

AN ANALYSIS OF OWNERSHIP AND COMPULSORY ACQUISITION UNDER  
CUSTOMARY LAND TENURE IN SOUTH WEST NIGERIA

BY

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## DECLARATION

I, Adeogun Richard hereby declare that the work in this Long Essay titled "An Appraisal of Land Ownership under customary law in the South west, Nigeria" was performed by me in the faculty of Law, Lead City University, Ibadan, under the supervision of Dr. Simeon Ola Oni. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this work has been presented for another degree or diploma at any institution.

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## CERTIFICATION

I certify that this research was carried out by Adeogun Richard (Matriculation Number, LCU/PG/002801) in the Faculty of Law, Lead City University, Ibadan, Oyo State during the 2022/2023 Academic session under my supervision.

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Date

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## **DEDICATION**

This thesis is dedicated to Almighty God

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## **ACKNOWLEDGEMENT**

Writing these acknowledgements reminds me of the tough, courageous, worrisome and tensed moments in my academic career. My profound appreciation goes to almighty God for his strength during my studies in Lead City University, Ibadan.

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## LIST OF STATUTES

1. Constitution of the Federal Republic of Nigeria,1999 Cap C 23 Law of the Federation of Nigeria,2004.
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6. Land Development Law. Cap. L 57 Law of Lagos State, 2003.
7. Land Registration Act (1925)
8. Land Use Act Cap. L5, Laws of the Federation of Nigeria, 2004
9. Nigerian Coal Authority Act, Cap.N95, Laws of the Federation of Nigeria, 2004
10. Oyo State Land Registration Law, Cap.56, 1978
11. Sheriffs and Civil Process Act and Judgment (Enforcement) Rules Cap. S6, Laws of the Federation of Nigeria 2004
12. Urban and Regional Planning Board Law, Cap. L52 Laws of Lagos State 2003.

## LIST OF ABBREVIATIONS

&	And
ALL FWLR	All Federation Weekly Law Report
Anor	Another
Cap	Chapter
e.g.	Example
etc.	and so on
JCA	Justice Court of Appeal
JSC	Justice Supreme Court
L.F.N Nigeria	Laws of Federation of Nigeria
No.	Number
NWLR	Nigerian Weekly Law Report
Ibid previously cited	In the same source as previously cited
Ors	Others
P.	Page
Paras	Paragraphs
Pp.	Pages
Pt.	Part
SC	Supreme Court
V.	Versus
Vol.	Volume

WNLR

Western Nigeria Law Report

FWLR

Federation Weekly Law

Report

SCJN

Supreme Court of Nigeria

Judgment

WACA

West African Court of Appeal

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## ABSTRACT

Land from time immemorial through the period of agriculture to the period of industrial development, land has remained the most valuable property in the life of man and his development. It is a source of wealth to those who have it and the mother of all properties. In other words, virtually all the basic needs of human existence are land dependent. In view of the importance and usefulness of land to man and his development as well as the development of his society, every person generally desires to acquire and own a portion of land to achieve the various ends for which the land is meant. Therefore, to make land in Nigeria available to all and to ensure that land is acquired and put to a proper use for the needed development, governments during and after colonial period enacted laws to govern the use or administration of land in Nigeria. Before the arrival of the colonial masters, there were customary laws which governed the administration of land in Nigeria. These customary laws varied from one locality to another because of the differences in customs of the people. This accounted for the multiplicity of land laws in Nigeria prior to the promulgation of the Land Use Act of 1978.

Thus, the thrust is to examine land ownership in Nigeria while the specific objectives are to appraise the customary land tenure system in the South west in Nigeria. This study further explores a qualitative research methodology, that is, library-oriented research. It makes use of both primary and secondary sources

This study discovers that most of the laws in relation to land ownership in Nigeria are as old as mankind and needs review. It also discovers that the present laws lack enforcement mechanism and makes it difficult for the provisions of the law to be effective and efficient in the society. It also discovers that powers of the Governor to acquire land is not absolute. The power must be exercise in accordance to the law. Governor consent should not be required for alienation of customary land

Keywords: Customary, ownership, Alienation, Consent, Land, Governor, Right of Occupancy

## **CHAPTER ONE**

### **INTRODUCTION**

#### 1.1 Background to the Study

Unarguably, globalization has become the most prominent defining process of the present age and perhaps the most widely discussed phenomenon today<sup>1</sup>. Gradually but impressively, the difference between what is local and what is global is becoming increasingly blurred, and every facet of human life, which includes the built environment, urban planning, growth and development and control, is under strong transforming influence of the global system, which is an outcome of the interdependence of the world. It is however important to note that in spite of global trend of adopting the approach of sustainable development of cities and urban centres by both Federal and State Governments through adequate urban planning mechanism, which essentially include the legal instrument, most Nigerian cities and states are still characterized by growth and development without effective planning and control by government.

Land has been defined as 'an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the earth surface, everything growing on or permanently affixed to it<sup>2</sup>. "In its legal significant, land is not restricted to the earth's surface, but may encompass within its bounds such as things as gases and liquid. A definition of land along the line of mass of physical matter occupying space also is not sufficient, for an owner of land may remove part or all of that physical matter, as by digging up and carrying away the soil, but would nevertheless retain as [art of his land the space that remain. Ultimately as a juristic concept land is simply an area of three-dimensional space, its position being identified by natural or imaginary points located by reference to the earth's surface land is not the fixed content of that space, although, as we shall see, the owner of that space may well own those content. Land is immoveable as distinct from chattels, which are moveable; it is also, in its legal significance, indestructible.

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<sup>1</sup> A.A. Adedeji, The land Use Act as an Instrument for Sustainable Urban Development, Lead City University Law

Journal: 1(2) (2009), 277.

<sup>2</sup>B.A. Garner, *Black's Law Dictionary*, (10<sup>th</sup> Ed. United States: Thomson Reuters Publishing Company, 2009) at pg. 955

The content of the space may be physically severed, destroyed or consumed, but the space itself and so the land remains immutable<sup>3</sup>."

*At customary law, ownership of family land is vested in the past, existing and future members of the family. Thus, communal or family land belongs to all members of the...family...<sup>4</sup>*

Historically, the management and control of land in Nigeria can be traced to the customary transaction in the southern Nigeria and the legal position in the north. Aina, Taiwo and Onakoya rightly stated that under the customary law, land was organized largely around the community and the family, this suffice to say that the alienation of same lies in the hands of the community and the family, the individual could rarely claim ownership of any part and could not alienate it without the consent of the family head or the community, land belonged to corporate bodies like the family, village, community and the members of these units are vested with *usufructory* rights to use and enjoy the property while the head of these units were vested with the right to hold the land as trustees for the other members<sup>6</sup>. In northern Nigeria, land was held and administered for the use and common benefit of the people who held a right of occupancy over it and such rights were subject to the control and disposition of the native authority.<sup>7</sup>

Actual physical control of native lands is vested in the families and only in the sense that it is an aggregate of the constituent family groups could the community or tribe be said to own the land.<sup>8</sup> The customary land tenure system is a form of land holding indigenous to Nigeria. The evolution of this system and the various principles regulating same, exhibit the historical credentials rooted in the customs and traditions of different ethno-cultural groupings in Nigeria over a period of time. Essentially, the principles regulating the customary land tenure system appears uniform throughout the country but the fact

remains that they vary in their details as a result of diversities in the customs, traditions and values of each tribe.

<sup>3</sup> Peter butt, Land law, (2nd ed, Malhouse law books,1988), 18.

<sup>4</sup> See Adejumo v. Ayantegbe (1989)3 NWLR (Pt. 110)417 at 444, Paras C-D.

<sup>5</sup> A.A. Aina, E.A. Taiwo and O.O. Onakayo, Land Administration and Economic Development in Nigeria. *Law, Democratization and Social Change*, Publication of the National Association of Law Teachers (NALT). (2020),152.

<sup>6</sup> See Amodu Tijani v. Secretary of Southern States (1921)AC 399.

<sup>7</sup> See Aina et. Al. Op. cit. p. 152.

<sup>8</sup> Interpretation Act Cap. 123,LFN 2004;this definition was a later development after the common law impact on our laws

In ancient times, 'minerals' were not in the contemplation of the communities, since there were no such discoveries"

<sup>9</sup>Onakoya, Op. cit. p.219.

