interest in land that is to seek and obtain consent from the appropriate authority, where he failed to so do, he will be estopped from raising the absence of consent to set outside the

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<sup>82</sup> Ibid at Pp. 226-227

alienation. In *Ugochukwu v. Cooperative & Commerce Bank (Nigeria) Ltd*<sup>84</sup>, the mortgagor sought and got consent, but the commissioner of lands gave the consent. The Governor had delegated this authority to him by virtue of section 45 (1) of Land Use Act. The mortgagor contended that the mortgage was void because the consent was not given by the Governor himself. The contention was rejected and the mortgage upheld. Belgore JSC noted:

*The holder of a right of occupancy... is the one to see consent of the Governor to ...mortgage ... It is not from him one must hear that the consent he obtained was void ... The appellant, being the holder of a right of occupancy... was to seek consent and it is unconscionable for him to turn round and maintain that the consent of the Governor he obtained was flawed, having received valuable consideration, i.e. the loan from the respondent*<sup>86</sup>.

To the same effect is Ogundare JSC's dictum:

*It was the duty of the plaintiff, as mortgagor, to seek the consent of the Governor for him to mortgage his property to the defendant. That is what the law says*<sup>87</sup>.

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<sup>84</sup> (1996) 6 NWLR (Part 456) 524

<sup>86</sup> Ibid at 540

<sup>87</sup> Ibid at 542

The decisions of the court in the above cases put final answer to the question - "Who is to obtain consent for land alienation". It is now clear that in any alienation of right of occupancy be it by way of mortgage, assignment, lease, sublease or otherwise, it is the onerous duty of the right holder to seek and obtain the required consent.

### **DOES THE CONSENT OBTAINED HAVE RETROACTIVE EFFECT ON THE LAND ALIENATION**

We have already established with authorities<sup>88</sup> that consent can be obtained even after the land alienation agreement has been executed. It follows therefore that any consent obtained after the execution of the land alienation deed will relate back to feed the transaction and it will have effect as if it was obtained at the time of the execution of the deed of transfer. A few cases here will support our submission above. In *Ogunsola v. National Insurance Corporation of Nigeria*<sup>90</sup> the loan was granted in 1981, but the

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<sup>88</sup> *Awojugbagbe Light Industries v. Chinukwe and NIDB* (1995) 4 NWLR (Part 390) 379, Section 22 (2) Land Use Act. Cap I5 2004.

<sup>90</sup> (1991) 4 NWLR (Part 18) 762

consent of the Governor to the mortgage was not obtained until over a year later. It was held that since the consent was obtained later, such deed was valid notwithstanding that the habendum of the deed states that the mortgage was security for a loan already advanced before the execution of the mortgage deed.

In *Trade Bank Plc. v. Continental Merchant Bank (Nig.) Plc.*<sup>91</sup>, the mortgage applied for consent eight months after the execution of the mortgage deed and it was granted shortly thereafter. The Federal High Court turned down a plea that the mortgage was void for being obtained retroactively. Bioshogu N.J. said:

*Where consent is a statutory requirement before a transaction of sale or mortgage can be entered into, failure to state in the deed that such consent was obtained would not render the deed invalid if in fact consent was obtained. In such a situation, the presumption of regularity will be applied*<sup>92</sup>.

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<sup>91</sup> (1993) FHCLR 69

<sup>92</sup> *Ibid* at 78

In *Barclays Bank DCO v. Ibironke*<sup>93</sup>, consent was not obtained as required by the native Lands Acquisition Law until eleven years after the execution of the mortgage. Akinkugbe J. held that to set the deed aside because it was not approved before its execution is to impugn the authority of the Governor.

The above analysis supported by judicial authorities has removed any doubt, and confirmed the position that consent has retroactive effect on any transfer done before the consent was given. Such consent retroactively validates such earlier transaction.

## **WHAT ARE THE EFFECTS OF FAILURE TO OBTAIN CONSENT FOR ALIENATION OF INTEREST IN LAND?**

Judicial interpretations of the consent provisions of the Land Use Act have shown that failure to obtain consent from the appropriate authority by a right holder in the alienation of his right in the property, whether temporarily (as it is in mortgage, lease, sublease) or permanently (as it is in

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<sup>93</sup> (1965) Afr. LR (Commercial) 559

assignment) will render such alienation null and void. And where land alienation is null and void, the interest in the property remained in the transferor, mortgagor, lessor, etc. as the case may be and the supposed transferee, mortgagee, lessee, etc. has no interest whatsoever in the purported transferred property. This position was established in the celebrated case of Savannah Bank (Nigeria) Ltd. v. Ajilo<sup>95</sup>. In that case, one Ammel O. Ajilo had mortgaged his landed property in favour of Savannah Bank of Nigeria Limited in September 1980 about two and half years after the Land Use Act was enacted. The Governor consent was never obtained to the mortgage agreement as required by the Act. When the bank attempted to enforce the mortgage, Ammel Ajilo brought an action claiming that the mortgage was a nullity because the Governor's consent was not obtained. In his Judgment, Hotonu J. held that:

*failure to obtain the required consent of the military Governor under section 22 of the Act has rendered the deed of*

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<sup>95</sup> (1989) 1 NWLR (Part 77) 305

*mortgage...null and void abinitio and the mortgage transaction illegal.*

Both appeal to the Court of Appeal Court and Supreme Court were dismissed and the decision of the High Court upheld.

Although in some cases<sup>97</sup>, the court had refused to set aside an alienation without consent as required<sup>98</sup> on the ground that equity will not allow a man to benefit from his own wrong, the position of law still remains that given in Ajilo (supra) to the effect that any alienation without the required consent is null and void. This position of law as decided by the Supreme Court is in agreement with section 26 of the Land Use Act, which provides thus:

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<sup>97</sup> Emmanuel O. Adedeji vs. National Bank of Nigeria Ltd & Anor (1989) 1 NWLR (Part 906) 212 and others – Judgement Delivered by Court of Appeal.

<sup>98</sup> Refuse to set aside mortgage transaction without consent on the ground equity will not allow a mortgagor who refused to obtain consent to plea for set aside based on lack of consent.

*Any transaction or any installment, which purports to confer on or vest in any person any interest or right over land other than in accordance with the provision of this Act, shall be null and void.*

We have given account of the judicial interpretation of consent provisions of Land Use Act in this chapter. In the next chapter, the problems of the consent provisions of the Act and its effects in the economic development of Nigeria will be examined.



## CHAPTER FOUR

### PROBLEMS OF THE CONSENT PROVISIONS OF THE LAND USE ACT AND ITS EFFECTS ON THE ECONOMIC DEVELOPMENT OF NIGERIA

#### INTRODUCTION

What we intend to examine in this chapter forms the basis of this project work. All we have done in the preceding chapters is a prelude that will enable us have a better understanding of the problems caused by the consent provisions of Land Use Act and how these problem have inhibited the much needed economic development in Nigeria. Undoubtedly, we know that the consent provisions of the Land Use Act were made to achieve some objectives rather than cause problems and in the concluding part of chapter one of this project, we attempted an examination of these objectives. In this chapter therefore, we will attempt to know if the Land Use Act consent provisions have achieved its objectives vis-a-vis the compliance of transferor, mortgagor, lessor, assignor, etc, with the consent provisions of the Act. The

chapter will be divided into four heading as follows: problems caused by the consent provisions of the Land Use Act; how have these problems affect economic development in Nigeria; are land owners complying with the consent provisions of the Act; and have the consent provisions achieved its objectives.

## PROBLEMS CAUSED BY THE CONSENT PROVISIONS OF LAND USE ACT

The dictum of Obaseki, J.S.C. in the case of Savannah Bank Ltd. v. Ajilo<sup>101</sup> clearly indicates that the consent provisions of Land Use Act have caused more problems than the good the provisions were made to do. In his words:

*In my view and I agree with Chief Williams expression of anxiety over the implementation of 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 the banks. I have no doubt that it will take the whole working hours of a State Military Governor to sign consent papers (without going half way) if these clauses are to be*

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<sup>101</sup> (1989) 1 NWLR (Part 77) 305

*implemented. These clauses of the Land Use Act need urgent review to remove the problem nature<sup>102</sup>.*

While we cannot examine all the problems caused by the consent provision of the Act here, the following are identified as some of the many problems of the consent provisions viz:

### 1. High Cost of Land

The consent provisions have led to exorbitant prices in the purchase of land as land owners always include the cost of processing land transfer consent into the cost price of the Land. This was duly noted by Adeoye, F. O. and Ogunniran, H. D.; in their paper presentation at a workshop on Land Use Act<sup>104</sup> in their words:

*Demands of exorbitant consent fees by some states have been a source of great dissatisfaction. As noted earlier, this is sought to be justified on the ground that. It assists in generating public*

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<sup>102</sup> Ibid at 329

<sup>104</sup> “The Socio-economic implications of the consent provision of the Land Use Act” in Adigun, O. (ed) The Land Use Act Administration & Policy Implication; Proceedings of Third National Workshop, Lagos, Unilag Press, 1991, 77

<sup>4</sup> Ibid at Page 81

*revenue. We have at a different forum described this purpose as seriously objectionable. In some states, for example, the consent fee imposed for "consent to a subsequent transaction to a grant of statutory or customary right of occupancy" is as prohibitive as fifteen percent (15%) of the value of the land. Where there is improvement the value of the development as well as that of the land. The sums payable as consent fees in such cases are usually ridiculously prohibitive. And the industrialists in Lagos State have once cautioned that this land cost factor could well cause the astronomical increase of the prices of locally produced goods and services to the detriment of the nation<sup>105</sup>.*

With this problem of high cost of land resulting from exorbitant consent fees, the multiplier effect is unhealthy and undesirable for our nation economy, as we will soon discover.

## 2) Delay and Cumbersome Nature of Land Alienation Transaction in Nigeria.

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<sup>105</sup> Ibid at Page 81

The seeking and obtaining of consent, caused delay in land alienation transaction in Nigeria. This is because the implementation of the consent provisions has placed severe bottlenecks in the path of those willing to acquire or transfer land for industrial or commercial purpose. We cannot but agree with Nnamani J.S.C.<sup>108</sup>, when he observed as follows:

*Aspects of the Act, which have brought untold hardship, include the provisions relating to the issue of certificate and grant of consent to alienate. Both can take years and the applicant is subjected to the vagaries of bureaucratic action, which 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 make industrial take off a matter very much in the future.*

Expressing a similar view, Olayide Adigun and A. A. Utuama, at the 26<sup>th</sup> Annual Law Teachers' Conference also observed that:

*The operation of the consent provisions of the Act has made land transactions more difficult and less economic. In fact, it can be said that the delay in seeking compliance with the consent provisions of the Act has tended to reduce*

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<sup>5</sup> Nnamani, A., "The Land Use Act – 11 Years After" 1989 2 GRBPL, No. 6

<sup>108</sup> Nnamani, A., "The Land Use Act – 11 Years After" 1989 2 GRBPL, No. 6

*considerably the number of land transaction; consequently, capital formation has not been satisfactory, so also is the general development process in the country<sup>109</sup>.*

The above opinions of the learned writers are understatement of the magnitude of delay the consent provisions could cause in the alienation of land.

### **3) Value Depreciation of Land as Collateral for Bank Loan and Overdraft**

Another major problem caused by the consent provisions of Land Use Act is that there seems to be depreciation in the value of Land as collateral for bank loan and overdraft in the eyes of the banks. This is so because no bank at present, will accept a landed property as collateral for loan and overdraft unless there is evidence of a grant of the required consent to so use the land. This is an aftermath effect of the decision in Savannah Bank (Nigeria) Ltd. v. Ajilo<sup>110</sup>, where it was held that the bank could not sell the

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<sup>109</sup> Adigun & Utuaman, "A Decade of Land Reform in Nigeria: The Land Use Act, 1978 in Perspective" in Proceedings of the 26<sup>th</sup> Annual Conference of National Association of Law Teachers, (1988) P. 31, 48

<sup>110</sup> [1989] 1NWLR (Pt. 77) 305

mortgaged land property because the required consent was not given before the mortgage transaction.

As long as there is delay in getting consent, the value of land as collateral will continue to depreciate.

#### **4. Problem of Valid Documents for Land Alienation**

This is another problem associated with the consent provisions of Land Use Act. Although many Nigerians today can happily say "I have bought a land for my house project", they don't have valid documents to show such land transfer in their favour. The simple reason for this is that most landowners who are transforming their interest in such land by assignment do not obtain the required consent before such transfer. All they do is the execution of deeds of transfer by both parties to the land alienation agreement.

This method of transfer in the eyes of a layman is sufficient. But in the eyes of the law as held in *Ajilo's Case Supra* is a void transfer. While the

transferee proudly assumed possession of the land, the "ownership" continues to reside in the transferor until the Governor consent is obtained for the transaction. Though the transferor may never institute action for the recovery of the land for void transaction, the documents for the transaction all the same remain invalid.