Title to land under customary law is vested in the corporate unit and no individual within the unit can lay claim to any portion of it as the 'owner'. The individual right is limited to the use and enjoyment of the land and he cannot therefore alienate same without the consent of representatives of the corporate units recognized as such by law.<sup>10</sup> The whole idea as Viscount Haldane<sup>11</sup> succinctly puts it is that:

*...The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner...This is a pure native custom along the whole length of this coast...*

Oluyede,<sup>12</sup> much later puts this issue in perspective thus:

*Group ownership in African context is an unrestricted right of the individual in the group to run stock on what is held to be the common asset of land; the right of all in the group to claim support from the group's asset of land; the right of all in the group to claim support from the group's land and the tacit understanding that absolute ownership is vested in the community as a whole.*

In pre-colonial Nigeria, customary land tenure system was well-settled and structured, particularly among the Yorubas of the early centuries, the system and the structure were so well entrenched among the natives, that the initial British intervention was to expressly declared it be preserved. The Royal Charter (10 July 1887) granted to the National African Company by the British provides *inter alia* that:

*In the administration of justice by the company to the peoples of its territories, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class, or tribe, or*

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<sup>10</sup> I.O. Smith, Practical Approach to Law of Real Property in Nigeria (1st ed., Lagos: Ecowatch Publications Nigeria Limited, 2013), 23.

<sup>11</sup> Amodu Tijani v. Secretary, Southern Nigeria [1921] 2 A.C.399

<sup>12</sup> P.O. Oluyede, Modern Nigerian Land Law, (Ibadan. Evans Bros, 1989), p.12.

*nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of lands.*

The concept of family in customary law of property is narrower than the general concept of family, for the purpose of land holding include the children of the deceased, family is a corporate body created upon the death of the founder holding an interest in land. It includes all his or her descendants in the male line (in the case of agnatic lineage) or in both male and female lines (in the case of agnatic descendant group). New members of the group belong to it by virtue of their birth and they accede to their rights at the time of their births. Membership of the family does not take cognizance of the extended family, hence, brothers, sisters, uncles, aunties; cousins of the founder of the property do not qualify as members,<sup>13</sup> except where by his own declarations, the founder himself enlarge the family to include the relatives. The widow of the founder (when he becomes deceased) is not a member of the husband's family, a grandchild, for the purpose of succession is not a member of the family unless where his parent who is the original member of the family is dead.<sup>14</sup> Ownership of family property is joint and indivisible. The family itself may comprise of large number of children who may be spread all over the country. There is need to determine or appoint someone or some of their members to represent them in negotiations on the family property, to generally administer the properties, to equitably

determine how best to share the family property amongst them in order to appropriate the greatest benefit for all the members of the family.

Members of a family are not without rights in the family property, though all powers to management and control family property resides in the head of family, they are expected to be exercised for the benefits of the members of the family. The benefits accruing from the proper management of the family property are true rights of the members. The family members therefore could enforce these basic rights in court of law as enforceable rights under customary law.

Meanwhile, there is a connection between the customary system of land holding and the legal concept of trust although, Fabunmi explains that the comparison between the family head and a trustee broke down at some point which is evident that the two institutions are products of two

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<sup>13</sup> See *Suberu v. Sunmonu* (1957) 2 FSC 33.

<sup>14</sup> See *Lewis v. Bankole* (1908) 1 NLR 82.

different legal systems and cannot be put in the same compartment.<sup>15</sup> Fabiyi JSC in *Ibekwe v. Nwosu*<sup>16</sup> explained that trust is simpliciter a right enforceable solely in equity to the beneficial enjoyment of property where another person holds the legal title. Also, Object of a trust may be personal or real property.<sup>17</sup> Yerokun<sup>18</sup> explains that some of our customary laws had some resemblance to the trust concept and it is in the liability of the family or the community head, the family as a corporate body in such instance is vested with the title of the property while the family head holds same for the members of the family as a trustee who has the power to administer the property and in the case of *Amodu Tijani v. Secretary of Southern States*,<sup>19</sup>

It is important to state here that it has never been the practice in the olden days to alienate land under customary law. Land was seen as inalienable, and the present owners hold it in trust for future generations. Non-members of the family are not allowed to have any access to family property. However, in some cases, there may be gift of family land to close relatives or allowing customary tenants where the land is so vast and the family believes such will be in the interest of the family. In the contrary, as time goes by, the

development of the trade, industrialization and the persistent demand for the use of land has made customary in its flexible nature, to recognize certain transactions on property which include alienation of same. This then conform to the principle of law on the concept of ownership as stated by Niki Tobi JSC in *Abraham v. Olorunfemi*<sup>20</sup> as follows

*It [ownership] connotes a complete and total right over a property.*

*The owner of a property is not subject to the right of another person...he has the full and final right*

*of alienation or disposition of the property and he exercises his right of alienation and disposition without seeking the consent of another party...the owner of a property can use it for any purpose, material,*

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<sup>15</sup> J.O. Fabunmi, *Equity and Trusts in Nigeria*, (2nd ed. Ile-ife: OAU press ltd, 2006), 200.

<sup>16</sup> (2011)9 NWLR 1

<sup>17</sup> This was explained by Ngwuta JCA, in *Iwok v. University of Uyo* (2010) LPELR 4345, while stating that the object of a trust can be either real or personal property.

<sup>18</sup> *Op. cit.* p.404.

<sup>19</sup> *Ibid.*P.69.

<sup>20</sup> (1990) 1 NWLR (Pt. 165) 53.

*immaterial, valuable, invaluable, substantial, non-substantial, beneficial or even for a purpose detrimental to his personal or proprietary interest...he is the alpha and omega of the property*<sup>21</sup>

In line with the exercise of the family's ownership right, Mnaefo F.J in the case of *Oloto v Dawodu*<sup>22</sup>observed:

*If the family is absolute owner of land there is nothing to stop the family if the head and all the members agree, from transferring the totality of their interest in it. It is a question of the nature of the grant as to whether they meant to transfer their entire interest in the piece of land or only a part of such interest.*

In effect, where the family has agreed and consented to the sale or alienation of their interest in family land, then nothing stops them from being able to do so and machinery for passing a valid title by the family of family property.

Also, the importance of land to man over the years can hardly be overemphasized. Land represents about two-fifth of the earth surface; it provides a platform on which man's activities are predicated. It is however ironical that while the world population increases, the land in supply appears to be receding. Hence land is never thought to be sufficiently available to meet the need of man in a society. The ownership of land is jealously guarded against. Wars are fought, territories conquered to assert and preserve the ownership of land. The rift between Nigeria and Cameroon over Bakassi Peninsula, wars between Ife and Modakeke and that between Erin-Ile and Offa attest to the above claim. For few available lands to be equitably administered among the people and be maximally utilized there is need for a good land policy to be put in place for effective control and management of land in order to witness the desired development in the society. However, as the population of the world grows, land appears to gradually become a scarce commodity. In order to assert and preserve the ownership of land, this necessitated the need to draft a policy in order to ensure effective control and management of land.

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<sup>21</sup> Ibid, P. 74-75.

<sup>22</sup> (1904)1 NLR 58.

This part of our law deals basically with state control of land holding and development on land. This is an area where local statutes play predominant role in streamlining title to land and channeling state control of land use and development. The land use act establishes state control and management of land, harmonized these with the customary land tenure system and other existing land rights and laws in Nigeria, as well as monitors and/or restrict land transactions development. A study of this legislation and the judicial interpretation of its provisions are crucial to an understanding of land right in Nigeria. A developer or user of land is largely affected by the existing planning laws and regulations contained in the pieces of legislation put together which include urban and regional planning act (or similar law in the state) and regulations made thereunder, the environmental impact assessment as well as the relevant building regulations. An illegal development is as far reaching as a defective title; it does not only date back to the initial

act of illegality with all the penal consequences including demolition of an existing structure, it may frustrate interest in real property.<sup>23</sup>

Although, planning laws exist in various forms of country, the Land Use Act and other relevant statute which serve as the most revolutionary piece of legislation of our time with national application that could be utilized as an instrument of urban planning, development is unfortunately perceived and recognized mainly and essentially as a land tenure law. Consequently, its potential utility in this respect has not been fully utilized and explored.

It is worthy to mention that for the purpose of control and management, the land vested in the Governor has been classified via the provision of Section 2(1) (a) of the Act into two.<sup>24</sup> These are urban and land non-urban land. The total control and management of urban land is vested in the Governor,<sup>25</sup> while that of other land not designated as urban land, and is placed under the management and control of the local government.<sup>26</sup>

In control and management of this land, the Governor is to be assisted by the Land Use Allocation Committee, which shall be established by the State. It is instructive to note further that Governor is given an unquestionable power under Section 3 of the Act to designate by an order published in the State Gazette, to extend the urban areas in a State by declaring part of the non-urban areas as

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<sup>23</sup> I.O. smith, op. cit.467.

<sup>24</sup> Land Use Act, 1978.