## **5. Difficulties in Registration of Land Title Deeds**

Registration of land title deeds in the land registry of states enables a transferee to enjoy undisturbed ownership of his land, which he just acquired. Where however, a person trespasses on the land or struggles ownership with him, he can commence an action against the trespasser in the court relying on his title deeds registration as evidence. Also, even where the transferor of the land fraudulently sells the land to a third party, he will have a better title than the third party because of his earlier registration of the land title deeds.

The importance of registration of land title deeds therefore cannot be over emphasis. However, section 10 of the Land Instrument Registration Law



provides that a document that requires consent shall not be registered unless consent has been obtained. In *Elkali v. Fawaz*<sup>111</sup>, It was held that a document for which consent has not been obtained is not an "instrument" for the purpose of registration. Chianu<sup>112</sup> agrees with this position of the court in one of his work.

As we already stated above, the delay in getting consent made most Nigerian landowners to transfer land without consent. Since land title without consent cannot be registered, transferee found it difficult to register their land title documents.

## **.6. Double Consent Tragedy**

This arises where a person want to buy family land or community land. As required by law, the consent of the family or community must be given in unity before such land can be validly transferred<sup>114</sup>. In addition to this, is that

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<sup>111</sup> (1940) 6 WACA 212, 214

<sup>112</sup> Chiana E. "Priorities Under The Land Registration Act in Nigeria", (1992) 36 (No. 1) Journal of African Law, 66

<sup>114</sup> 10 Ekpendu v. Erika 4 F.S.C 79, Adebubu & Anor v. Makanjuola, 10 W.A.C.A 33

the family or community must also seek and obtain the consent of the appropriate authority through their appointed representative, to enable them transfer the land validly.

In this kind of scenario, the transferee who needs land urgently for his business or agricultural establishment is faced with double consent tragedy.

These and so many others are the problems created by the consent provisions of the Land Use Act. Naturally problems must have effects. This is the focus of the next sub- heading.

## **HOW HAS THE PROBLEMS CAUSED BY THE CONSENT PROVISIONS OF LAND USE ACT AFFECTED ECONOMIC DEVELOPMENT IN NIGERIA?**

As the problems caused by the consent provisions of Land Use Act are numerous so also the negative effects these problems have on Nigerians and Nigerian economy. Some of these negative effects are as follows:

### **1. High Cost of Goods and Services in Nigeria**

This is natural fallout from the problem of high cost of land and high cost of securing loan/overdraft, which, as earlier stated resulted from the

consent provisions of the Land Use Act. The industrialists and farmers need land for their businesses and where they buy such land at high cost, they will certainly reflect it in the sale of their goods to the final consumers. Also, they need money for their businesses, which in most cases, is gotten from loan and overdraft from the bank. As the cost of getting such loan goes higher<sup>115</sup>, the prices of finished goods will increased.

The ordinary Nigerian who is already handicapped financially by man-made economic hard ship, is worst for it. The effects of high cost of land and high cost of securing loan resulting from consent provisions of Land Use Act is worst than the effect of the reversed "10% VAT" which led to nationwide strike. I hope that the Nigeria Labour Congress and other labour groups as representatives of Nigeria masses will acknowledge this and fight for the reform of the consent provisions of the Land Use Act.

## **.2. Proliferation of Land Dispute and Litigation**

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<sup>115</sup> Due to high cost of getting Governor consent for mortgage

This is the most common identified effect of the problems caused by the consent provisions of the Land Use Act. From all lengths and bread of this Nigeria, abound land disputes and land dispute litigations in court resulting mainly from invalid land title documents, invalid mortgage documents, etc, all due to failure to obtain the required consent for such land transactions. For example, the plethora of cases in land mortgage transactions in Nigeria confirmed this open truth. These land disputes and litigations lead to economic waste, waste of time and even loss of life in some cases. The Nigeria economic is worst hit by this land disputes and litigations.