<sup>25</sup> See section 2 (1) (a) and (b) of the Land Use Act, 1978

<sup>26</sup> See section 2 (2) of the Land Use Act, 1978.

urban. It was pursuant to this section that the Lagos State Government in the Second Republic designated the entire land of the state including those in the rural areas of Lagos as urban land, thus leaving the local government as with no land to control in the state.<sup>27</sup>

Some other states also, acting under the provisions of the same section of the Act, however only designated the land within ten-kilometer radius of each local government headquarters as urban land, while the remaining is considered as other lands.<sup>28</sup> Meanwhile, it is interesting to mention that customary land ownership is not abrogated

under the Land Use Act. The only modification is just that there is no absolute ownership of land under the Land Use Act while there is absolute ownership under the customary law.

One of the key functions of any government is to ensure lives and properties are protected and this basic function is not restricted to any form of government<sup>29</sup>. Over the decades, scholars, citizens as well as politicians have paid cursory attention to ownership of land as one of the importance sectors to the socio and economic development of Nigeria.

Over the few decades up till now, Nigeria has experienced unprecedented crises, ranging from land grabbing and louting in regard to land ownership in Nigeria. These crises situations have can be traced to Nigeria's independence whereby primordial sentiments have eclipsed the lofty gains of true nationalism. The laws put in place in regard to the control and management of land in Nigeria is deficient and ineffective in responding to the crises. Desperate time calls for desperate measure to be adopted. In a bid of adopting a drastic measure to curbing land grabbing and other related matters in Nigeria, some states enacted into law, Land grabbers Law. As lofty as those laws are, it is still observed that the perennial issue associated with land ownership in Nigeria has not been totally and completely resolved. Perhaps, the challenge after the enactment of the law is the enforcement mechanism. This exposed some sad repercussions of the inability of the government to secure the immoveable properties of her people.

Thus, this study examines the incidence of land ownership under customary law in the Southwest, Nigeria.

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<sup>27</sup> See Urban Area, 1982 L.S.L.N. No. 13 1982.

<sup>28</sup> See Borno Legal Notice No. 8 of 1980; Sadiku v. Dalori (1996) 5 N.W.L.R. (Pt.447) p. 151-165.

<sup>29</sup> A.J.Otu And I.L.Apeh, A Critical Analysis On Land Use Act In Nigeria, *Journal of Public Administration, Finance and Law*, (2022), 22 available at <https://doi.org/10.47743/jopafl-2022-24-06> last accessed 05/05/2023.

## 1.2 Statement of the Problem

Before the enactment of the Land Use Act, land ownership in Nigeria is governed by customary law. Under customary law, land ownership is absolute and the owner has the total and absolute power to dispose the property as he wishes. Also, the Kings and the

chiefs are in charge of the lands in the community. Meanwhile, the Nigerian at reform offers a less disturbing initiative and has been comparatively more successful, by making land the property of government, specifically the Governor of the state. The Land Use Act, enacted in 1978 is an expropriation law placing all lands within a state in the management and control of the Governor of the state with the powers to grant a right of occupancy for a specific period in the manner of a leasehold, compulsorily acquire for overriding public interest, invalidate alienation of interest where consent to the transaction was not obtained, etc.

Nonetheless, several legal issues have arisen since the coming into being of the law: the place of customary law in traditional landholding, duality of legal regime, compensation, the loss of land as a resource by traditional owners, the abuse in the process of acquisition due to existing political interest. These are the concerns of that have made the Nigerian reform far from wholly successful but a continuing subject for academic and scholarly examination.

Also, this study sets out to examine the concept of ownership of land under the customary land tenure system. With respect to land within the confines of the provisions of the Land Use Act and in the light of the diverse positions taken by scholars and commentators on the provisions of the Act. It discusses the positions of the 2 schools of thought on the subject. The schools are "nationalization school of thought" and "private property right school of thought". However, it is of noteworthy to mention that the intent of the Act was to nationalize all lands in the country by vesting the beneficial interest in the land in the state, leaving the citizens with determinable possessory rights and beneficial interest in the developments and improvements on the land. This is one of the problems associated with land ownership in Nigeria and it is this dichotomy this study seeks to resolve.

Also, the concept of alienation of land and individual ownership under the customary land tenure system is not totally strange but also unacceptable and this study will examine if the concept of

individual ownership does not really exist under the customary land tenure system in the Southwest, Nigeria.

### **1.3 Aim and Objectives of the Study**

The aim of this study is to examine land ownership under customary land tenure system in the south west in Nigeria while the specific objectives are to:

- i. explain the customary laws concerning land ownership in Nigeria
- ii. determine the extent of powers of the family head and the principal members in relation to control and management of land ownership under the customary land tenure system
- iii. explain compulsory acquisition of customary land by the state under the land use act
- iv. discuss the alienation of customary land in south west Nigeria.

### **1.4 Research Questions**

- i. What are the customary laws concerning land ownership in Nigeria?
- ii. What is the extent of powers of the family head and the principal members in relation to control and management of land ownership under the customary land tenure system?
- iii. What are the rights of land owners under customary land tenure as regards the power of the governor to acquire land in south west Nigeria?
- iv. What is the requirement for transfer, of ownership under customary land tenure system in south west in Nigeria?

### **1.5 Significance of the Study**

It is observed that the customary law in relation to land tenure system in Nigeria are fraught with many inconsistencies and irregularities. Many legal scholars have written extensively on how customary law has become inchoate in the allocation, control and management of land in the south west in Nigeria. Many of these legal scholars have called for a review of these customary land tenure system in order to meet up with a modern-day reality. However, there have not been enough

Works and precedents on the recognition of customary and land tenure practice in relation to land ownership in the south west in Nigeria and it is this lacuna this study has set out to fill. The study will benefit and influence law and policy makers, researcher, real estate consultants, property lawyers and community leaders with sufficient and adequate knowledge on land ownership under customary law in Nigeria.

### **1.6 Research Methodology**

The methodology adopted and explored in this study is qualitative i.e. library oriented research. The materials employed in the research include both primary and secondary sources of law. primary sources, for instance, include the 1999 Constitution of the Federal Republic of Nigeria, as amended, 1999; Customary law; Land Use Act, 1978; Land Grabbers Law of various states; Interpretation Act, 2004; and judicial precedents while Secondary sources include relevant information from leading authorities, textbooks on the subject matter of the research, journal articles, and periodicals, opinion of specialists and practitioners all of which are expected to add value to the quality of the work.

### **1.7 Scope of the Study**

This study will cover the concept of “ownership” under land jurisprudence in Nigeria. It will also do a comparative analysis between customary land ownership and land ownership under the Nigerian laws; it will also look into problems associated with land ownership and the problem that are faced during the drafting of relevant laws in relation thereto, it will also discuss the negative effects and factors inhibiting relevant statutes in curbing land grabbing in Nigeria; it will also appraise the importance of customary land tenure system in the control and management of land. It further concludes with the way-out and recommendations on how customary laws have enriched our legal jurisprudence in relation to land ownership in Nigeria. It also discovers the recognition of the customary land tenure system under the Land Use Act and other related enactments.

This study also focuses on the legal process of alienation of land in the south west in Nigeria. Hence, more emphasis is placed on acquisition, control and management of land ownership and the requirement of consent of the family head and the principal members in the case of a family property. More so, the work touches some aspects of alienation under customary law, other laws

and some other legislation. As such, local cases on alienation of land in Nigeria, some of the provisions of the Land Use Act which gives statutory backing to land ownership under the customary tenure land system. It will also find out land acquisition under customary law in south Nigeria.

### **1.8 Limitation of the Study**

The limitation of this study are lack no sufficient governmental information on my area of study as to lack of documentations. The government does not have any medium through which customary law of each place is documented. Difference in customary land law in states of Nigeria as a whole, when discussing about limitations of the land tenure system under customary law, there are plethora of cases in the court of law which revolves around the conflict on land under customary land tenure system in Nigeria. And still the customary law has not yet been able to resolve all conflicts most especially on acquisition of land, revocation of land, conflict in relation to ownership of land most especially in the south west in Nigeria. Non-uniformity and evolving nature of Customary law in south west Nigeria makes it enormous and arduous to cover within a reasonable time.

### **1.9 Definition of Terms**

**Land:** this is an immoveable property which is not capable of being stolen. It also includes land of any tenure, buildings or part of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments, also a rent and other incorporeal hereditament and an easement, right, privilege, or benefit in, over, or derived from land; but not an undivided share in land

**Land grabbing:** the act of unauthorized people laying claim to a property that belongs to another person.

**Customary:** this is the rules of standard among the people which have been recognized as law in a community.

**Ownership:** this is the person who is vested with the control and management of land.

**Governor:** this is the Chief Executive of a state who controls and manages all lands in that state on behalf of the people of the Federal Republic of Nigeria.

**Legal Framework:** This is the totality of all laws in relation to legal drafting and land ownership in Nigeria.

**Legal drafting:** this is a skill acquired by a legal practitioner to draft any document that has the backing of law.

**Constitutional Questions:** This includes the legality or otherwise of land grabbing in Nigeria.

**Right:** The word "right" possesses an ordinary and technical meaning. In the ordinary sense, it means the standard of permitted action within a certain sphere. In legal parlance "a right" is a legally protected interest. A right in its legal parlance thus correlates with a duty but the converse is not necessarily true as there may be duties without rights. Rights are legal, social, or ethical principles of freedom or entitlement; that is, rights are the fundamental normative rules about what is allowed of people or owed to people according to some legal system, social convention, or ethical theory.

**Law:** This is the code of conduct regulating human conduct in the society and making man's actions to be predictable. The definition of law is as old as mankind. It does not have a precise definition. Black's Law<sup>30</sup> describes law as the regime that orders human activities and relations through systematic application of the force of politically organized society, or thorough social pressure, backed by force; the legal system; It is also seen as the aggregate of legislation, judicial precedents; and accepted legal principles; the body

of authoritative grounds of judicial and administrative actions especially the body of rules, standards, and the principles that the courts of a particular jurisdiction apply in deciding controversies brought before them; It is a set of rules or principles, dealing with a specific area of legal system.

**Courts:** This is one of the arms of government saddled with the interpretation of the law<sup>31</sup>

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<sup>30</sup> B.A. Gamer, Black's Law Dictionary, (9<sup>th</sup> Ed. United States: Thomson Reuters Publishing Company,2009)962.

<sup>31</sup> Section 6 of the Constitution of the Federal Republic of Nigeria, 1999, as amended.

**Police:** Police are the officers empowered to protect lives and property, safeguard fundamental human rights and prosecution of offenders<sup>32</sup>

**Violence:** violence is the use of physical force usually accompanied by fury, vehemence, or outrage, especially physical force unlawfully exercised with intent to harm.<sup>33</sup>

**Constitution: it is the fundamental and organic law of a nation or state that establishes the institution and apparatus of government, defines the scope of government action through legislative ordinary process, the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it; a written instrument embodying the rules of a political or social organization.**

**Crime:** Crime is an act that the law makes punishable; the breach of legal duty treated as the subject-matter of a criminal proceeding. <sup>34</sup> A crime is also any act or omission which makes the person doing the act or making the omission liable to punishment under this Code, or under any Act or law, is called an offence<sup>35</sup>. Crime also refers to an action or omission which constitutes an offence punishable by law and prosecuted by the state or its authorized agencies<sup>36</sup> thus, crime is whatever is provided by law, as contained in the provisions of the statute, with punishments prescribed for violation of the law and enforced by the machinery of the state or persons authorized by the state. It is however

difficult to consider all acts and omissions which constitute violation of the Nigerian Criminal Law, as a result of the dynamic nature of our criminal jurisprudence any human conduct, however noble or outrageous, can be categorized as criminal simply by being forbidden on pain of punishment by the law making authority in any of the three tiers of government in Nigeria, as presently constituted. Meanwhile, whatever that is construed as an offence depends on the jurisdiction or a particular place. For instance, land grabbing is an offence under the Nigerian law.

**Conveyance:** means the voluntary transfer of a right or of property<sup>37</sup>.

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<sup>32</sup> Section 4 of the Police Act, 2020

<sup>33</sup> Ibid pg.1705

<sup>34</sup> B.A. Garner op. cit. page.427.

<sup>35</sup> Section 2 of the Criminal Code CAP C38 Laws of the Federation of Nigeria 2004; See also the case of Al-Mustapha Mustapha v State (2013)17 N.W.L.R(Pt.1383)350 @397 Para H.

<sup>36</sup> C.C. Wigwe, Introduction to Criminal Law in Nigeria (1st ed., Ghana: Princeton & Associates Publishing Co. Ltd, 2016) p.25.

<sup>37</sup> Black's Law dictionary, 10th ed.Pg.407.

**Court:** means High Court,<sup>38</sup>

**Customary Right of occupancy:** means the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by a Local Government under this Act<sup>39</sup>.

**Decree:** means a law or a court order<sup>40</sup>, especially by the military.

**Deemed:** means to treat something as if it were really something else or it has qualities that it does not have<sup>41</sup>.

**Edict:** means a formal decree, demand or proclamation issued by the sovereign of a country<sup>42</sup>.

**Express:** means clearly and unmistakably communicated; stated with directness and clarity<sup>43</sup>.

**Government:** means the Government of the Federation or the Government of a State;

**Governor:** means the Governor of the State concerned.<sup>44</sup>

**Grants:** means the creation or transfer of the ownership of property by written instrument.<sup>45</sup>

**Hereditament:** means any real property which on an intestacy occurring before the commencement of this law might have devolved upon an heir<sup>46</sup>.

**Holder:** in relation to a right of occupancy, means a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed

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<sup>38</sup> Section 2 of the property and conveyance law cap 100 LWN 1959

<sup>39</sup> Section 51(1) of the Land use act, cap.202, LFN 1990

<sup>40</sup> Oxford dictionary of Law, 6th ed. Pg. 152

<sup>41</sup> Black's Law dictionary, 10th ed.Pg.504

<sup>42</sup> Black's Law dictionary,10th ed.Pg.627

<sup>43</sup> Black's Law dictionary, 10th ed. Pg.701

<sup>44</sup> Section 51(1) of the Land use act, cap.202, LFN 1990

<sup>45</sup> Oxford dictionary of Law,6th ed. Pg 243

<sup>46</sup> Section 2 of the property and conveyance law cap 100 LWN 1959

on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub lessee or sub-under lessee.<sup>47</sup>Purchaser: means a purchaser in good faith for valuable consideration and include a lessee, mortgagee or other person who for valuable consideration acquire an interest in property. or means a person who acquires an interest in or charge on property for money or money worth.<sup>48</sup>

Registered land: means land demised by a registered lease.<sup>49</sup>

**Statutory Right of Occupancy:** means a right of occupancy granted by the Governor under this Act<sup>50</sup>.

**Settlement:** means any deed, will, agreement or other instrument under or by virtue of which any property is or deemed under the law to be limited to or in trust for any person

by way of succession and the expressions "settle", "settlement", and "settler". Shall be construed accordingly.<sup>51</sup>

### **1.10 Structure of the Study**

Chapter one covers background to the study, aim and objectives, research methodology, research questions, significance of the study, Scope of the study, limitation of the study, definition of terms and structure of the study.

Chapter two covers Literature Review and Conceptual Framework Review of the study. It introduces the subject matter, the concept of legal drafting, land, ownership, customary law, family property, and the historical perspective of Land Tenure System from Land tenure system before the Colonial Era; Land tenure system during the Colonial Era; Land tenure system after the Colonial Era: Land tenure system before military intervention; Land tenure system during military intervention and Intervention of the Land Use Act. in Nigeria. the Management of land under the customary land tenure system, family property, the powers of the family head and the principal members in the alienation of family property under the customary land tenure system

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<sup>47</sup> Section 51(1) of the Land use act, cap.202, LFN 1990

<sup>48</sup> Section 2 of the property and conveyance law cap 100 LWN 1959

<sup>49</sup> Section 3 registration of titles law, F.& L. 1958, cap 181.1968

<sup>50</sup> Section 51(1) of the Land use act, cap. 202, LFN 1990

<sup>51</sup> Section 2 of the property and conveyance law cap 100 LWN 1959

Chapter three discusses. Research methodology to be adopted for this study.

Chapter four covers a comparative analysis between customary land ownership and land ownership under the Land Use Act. Issues associated with Land ownership in Nigeria.

Chapter five covers summary of findings, conclusion and recommendation.

## CHAPTER TWO

### LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK

#### 2.0 Introduction

This chapter deals with the review of literature in the related areas on the customary tenure system in the South-west, Nigeria. This aspect is divided into the conceptual clarification of terms which include the concept of legal drafting, the concept of land, the concept of ownership, customary law and family property. The second part of this chapter is the analysis of theories upon which the study is premised.

#### 2.1 The Conceptual Framework

The available literatures in this area of law are mostly texts by foreign authors; this is understandable because the concept of legal drafting is an integral part of received English law adapted from English jurisprudence. They are as follows:

##### 2.1.1 The legal concept of Legal Drafting

Thus, Maitland describes legal drafting as the greatest skill a lawyer must possess within the English jurisprudence.<sup>52</sup> One of the important authors who have contributed to the concept of legal drafting is Keeton<sup>53</sup> whose work is relevant in the area of definition of the concept, he explains that legal drafting enables lawyers to know what to put on paper.

##### 2.1.2 The concept of Land

Land represents about two-fifth of the earth surface; it provides a platform on which man's activities are predicated. It is however ironical that while the world population increases, the land in supply appears to be receding. Hence land is never thought to be sufficiently available to meet the need of man in a society. The ownership of land is jealously guarded against.