### 3. Increase Rate of Land Speculation

Control of land speculation by fraudulent landowners was one of the objectives of Land Use Act in general and the consent provisions in particular. In the words of Adeoyo, F. O., and Ogunniran, H. D.<sup>117</sup>;

*Control of land speculation policy is another argument being frequently preferred in support of the consent provisions...*

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<sup>117</sup> Ibid No.3

Unfortunately, rather than achieving this objective, the consent provisions have encourage land speculation by fraudulent landowner. The scenario is like this: a fraudulent land owner transferred his interest in land by assignment to John Akhimien without obtaining the required consent. He knows very well that the transfer is invalid and that due to lack of consent in the transaction, the John Akhimien cannot register the executed title document in the Land Registry. He goes ahead to sell the same land to Monday Peters, especially if John Akhimien has not commenced work in the land site. Monday Peters goes to Land Registry and found the name of the fraudulent seller as the original registered owner, hence he pay for the land, without knowing that the land has been sold earlier to John Akhimien. He can sell the land like that to about five persons or more before they will discover his fraud. What just happened in the above example is that the first buyer, John Akhimien, cannot register his title because there was no consent. Although during the transaction, he must have promised John Akhimien he would obtain the consent, John Akhimien will not know that the seller is deceiving him, bu he will be waiting for the consent to register his

title, while the fraudulent seller is reselling the land to as many people as he can deceive.

This land speculation does not only lead to land dispute and litigation, but sometimes to violent fight that may cause loss of lives and property. A visit to the various Police Stations will buttress the point being made here.

#### **4) Slow Down Economic Growth and Development**

Due to the problems associated with getting consent for genuine land transaction, and the aftermath effect of being a victim in the hands of land speculators in Nigeria, most business men shy away from businesses in agricultural and industrial sector, both of which require considerable size of land for their take off. This becomes a problem in Nigeria because most of the so called industrial estates in Nigeria are not functioning in terms of infrastructures, hence, people want to acquire their own land for industrial business, but which is made impossible for the reason already given on getting required consent above.

Faced with this situation, Nigerian businessmen now prefer to go into such business like transportation, buying and selling<sup>118</sup>etc., thereby neglecting large scale farming and manufacturing which are both required for economic growth and development of any nation.

While we cannot lay claim here that we have identified all the negative economic effects of the consent provisions of Land Use Act in Nigeria economic growth and development, we believe that the few of them analyzed above will serve as appetizer for all and sundry, in stimulating the needed appetite to clamour with loud voice for reform in the consent provisions of the Land Use Act.

Even with the above identified negative effects of the consent provisions, we still know that most people will argue that, the consent provisions are meant for good objectives. Have the provisions really achieved its objectives? This will now turn.

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<sup>118</sup> These types of business do not need large land to start. They can even be located on rented land

## **.HAS THE CONSENT PROVISIONS OF LAND USE ACT ACHIEVED ITS OBJECTIVES**

From the preceding analysis in this chapter, this question is now a mere formality because a discerning mind will know that the consent provisions of the Land Use Act have done more harm than the good it was meant to achieve. In the concluding part of chapter one, we identified the reasons for the inclusion of the consent provisions in the Land Use Act to include:- To keep a pulse for State and Local Government Council; to ensure that sections 6 and 36 of Land Use Act are not flouted; to help the Governor determine through consent application whether landowners have complied with section 34 (5) - (8) of the Act, to control land speculation by fraudulent land owners among others.

While these objectives of the provision may be argued to be good, the provisions have not achieved its objectives in Nigeria. For example, more than it was before the Act, the activities of land speculators in our urban area is at its peak. Also, since there is no effective monitoring of the

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implementation of the provisions in land transactions in Nigeria today, government do not get the estimated revenue from land transactions. In addition, most Nigerians do not comply with sections 6, 34 (5) - (8) and (36) in their land transactions.

Like any other law, maybe if the provisions were carefully implemented with human face, Nigerians who transact land alienation could have observed the tenets of the provisions. But it seems that landowners are not observing the consent provisions in their land transaction.

#### **ARE LANDOWNERS COMPLYING WITH THE CONSENT PROVISIONS OF THE LAND USE ACT IN THE ALIENATION OF INTEREST IN LAND**

We will conclude this chapter by reviewing the level of compliance with the consent provisions by those that transact land business. When established that the provision is not complied with by <sup>120</sup>land owner alienating their interest in land, the logical conclusion we can therefore deduce is that the consent provisions has failed.

Our starting point under this head is to reproduce the observation of

Ekpu,<sup>121</sup>:

*From investigation, it was however found that dealings in land are still as ever in total disregard or ignorance of these important provisions on consent. For those who are aware of the requirement of consent, they circumvent it by resorting to falsehood or deceit, for example, by backdating the instrument to any time before March 29, 1978. This is done in most cases, even with the consent of Lawyers. The only transactions for which consent is normally sought are mortgages, apparently on the insistence of the finance institutions.*

This statement above is a summary of the compliance level to the consent provisions of Land Use Act. Even in mortgage transactions where parties to it could be said to be enlightened, the compliance to the consent provisions is still very low. The plethora of cases on mortgage transactions where consent was not obtained for the transaction will attest to this total disregard for the observance of the consent provisions of the Act.