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<sup>52</sup> W.F. Maitland W.F. (1949), *Equity*, UK: Brunyate. (1949), 32

<sup>53</sup> Keeton G.W(1963), *Law of Trusts*, London: Stevens and sons. p. 3.

### **2.1.3 The Concept of Ownership**

Ownership entails the total control, which a person has over his property. He has overriding right over his property is subject to no control. He is the owner and omega of his property. Ownership and Title are synonymous, and can be used interchangeably. The land tenure system in Nigeria serves as a process of granting ownership of land to individuals, legal bodies, and corporate entities based on their use of these lands. The statutory instrument is used to ensure that human habitats are safe and sustainable.

Ownership is the exclusive right to use, possess, and transfer property, subject only to the rights of persons having a superior interest and to any restrictions on the owner's rights imposed by an agreement with or by an act of third parties or by operation of law. It is a title to a subject matter which is good to the whole world. The meaning of ownership is an elephant before the blind men. Concerning land, English law has never applied the concept of ownership.

Under customary law, the concept of ownership is contentious. Undisputedly, the land is a natural gift; therefore, no one can claim absolute ownership of land. Ownership may also be referred to as acquisition. Ownership involves the enjoyment of several rights over the property i.e. the right of alienation and disposal

### **2.1.4 Customary Law Concept of Trust**

Under the Customary land tenure system in the Southwest, it is a notorious fact that the family head and the principal members of the family holds the family property in trust for themselves and other members of the family. It is against this backdrop that the concept of trust under the customary law shall be explained.

Yerokun<sup>54</sup> explains that some of our customary laws had some resemblance to the trust concept and it is in the liability of the family or the community head, the family as a corporate body in such instance is vested with the title of the property while the family head holds same for the members of the family as a trustee who has the power to administer the property and in the case of Amodu

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<sup>54</sup> Op. cit. p. 404

Tijani v. Secretary of Southern States,<sup>55</sup> Viscount Haldane described the status of family head as follows:

*He is to some extent in the position of a trustee and as such holds the land for the use of ... the family*

Also, in Kuma v. Kuma<sup>56</sup>, the West African Court of Appeal described the family head as a trustee in determining whether the family head should be held liable for management of the family property, the court held that as a result of his fiduciary position, he was required to account for the management of the property. However, Smith<sup>57</sup> opined that it is misleading to suggest that the position of a family head under the customary law is stricto sensu that of a trustee under English law, the reason for this opinion is that the legal estate is vested in the trustee in English law while under customary law, legal estate is vested in the family while the head of family does not have beyond usufruct for life.<sup>58</sup> In the same vein, Smith<sup>59</sup> proceeds to state that a trustee is not liable for debts incurred on behalf of the trust property but a family head must obtain the consent of the family before embarking upon the expenditure of money to be charged upon the interest of the family as seen in Aralawon v. Aromire.<sup>60</sup> Meanwhile, despite the differences pointed out, it can be stated that the family head occupies the position of a trustee in certain respects.<sup>61</sup> Also, the remedies available to a beneficiary are also available to members of the family where the head has misused his fiduciary position, he may be removed, the members can also seek an order for the partition of the property.<sup>62</sup> From the discussion above, it will be apt to refer to the opinion of Fabunmi<sup>63</sup> where he stated that the comparison between the family head and a trustee broke down at some point which is evident

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<sup>55</sup> Ibid.P.69

<sup>56</sup> (1938)5 WACA 4

<sup>58</sup> See Oba Adenle v. Oyegbade (1967) NMLR 136 at 137; Olohunkun v. Teniola (1991) 5 NWLR (pt. 192)501 at513.

<sup>59</sup> Smith Op. Cit.p.69

<sup>60</sup> 15 NLR 90

<sup>61</sup> See *Balogun v. Balogun* (1935)2 WACA 290; *Kosoko v. Kosoko* [1937] 13 NL 131; *Archibong v. Archibong* [1947]18 NLR 117; *Ozoma v. Ozoma* [1965] NMLR 88

<sup>62</sup> See *Lopez v. Lopez* (1924) 5 NLR 50 at 54

<sup>63</sup> *Fabunmi Op. Cit.* P. 200

that the two institutions are products of two different legal systems and cannot be put in the same compartment.

Meanwhile, under the Land Use Act, the ownership of land was expropriated from the original owners (community, village and individuals) and was vested in the governor of each state who now holds the land in trust for Nigerians who intend to acquire an interest in the property. However, the right to use and enjoy land is still given to citizens, but no individual can claim an allodia title over land.<sup>64</sup> To make the above policy of expropriation effective, the land use Act provides for "right of Occupancy"<sup>65</sup> which gives the holder a mere right of possession and not ownership.<sup>66</sup> Under the land use act, the government makes all lands available for the benefits of Nigerians, the governor of a state is a trustee of all lands and Nigerians are left with equitable interest in the land and are beneficial owners.<sup>67</sup> More so, the Land Use Act conferred government with powers and control over land acquisition in Nigeria. Thus, Section 1 of the Act provides that:

*Subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.<sup>68</sup> From the foregoing provisions of the Act it can be established that right of occupancy is subject to the control and management of the government be it local or state government.<sup>69</sup>*

Hence, two types of occupancies are provided for namely: Statutory Right of Occupancy (SRO) and Customary Rights of Occupancy (CRO).<sup>70</sup> A Right of Occupancy however was not defined under the Act, but some authors<sup>71</sup> and judicial decisions<sup>72</sup> have linked it to a lease. Omotola<sup>73</sup>

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<sup>64</sup> Ibid, section 5 (1); see also, Ezeananah v. Attah (2004) All FWLR (Pt.202)1858 at P.1884

<sup>65</sup> M.O. Onwuamaegbu, Nigerian Land Law, (London: Sweet & Maxwell, 1966) p.216208.

<sup>66</sup> Ibid 210-211

<sup>67</sup> See Abioye v. Yakubu (1991)5 NWLR (pt.190)130

<sup>68</sup> See generally Section I of the Land use Act cap L5 L.F.N 2004.

<sup>69</sup> Sections 1(2), 5 and 6 ibid

<sup>70</sup> Ibid

<sup>71</sup> T.O. Elias, (1971) Nigerian Land Law and Custom. London: Sweet & Maxwell,1971)284.

<sup>72</sup> Director of Lands v. Sohan (1952)1 TLR 631, Henvinchsorft v. Dodd (1960) EAR 631

<sup>73</sup> Omotola Op.Cit.P.24

opined that a Right of Occupancy was a hybrid form of right, something between a personal and proprietary right. He however viewed that there was nothing wrong in the right being a new form of right as the categories of rights over land and need not be closed. A right of Occupancy was defined by Justice I.A. Umezululike<sup>74</sup> as the right to use and occupy land in accordance with the terms and tenure set forth by the state within the provisions of the Act.

The right of occupancy is evidenced in a Certificate of Occupancy (C of O) issued by a competent authority and raises the fact that the holder is in exclusive possession of the land, the specific features of the Act are:

- i. The act vests in each governor, the power to hold and administer the land
- ii. It empowers the governor to grant a right of occupancy and easement appurtenant thereto for an agreed period
- iii. It empowers the governor to plan the use of the land
- iv. It prohibits the alienation of the right on the land by way of transfer of possession, assignment, mortgage, sub lease without the consent of the governor first had and obtained
- v. It allows the revocation of a person's right to occupy the land on the ground of public interest subject to compensation.<sup>75</sup>

It can therefore, be stated that the right of a holder of right of occupancy cannot in anyway be compared to ownership since the owner of a property is the alpha and omega of same and he can do anything to improve or even destroy the property.<sup>76</sup> However, the holder of a right of occupancy cannot use the land in contravention of the covenants attached to the grant. More relevantly, the holder of the grant cannot alienate his right in the property or any part thereof, without the requisite consent required by the Land Use

Act, the Act stipulates that those rights granted to holders can only be alienated when governor's consent is first had and obtained.<sup>77</sup> And failure to secure that consent may render any transaction or alienation null and void.<sup>78</sup> Summarily, it can therefore, be

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<sup>74</sup> I.A. Umezululike, *The Land use Act, More Than Two Decades After, And Problems of Adaptive Strategies of Implementation*, Snapp Press Ltd Enugu (2004) 45.

<sup>75</sup> O. Yerokun, *Case Book on Land Law*, (Lagos: Nigeria Revenue Project Publication, 2006), 385.

<sup>76</sup> See Niki Tobi in *Abraham v. Olorunfemi* (1990) 1 NWLR (Pt.165) 53.

<sup>77</sup> See generally s.22 of the Land Use Act cap L5 LFN 2004.