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<sup>121</sup> "The Role of the Local Government in the Implementation of Land Use Act: The Bendel State Experience" in Adigun, O. (e.d) The Land Use Act Administration & Policy Implication: Proceeding of Third National Workshop, Lagos, UNilag Press, 1991, 42

The reasons for this non-compliance with the consent provisions in land transaction that requires it will include, but not limited to the following; High cost of processing consent; unwarranted delay in the processing of consent due to bureaucracy; underserved refusal to grant consent application by the Governor or his representatives which could result from political enmity; ignorance on the part of land owner on one hand , and land buyer on the other hand , who will not even demand for it; etc.

Having identified the problems and effects of the consent provisions in this chapter, we will attempt to recommend ways of solving the problems caused by the consent provisions in the concluding chapter five of this project.

## CHAPTER FIVE

### GENERAL OVERVIEW, SUMMARY AND CONCLUSION

#### GENERAL OVERVIEW

In the preceding chapters, we have been able to discuss land ownership system and transfer of interest in land in the Pre-Land Use Act; the consent provisions of the Land Use Act; Judicial interpretations of the consent provisions of Land Use Act; and the problems of the consent provisions vis-a-vis its effects on the economic development of Nigeria.

We have stated that in the Pre-Land Use Act Era, ownership of land was either by family or community, while individual ownership of land was subsumed in family and community ownership. But we established with authorities that where a parcel of land is validly allotted to individual member of a family or community, he has ownership rights to the exclusion of all others which include the right to transfer to a third party without having to seek the consent of the family or community that allotted the land to him. On the other hand, when a family or community land is to be

alienated, the consent of all members or representatives of the family or community must be obtained to make such alternation valid. We concluded chapter one with the reasons for the inclusion of consent provisions in the Land Use Act, which we said include; using it as a source of revenue for the Government; using it to control land speculation; using it to control the size of land for farming and grazing in non-urban areas; and using it to ensure that people with excess land more than what they are require to have in urban areas under the Act surrender same to the Government.

We have also examined the consent provisions of Land Use Act as it affects alienation of land. The consent provisions must be fully complied with, when transferring right of occupancy whether statutory or customary or that which is deemed granted either by way of assignment, mortgage, lease, sublease, transfer of possession or otherwise howsoever. Consent must also be observed in devolution of right of an occupier upon death if the said land is to be divided into two or more parts. We stated that a violation

of the consent provisions renders the land alienation null and void and in some cases illegal with penal sanctions.

We have also seen the way the Nigerian Courts have interpreted the consent provisions in the areas of; the types of land alienation, the consent provisions apply. On this the court said, are alienation by assignment, mortgage, lease, sublease, transfer of possession, etc. on the right of occupancy in which consent is needed, the court said, includes customary right of occupancy, statutory right of occupancy and deemed statutory right of occupancy. The courts have also said that consent can be obtained at any stage of the transaction even after the deed of transfer has been executed by parties. It is the transferor or the person alienating interest in land that is required to obtain consent and where the consent was obtained after the execution of transfer, the consent will act retroactively to validate the land transfer transaction. The court has said categorically that failure to obtain consent renders the transaction invalid.

We have discovered that the inclusion of the consent provisions in the Land Use Act has caused problems than the good it was aimed to achieve. These problems include but not limited to; high cost of land; delay and cumbersome nature of land alienation transaction in Nigeria; have made the value of land to depreciate as collateral; it has made it difficult for people to get valid land documents; it has made it difficult for land buyers to register their land title document; and it has caused double consent tragedy amongst others. These problems as we have seen, have affected Nigeria economic development in the areas of high cost of goods and services; waste of time and money in land dispute and litigation; loss of money to land speculators and slow economic growth and development. We have discovered that the consent provisions have not achieved its objectives due to the fact that people are not complying with the consent provisions in the land transfer transactions.

Before we make our recommendation on the needed reform in the consent provisions of the Land Use Act, it is germane that we compare land

alienation in the Pre-Land Use Act Era and under the Land Use Act regime in order to know which of them more of economic good to Nigeria is. Also to be considered is to know whether the judiciary has helped in ameliorating the hard ship occasioned by the consent provisions. Analysis in this two area will illuminate our clamour for reforms, in the consent provisions of Land Use Act.

## **COMPARISON OF LAND ALIENATION IN THE PRE-LAND USE ACT ERA AND UNDER THE LAND USE ERA**

As stated in chapter one, an individual owner of land could transfer his land without having to seek and obtain consent for such transfer from any person or body of person (e.g. family or community). This made transfer of land in that period easier and stress free. Even where the family or community wanted to transfer their land which required the consent of members or representatives of the family or community, the period, energy and cost required to get the consent was minimal, which made transfer at that period easy, and stress free.



On the other hand, under the Land Use Act regime, for the reasons already given, there involves a lot of bottleneck and bureaucracy in getting consent to transfer land. The result of this is waste of time, energy and resources in land transfer. This we already said inhibit the much needed economic development in Nigeria.

We are of the view that the land transfer system under the Pre-Land Use Act Era is better and preferred. A reform is therefore needed in the consent provisions of Land Use Act which is the extant law guiding the alienation of land and land interest.

## **A CRITIQUE OF JUDICIAL RESPONSES TO THE CONSENT PROVISIONS OF LAND USE ACT**

The decision of Supreme Court in *Savannah Bank of Nigeria Ltd. v. Ajilo*<sup>123</sup> remains the authority on the effect of failure to obtain the required consent for land alienation in Nigeria. This decision is to the effect that such transaction is null and void. This decision is sacrosanct on this issue and the

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<sup>123</sup> (1989] 1 NWLR (Part 77) 305

decision in *Adedeji v. National Bank of Nigeria Ltd. & Anor*<sup>124</sup> by the Court of Appeal which is to the effect that a transferor who failed to obtain the required consent for his land transfer cannot be held to say the transaction is void, is forever subservient to the decision in *Ajilo's* case.

The Supreme Court had many opportunity to revisit the decision in *Ajilo's* case so as to do equity and justice to the underserved victims of the consent provisions of the Land Use Act, but have failed to so do. The implication of this attitude of the Supreme Court by rigidly adhering to the literal interpretation of the consent provisions of the Land Use Act (to the detriment of Nigerians that buy land, accept land as collateral, etc.,) is that those landowners who deliberately violate the consent provisions are allowed to get away with their act. One could have expected the Nigerian Courts most especially the Supreme Court, as the last hope of the ordinary man, to live up to the challenge of judicial activism by ensuring that Nigerians who buy land and landed property are protected against owners that will

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<sup>124</sup> (1989) 1 NWLR (Part 96) 212

intentionally fail to acquire consent for the transaction. After all, there is a rule of legal interpretation that says that when literal interpretation of a law or provisions of a law will lead to absurdity and hardship, that the literal rule should be dispensed with and the golden rule of legal interpretation adopted. We are bold to say here that the literal rule of interpreting the consent provisions of Land Use Act has led to absurdity and hardship. The time is now for the needed judicial activism to change the tide. These retrograde judgments<sup>125</sup>, must be overruled now.

## **RECOMMENDED REFORMS IN THE CONSENT PROVISIONS OF THE LAND USE ACT**

We have said enough to establish that imminent reforms are needed in the consent provisions of the Land Use Act in order that the act could fast track economic development in Nigeria through land and landed property. No nation can develop if the mode of acquiring land for business activities, for agriculture, industries, etc.,) is made cumbersome and perplexing by an obnoxious law like the consent provisions of the Land Use Act. The time for

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<sup>125</sup> Chianu, E. Law of Security for Bank Advances. (Mortgage of Land) (Second edition), Benin, Ambik Press, 2004, 66

such reforms is now, and we therefore lend our mind and voice to this reform, by recommending the following as ways of bringing the consents provisions of the Land Use Act into conformity

## **1. Legislative Reforms**

Since the Land Use Act is within the exclusive legislative list, it is incumbent on our National Assembly to, as a matter of urgency, amend the consent provisions of the Land Use Act. The reform amendment will include the following;

- a) Section 26 LUA, which earlier provides that transaction in land without consent is null and void, should be amended to read "that such transaction is only inchoate" with a proviso that in such a situation the landowner will be order by the court to obtain the required consent to make the alienation complete.
- b) Section 24 Proviso (b), which provides that "a statutory right of occupancy shall not be divided into two or more parts on

devolution after the death of the occupier" should be expunge from the consent provision. Also to be expunged is transaction in land by mortgage, lease of less than 20 years, sublease of less than 20 years and transfer of possession as transfer that need consent.