<sup>78</sup> S.26 *ibid*

stated that the Land Use Act creates a special kind of trustee in the governor and holds a fiduciary relationship that renders him accountable for his actions and in-actions<sup>79</sup>

### **2.1.5 Concept of Customary Law**

The concept of customary becomes necessary for discussion in this sense due to the fact that the bulk of intestate succession is found in customary law subjects. Generally speaking, there is no universal or conclusive definition of customary law. Thus, various writers and judicial authorities have used different terms such as "native law and custom", and local law" interchangeably to refer to this class of laws.<sup>80</sup> Customary law has been described as "a body of customs and traditions, which regulate the various kinds of relationship between members of the community in their traditional settings"<sup>81</sup>

Customary or traditional law simply means the indigenous law of the people. It is a body of customs, norms and traditions that regulate and regularizes the relationship between members of the community. Obilade defines "custom" as a language of human interaction<sup>82</sup>. Customary law is derived from the word 'custom'; that is, unwritten law established by custom. But it is worthy of note that some European writers before now have fallen into error by thinking that African population that existed before the advent of British colonialists have no law either written or unwritten binding and enforceable among them unlike the law which judges of higher courts and magistrates of European model usually apply in the settlement of minor or major disputes. It was therefore assumed by the colonialists that no system of law existed in Africa. However, this view was criticized by Elias who posited that a human society is not necessarily in a state of nature merely because it lacks a sovereign commander, an army or uniformed policeman

and imposing prison"<sup>83</sup> as long as they have rules that regulate their relationship or interactions.<sup>84</sup>

At this juncture, we consider the judicial and statutory definitions of Customary Law. In the case of *Oyewumi v Ogunesan*,<sup>85</sup> Obaseki JSC, defines it as the organic or living law of the indigenous people

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<sup>79</sup> Fabunmi Op. cit. p.202

<sup>80</sup> J.O. Asein, *Introduction to Nigerian Legal System*, (2nd edition, Lagos: Ababa Press Ltd, 2005) P.114

<sup>81</sup> Ibid.

<sup>82</sup> O.A. Obilade, the place of Customary Law in our Lega System, being a paper delivered at Cultural Extravaganza of the Law Society, Lagos: University of Lagos 1996) p 1.

<sup>83</sup> Mosley & Whitley's (1988), *Law Dictionary*, 10th Tenth edition, London: E R Handy Butterworth, P.123.

<sup>84</sup> Tobi N (1996). *Sources of Nigerian Law*, Lagos: MIJ Professional Publishers, P. 130.

<sup>83</sup> (1990)3 NWLR pt 317; Ademola A Taiwo, "Doctrine of Estate Administration under Africa Customary Law", Ap164

Proceeding of International Conference on Humanities, Science and Sustainable Development, (6)5, July 28-31, 2014)

of Nigeria regulating their lives and transactions. It is organic, in that, it is not static. It is regulatory because it controls the lives and transactions of the community subject to it<sup>86</sup>. It is said that custom is the mirror of the culture of the people. These set of laws are not promulgated by any competent legislature in Nigeria; yet they are enforceable and binding within Nigeria and between the parties subject to its sway.<sup>87</sup>

Section 258 of the Evidence Act did not define the term customary law but it defines the word, custom as a rule which, in a particular district, has from long usage, obtained the force of law<sup>88</sup> Section 16(1)<sup>89</sup> therefore, provides that "a custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence". In the same vein, Customary Court Law of Anambra State defined customary law as: "A rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage which is appropriate and applicable to any particular cause, matter, dispute, issue or question"<sup>90</sup>

Asein<sup>91</sup> rightly states that for centuries, customary law has regulated virtually all kinds of relationships and notwithstanding the abrasive influence of received law and local legislation, it still serves the needs of ordinary citizens especially in the area of personal law including marriage, succession and property rights. However, its earlier application

in the field of criminal law has been abolished by virtue of Section 36 (12) of the Constitution<sup>92</sup> which provides that

*A person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law*<sup>93</sup>

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<sup>86</sup> [1990]3 N.W.L.R. 182 at 207 See also, *Aku v. Aneku* (1991) 18 NWLR (pt. 209)280.

<sup>87</sup> See *Zaydan v. Mohosen* (1973) 1 F.S.C. 1.

<sup>88</sup> Evidence Act,2011.

<sup>68</sup> Ibid.

<sup>90</sup> Customary Courts Law Cap 49, Revised Laws of Anambra State of Nigeria (1979) 51; This characteristic was alluded in *Oyewumi Agunbiade III v Ogunesan* (1990)3 NWLR 182@207.

<sup>91</sup> Asein, Op. cit. p. 115.

<sup>92</sup> CFRN,1999.

<sup>93</sup> A written law referred to her means an Act of the National Assembly, a state law, subsidiary legislation, or instrument under the provision of a law.

### **2.1.5.1 African Customary Law**

The basis of African conception of law is the same, though, the goal and objective they seek to achieve varies from one society to the other. Driberg, and Elias were unanimous in their view that law in African societies served the purposes of maintaining social equilibrium. Therefore, when a crime or tort is committed, it is the primary function of the law in African legal thought to restore social equilibrium. It is this particular feature that determines the measure of punishment under African law.

Driberg<sup>94</sup> argued that African law is not penal or vindictive. This is because it is based on the maintenance of social equilibrium. The penalty is for restoration of the status quo and that the penalty was not directed toward specific commission of a particular infraction of law. He was of the opinion that since the administration of justice was conterminous with peace keeping, the trial of criminal offences was not altogether devoid of consideration of peacekeeping and interpersonal relations.

The principle of collective responsibility is another key feature of African law. It is the consensus among the authors that the principle of collective responsibility assists a great deal in the prevention of crime and the eventual maintenance and restoration of social

equilibrium. Driberg<sup>95</sup> concluded that law in African conception is effective in its operation among the same cultural background and that those people who do not belong to a particular culture may not be protected by the law of such a culture.

Olaoba<sup>96</sup> referring to Driberg's view on Mbiti's perspective on religious belief that the individual should not preach his religion to people of different belief. Also maintains that an individual does not necessarily become a foreigner outside his country as there are three factors that could bring a non-member of a culture under the same communal cultural law by way of intermarriage, and submission.

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<sup>94</sup> J.H. Driberg J.H, The Concept of Law, The Journal of Corporate Legislation and International Law, Folume 16(3), (1955) pp 233-237.

<sup>95</sup> Ibid.

<sup>96</sup> Olaoba supra p.24.

Views of scholars vary as regarding the very existence of law in Africa. Surely, law exists in African societies. This is shown in Elias<sup>97</sup> definition of what is law in Africa perspective? That, "Law is the body of rules which are recognized as obligatory by members of a given community". Allot<sup>98</sup> advised scholars on African law to engage in a detached study of the nature of African indigenous jurisprudence. It is unfortunate that some European writers jumped to the conclusion that, the absence of prison to house criminals and Police Stations and security structures of western types in African societies, therefore, law as understood by them does not exist in African societies. Olaoba<sup>99</sup>, in his argument debunked the sweeping statement that regulation and enforcement of law is not attached to all these African legal rules. He added that there are other agencies that facilitated the administration of law in African societies. These include the secret societies and age-grade. For instance, '*elegbe*', '*egbe odo*' '*Ilari* in Oyo', '*Oodi* in Ijebu land, '*the Emese* in Ile-Ife, Ekiti and Ijesa' perform the functions similar to the police in European world. Adewoye<sup>100</sup> enumerated the functions of these groups and town criers of palaces to include: investigate crimes, arrest offenders and procure accused to appear in the Chief's Court. This group served as 'Police Officers Club in Yorubaland'.

Oyewo<sup>101</sup> emphasized the principles of social contract as a necessity in human peaceful co-existence and he maintains that living together is not only a social necessity but a 'social contract.' As a result, there is the need for a common code of conduct, which individual member has to observe and the breach of which will be resisted and visited with severe sanction.

### **2.1.5.2 Applicability of Customary Law in Nigeria**

It is important to state here that the existence of a custom is not an automatic admissibility of the custom. Any custom alleged to exist will only be admissible when it passes the tests known as the

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<sup>97</sup> Elias supra p 63.

<sup>98</sup> A.N. Allotts, (1960), *Essays in African Law*, London: Butterworth, pp 345-351.

<sup>99</sup> Olaoba supra p 25.

<sup>100</sup> S. Adewoye (1979), *The Judiciary System in Southern Nigeria*, (London: Sweet & Maxwell, 123)

<sup>101</sup> T.O. Oyewo, *African Customary Law in Comparative Milieu and Related Topics*, (Ibadan: Jator Publishing Co.2003) p8.

validity tests of customary law. This validity test can be seen in the provision of Section 34 of the High Court Law of Northern Nigeria, 1963<sup>102</sup> which provides as follows

The high court shall observe and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, or incompatible either directly or by implication with any law for the time being in force...