- c) A provision should be inserted into the consent provision that give right of action for any transferee to compel transferor to acquire consent after the deeds of land transfer is executed.
- d) The amendment should contain a section that gives a time certain of not more than one month from the date of submission of application for consent, as the period within which the application must be processed with a proviso that if after that period the consent application is not "approved" or "disapproved" and such notice sent to the applicant, the applicant shall deemed the application approved.

- e) The amendment should contain a section that gives right of action to an applicant when his application is unduly "disapproved" or unnecessarily delayed. Penal sanction should be made for officials that so delay or disapprove.
- f) The amendment should contain a section that states the amount to be paid as consent processing fee which should not be more than 5% of the total value in cost of the land or landed property as the time of the transfer.

## **2. Administrative Reforms**

At present, while we await legislative amendment to the consent provisions of Land Use Act, administrative reforms will go a long way to ameliorate the hardship caused by seeking and obtaining consent for land alienation. The reforms suggested here are as follows:

- 1) Creation of "Land Transfer Consent" Department in the Ministry of Lands which will be solely responsible for the

processing of consent application for land transfer. The Department will be headed by a Director who will be given full powers to grant consent on behalf of the Governor of the State.

- 2) Reduction of consent fees to 5% of the total value of property at the time of transfer of application
- 3) Setting of a time certain of not more than one month for the processing of consent application and delivery of "approval" or "disapproval" to applicant.

These suggested administrative reforms will encourage land owner who wants to transfer land to seek and obtain consent. With a proper awareness campaign on this issue, many landowners will embrace it in Nigeria.

### **3) Judicial Reforms**

As the situation is now, this is the only hope and the easiest area to effect reforms in the consent provisions of Land Use Act. The reforms will occur with high judicial activism from the bench as observed in Akpata J.C.A.

(as he then was) in *Adedeji v. National Bank of Nigeria Ltd and Anor*<sup>126</sup> In that case, the Court of Appeal speaking through Akpata J.C.A. refused to declare a mortgage transaction without Governor's consent as null and void, but upheld the mortgage transaction in this words:

*...It is morally despicable for a person who has benefited from an agreement to turn around and say that the agreement is null and void. In pursuance of the principle that law should serve public interest, the have evolved the technique of construction in bonam pattern. One of the principles evolved from such construction in the interpretation of statutes is that no one should be allowed to benefit from his own wrong (Nollus Commodum Capere potest de Juria Sua Propria). As Widgery L.J. ...Said in *Buswell v. Goodwill* (1971) 1 ALL E. R. 4 18 at Page 121, "the proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one which the usually that the literal meaning of the enactment is departed from where it would result in wrongful self-benefit!*

We are bold to say that this is a sound decision that will stand the test of time in jurisdiction where judicial activism is embraced by the Bench. Unfortunately, in Nigeria today where most of our Judges even at the

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<sup>126</sup> *ibid*



Supreme Court are dogged in literal interpretation of law, the Court of Appeal as per Akpata J .C.A . (as he then was) position in Adedeji's case will not be fully embraced . This could be the reason why the Supreme Court, even with so many opportunity to revisit Savannah Bank (Nig.) Ltd v. Ajilo's case supra, have failed to so do, and overrule that pathetic and unfortunate decision. It is painful to say that Ajilo's case still remains the judicial authority on this core.

The decision of the Court of Appeal in Adedeji's case is in line with modern economic reality and this is the type of reform we expect the judiciary to give the consent provisions of Land Use Act. The earlier the Supreme Court overrules the decision in Ajilo's case in favour of the transferee, mortgagee, lessee, assignee, the better for land alienation transaction in Nigeria. The time for the Supreme Court to do that is now.

With these suggested reforms in the consent provisions of the Land Use Act, fully implemented, the new reformed consent provisions will be in line with modern economic reality.

However, a recommended alternative to the suggested reforms above is that the whole consent provisions of the Land Use Act be totally expunge from the Act in an amendment to it. This recommendation is in line with clamour in some quarters that the Land Use Act be repealed<sup>127</sup>.

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<sup>127</sup> A Clamour by stakeholder of financial system strategy 2020 conference” held at Abuja, reported at Punch Newspaper of Wednesday June 20 2007 at Page 24

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