Similarly, Section 18 (3) of the Evidence Act, 2011 provides that no custom relied upon shall be forced if it is contrary to public policy or is not in accordance with natural justice, equity and good conscience. The three validity tests can therefore be presented below.

- a. It must not be repugnant to natural justice, good conscience and equity
- b. It must not be incompatible with any law for the time being in force in Nigeria
- c. It must not be against public policy.<sup>103</sup>

## THE REPUGNANCY DOCTRINE

For a custom to be valid, it must not be repugnant to natural justice, good conscience and equity. The word good conscience may be likened to customs which are not barbaric in nature. When a custom does not permit the economics, social and political growth of the people, it is equity as held in *Akpalakpa v. Igboibo*.<sup>104</sup> The court has then further stated that the court established by the British government have the power to enforce the native laws so long as they are not barbarous as held in *Laoye v. Oyetunde*.<sup>105</sup> Thus, the term "natural justice" has to do with the normal rule of natural justice. Thus, the court will declare any custom which does not give room for hearing as repugnant to natural justice. In *Guri v. Hadeija Native authority (1959) 4. F.S.C.44*. The court pronounced as invalid an Islamic law which deprived accused persons standing trial for high way robbery, the right to defend themselves.

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<sup>102</sup> See also, the provisions of Section 26, High Court Law of Lagos, Cap 65, Laws of Lagos State, 1973; Section 22. Eastern Nigeria High Court Law, Cap 61, 1963.<sup>103</sup>

<sup>103</sup> Asein Op. Cit. p. 129

<sup>104</sup> (1996) 8 NWLR 533

<sup>105</sup> (1944) AC 170.

Equity on its own refers to fairness and what is just. Therefore, the court has invalidated rules of custom that discriminate mostly on inheritance matters. Thus, in *Dawodu v. Damonle*,<sup>106</sup> the court rejected the Yoruba custom of *idi igi* which provides that the property of a deceased should be shared within his children based on the wives he has and approved the *ori ojori* custom which shares the property equally among the children without using the wives as the basis of distribution. Also, in *Mojekwu v. Mojekwu*.<sup>107</sup> The court rejected a Nnewi custom that discriminated against women in inheritance. Niki Tobi JCA (as he then was) stated that "it is the monopoly of God to determine the sex of a baby and not the parent.

The term "good conscience" may accommodate all other test as it is an open term. Thus, in *Edet v. Essien*,<sup>108</sup> the court rejected a custom that gives a child fathered by another man

to the previous husband of its mother merely because the dowry he paid has not been returned. In *Maryama v. Sadiku Ejo*,<sup>109</sup> the court rejected an Igbira custom which gave a child born within ten months of divorce to her former husband on the ground that it is repugnant to good conscience. The court also nullified a custom which has to do with inheritance of slave trade in *Re Effiong Okon Ata*<sup>110</sup> as slave trade is against good conscience. Meanwhile, the court in *Agidigbi v. Agidigbi*<sup>111</sup> held that the Benin custom which gave the permanent house of a deceased person to his eldest son (igi ogbe) is not repugnant to natural justice, good conscience and equity.

### THE INCOMPATIBILITY TEST

*S. 13(1)*,<sup>112</sup> provides that rules of customary law must not be incompatible with any written law in force, its counterpart in Cross river state High court law uses the phrase "with any law". Both laws mean laws that operate within Nigeria. Thus, it can be said that these laws in force will include the constitution and other enactments. Earlier on, *S.20, 1914* supreme court ordinance had provided that custom any law must not be incompatible with any local enactment while the *S. 17 of 1943* supreme court ordinance changed it from "any local enactment" to "any law", the implication of the 1943 ordinance is that even non-local enactment would debase customary law. However, the

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<sup>106</sup> (1958) 3 F.S.C. 46.

<sup>107</sup> (1997) 7 NWLR 28.

<sup>108</sup> (1932) 11 NLR 47.

<sup>109</sup> (1961) N.R.N.L.R. 81.

<sup>110</sup> (1930) 10 N.L.R. 65.

<sup>111</sup> [1992] 2 NWLR (PT-221) 98.

<sup>112</sup> *Oyo State High Court Law Cap 46*.

applicable laws as regards this aspect of laws will be the state high courts law. Thus, the court in *Agbai V. Okogbue*<sup>113</sup> nullified a custom that forces a person to belong to an association on the ground that it offends certain provisions of the constitution.

### PUBLIC POLICY TEST

The third requirement in the applicability of customary law is the test of public policy. *S. 18(3)* Evidence Act, 2011 provide that no custom relied upon shall be enforced if it is contrary to public policy. Thus, public policy requires what is right according to the

social value of a country. In *Meribe v. Egbu*<sup>114</sup>, the court refused to enforce a custom that permitted a marriage between two women on the ground that it is contrary to public policy. Also, in *Alake v. Pratt*<sup>115</sup>, the court that rejected a custom that places illegitimate children on the same level with legitimate children in inheritance. Meanwhile, In *Olulode V. Oviolu*,<sup>116</sup> the learned judge confirmed the principle enunciated in a long line of decisions that there is no issue of illegitimacy in Nigeria once the father has accepted the paternity of the child. Also, it must be stated that the concept of illegitimacy has no place again in Nigerian law. Thus, it will be important to refer to the provision of Section 42 of the Constitution

*"A citizen of Nigeria of a particular community, ethnic group, place or origin, sex, religion, political opinion shall not, by reason only that he is such a person: (a) be subjected either expressly by or in the practical application of any law in forces in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places or origin, sex, religion or political opinion are not made subject".*

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<sup>113</sup> [1991] 7 NWLR. 391.

<sup>114</sup> (1976) 3.S.C. 23.

<sup>115</sup> (1955) W.A.C.A. 20.

<sup>116</sup> Unreported, High Court of Lagos State, Ikeja Judicial Division, 27<sup>th</sup> Nov., 1981, Suit No M/133/81.126

### **2.1.6 The Concept of Family Property**

The term 'family land' has become too firmly enshrined in the Nigerian legal vocabulary to be lightly set aside and replaced by a more precise term. It is recognized by the High Courts, and to the Yoruba it is a literal translation of the vernacular *Ile Ebi*.<sup>117</sup> The concept of family in customary law of property is narrower than the general concept of family, *Carey J.in Coker v. Coker*,<sup>118</sup> stated that it is well established that the primary meaning of

the term family refers to children. To Smith,<sup>119</sup> for the purpose of land holding include the children of the deceased, family is a corporate body created upon the death of the founder holding an interest in land. It includes all his or her descendants in the male line (in the case of agnatic lineage) or in both male and female lines (in the case of agnatic descendant group). New members of the group belong to it by virtue of their birth and they accede to their rights at the time of their births. Membership of the family does not take cognizance of the extended family, hence, brothers, sisters, uncles, aunts; cousins of the founder of the property do not qualify as members,<sup>120</sup> except where by his own declarations, the founder himself enlarge the family to include the relatives. The widow of the founder (when he becomes deceased) is not a member of the husband's family, a grandchild, for the purpose of succession is not a member of the family unless where his parent who is the original member of the family is dead.<sup>121</sup> Generally, family includes the direct offshoot (children) of the founder,<sup>122</sup> both male and female children although, in some parts of the Ibo societies, female children are not entitled to inherit their fathers.<sup>123</sup> Meanwhile, Smith<sup>124</sup> explains five ways by which a family property can be created; declaration *inter vivos*, purchase of land with family fund, declaration in a will, conveyance and intestacy.<sup>125</sup>

To Taiwo,<sup>126</sup> family is defined as the body of persons who live in one house or under one head, including parents and their children, whether living together or not; in wider sense, all those who are connected by blood or affinity, those descendants claiming descent from a common ancestor,

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<sup>117</sup> Lloyd, P.C. (1962), Yoruba land law London: oxford University press London.

<sup>118</sup> (1983)13 NLR 83 at 85.

<sup>119</sup> Op. Cit. P. 64.

<sup>120</sup> See Suberu v. Sunmonu (1957) 2 FSC 33.

<sup>121</sup> See Lewis v. Bankole (1908) 1 NLR 82.

<sup>123</sup> See Lopez v. Lopez (1924)5 NLR 26; although, the said custom has been held to be repugnant to equity and also against the right to freedom from discrimination contained in the constitution.

<sup>124</sup> Op. cit. p.65.

<sup>125</sup> See also Olowosago v. Alh. Adebajo [1988] 4 NWLR (PT 88) 275.

<sup>126</sup> See Taiwo A (2011), The Nigeria Land Law, Ibadan: Ababa Press. P. 158.

house or kindred linkage. Taiwo<sup>127</sup> further explains that family property can be create by operation of law where the landowner who is subject to a customary law dies intestate, his acquired property devolves on his children as family property in accordance with the

applicable customary law rules or where it stated in a will, he explains also that the second way by which a family property maybe created is by act of the parties such as in the case of first settlement on a virgin land,<sup>128</sup> or by way of conquest, purchase and gift. Meanwhile, the definition advanced by Woodman captures the term absolutely, he defines family as a group of persons lineally descended from a common ancestor exclusively through males (in communities called patrilineal for this reason) or exclusively through females starting from them other of such ancestor, (in communities called matrilineal for this reason) and which group succession to office and property is based on this relationship.<sup>129</sup> As encompassing as this definition seems, it will also be stated that case laws have established that even in the patrilineal customary law societies, the court will recognize the rights of female children to inherit property and even allow male children to inherit in the so-called matrilineal societies, the court has over the years recognized the rights of persons against discrimination in the law of inheritance. In *Mojekwu v. Mojekwu*,<sup>130</sup> the deceased owner had two females surviving him, his male nephews claimed to be entitled to his estate. The Court of Appeal (per Tobi J.C.A.) rejected the view that the case was governed by Nnewi Customary Law but added that even if this were so, such a customary law which discriminated against women, would not be enforced as it would be repugnant to natural justice, equity and good conscience. According to his lordship: -

*Day after day, month after month and year after year, we hear of and read about customs which discriminate against the women folk in the country. They are regarded as inferior to the men folk. Why should this be so. All human beings male and female are born into a free world and are expected to participate freely without any inhibition on grounds of sex. Apart from being unconstitutional, it is an antithesis to the society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to*

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<sup>127</sup> *Ibid.*, p.161.

<sup>128</sup> See *Ekpo v. Ita* 11 NLR 68; *Idundun v. Okumagba* (1976) NMLR 200.

<sup>129</sup> See G.R. Woodman, *Customary Land Law of the Ghanaian*, (Accra: Ghana University Press, 1996), 218

<sup>130</sup> (1997) 7 NWLR (pt 512) 283.

*Beijing to know that some of our customs including the Nnewi "Oli-ekpe" custom relied upon by the appellant are not consistent with our civilized world in which we live today...on my part, I have no difficulty in holding that the oli-ekpe custom of Nnewi is repugnant to natural justice, equity and good conscience. The oli-ekpe custom is one of such customs as it permits the son of a brother of the deceased person to inherit the property of the deceased to the exclusion of the deceased's female children*

## **2.2 Theoretical Framework**

It is important to note that legal systems are very complex and a legal system cannot be totally explained by any single theory. As a result, this research applies interdisciplinary framework. Therefore, the following social legal approaches are discussed in this work.

### **2.2.1 The Historical Descriptive Theory**

The historical descriptive approach highlights a concern for law in action and the essence of harnessing techniques of sociological research. Sir Henry Maine was one of the proponents of this approach. He postulated theories of legal evolution under which law changes to reflect and facilitate social and cultural changes. It also seeks to find out the conditions or actual relationships that exists, opinions that held, processes that are going on, effects that are evident, or trends developing<sup>131</sup>. As a result of all these, the research engages in description and analysis to understand the past, present and determines the future. It is no wonder; the advocates of this theory see legal system as part of culture of a people. Hence, the historical-descriptive theory primarily performs three key functions, that is,

- i. To convert it or reduce it to questions relating to the proper descriptions of our practices,
- ii. To transform such questions into descriptions of the ways we actually act <sup>132</sup>.

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<sup>131</sup> Erugo S (2009), Distribution of intestate property under the customary law of the Ngwa people of Abia State, Nigeria, Unpublished Thesis submitted to the Institute of African Studies, University of Ibadan pp 37-39.

<sup>132</sup> ibid

This theory is therefore very relevant to this study particularly in the area of determining the state of law of distribution of estate in the Nigeria and event that made it conflictual in practice among the people. However, despite the relevance of this theory, it is still subjected to criticism. The theory much on historical perspective may not be too useful to solve the problem of choice of laws rule under the concept of succession.

### **2.2.2 The Comparative Theory**

The comparative approach is a scientific or behavioral approach which allows for a comparative analysis of data. It is an important source of ideas both in law and the social sciences. This aspect of comparative theory makes the understanding of the phenomenon of the customary law rule of distribution of intestate estate amongst the natives of the indigenous places in Nigeria very relevant. The three major functions performed by this approach are:

- a. to suggest a suitable solution to a legal problem,
- b. to aid in assembling which principles applicable in the field concerned, are fundamental and which are secondary
- c. to throw doubt on the usefulness of strongly entrenched views.

As a socio-legal perspective, the work shows concern for identified rules in action and harnesses appropriate techniques to see how this law takes care of changing circumstances<sup>133</sup>.

It is trite to further note that these approaches will serve as the tools for organizing concepts and theories, and one is able to describe, explain, and document the pattern of distribution of intestate estate under these laws.

One of the major criticisms of this approach is that it is not specific as to what the analysts are to compare. Apart from this, the theory is unrealistic and cannot achieve its set goals as propose by it proponents. There is no way a comparative analysis of a theory can helps solve the conflict of laws problems in a multi-cultural society like Nigeria.

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<sup>133</sup> ibid

### **2.2.3 Cultural Theory**

This is the theory that explores how cultures evolved by way of historical determinism. Gordon Marshall was one of the proponents of this theory. This approach has been applied to diverse attempt to conceptualize and understand the dynamics of culture. It also covers the interplay between race, ethnicity and culture and has also emerged as a central concern of contemporary cultural theory. It stresses the reflective assessment and critique of society and culture by applying knowledge from the social sciences and the humanities.<sup>134</sup> This theory is useful to describe the legal pluralism phenomenon in Nigeria. Though, it is not acceptable because it is not in tandem with the focus of this study. It was criticized further that, the explanation given by the coiners of the theory cannot solve the conflict of laws problem emanated from legal pluralism and choice of law rule. The empirical researchers are not overly impressed by cultural criticism theories because their justifications and conclusions depend on argument and debate rather than an empirical data.

However, the basic theories of choice of law within the context of legal pluralism include: Party Autonomy theory,<sup>135</sup> the Proper Law of Transaction theory,<sup>136</sup> the Choice of Alternative Remediestheory<sup>137</sup> and the Judicial Decision theory. From the four theories mentioned, the latter is the most

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<sup>134</sup> Taiwo, Op.cit. p.45

<sup>135</sup> The French Jurist De Moulin was the first to put forward theory of agreement of parties. See Weslake, A Treatise on Private International Law 7 edition (1925). The freedom of parties to a conduct or other transactions to determine which law shall regulate their respective rights and an obligation arising therefrom is recognized, though in various degrees, by all systems of conflict of laws. In a situation, where there is multiplicity of laws within a single jurisdiction, no rule of choice of law appears to us more suitable than that which gives judicial sanction to the choice made by the parties themselves. However, an unfettered freedom of contract will logically lead to permitting contract confusion. For instance, one can imagine a couple married under the Marriage Act agreeing between themselves to the Act. However, the objection against the doctrine of party autonomy in private international law does not arise in internal conflict of laws.

<sup>136</sup> this is derived from Morris "proper Law of Tort Theory" see Morris 64, Law Review 881. If the parties to a matter

would always endeavor to specify which law, they intend to govern their legal transaction or relationship and obligations; the task of the courts would be very easy. Surely, in most of the cases the litigants do not specify or give any indication. It is then the responsibility and duty of the court to ascertain their intention from the nature of the transaction. This theory is described as the process of the ascertainment of the "proper law" of transaction.

<sup>137</sup> This theory was proposed by Agbede. See Agbede Legal Pluralism at page 151. In a jurisdiction where different remedies obtain under the various laws, it should be open to a party whose right have been trampled upon to seek his remedy under whichever law suits him regardless of his race or creed. It is logical to think that where a non-native wife has been unlawful seduced, for instance, he should be able to sue under whichever system of law regardless of his cause of action. If it is considered undesirable that seduction or adultery should be actionable, the better thing to do is to abolish the rule that provide for such a course of action. It is absurd that the husband is right to claim compensation for adultery committed against his wife should depend on the nationality or racial origin of the adulterer or the nature of their marriage ceremony. This rule that permits this approach falls below civilized standard. It is not open to a party to obtain compensation for the same wrong under more than one system.

appropriate theory and relevant to this work. The researcher without hesitation applied the Judicial Decision theory.

#### **2.2.4 Judicial Justice Theory**

The most significant advance in modern science of law is the change from an analytical to a functional approach. On this approach, Friedman posited: "When, nationally as well as internally, the balance of forces was upset and self-satisfaction gave way to doubt and revolt, analytical positivism was bound to give way to a new preoccupation with social justices <sup>138</sup>.

This Judicial Justice <sup>139</sup> is evidenced in the land mark decisions in *Bangboye v. Daniel*<sup>140</sup>, *Coleman v. Shang*<sup>141</sup> and equally in *Alake v. Pratt*<sup>142</sup> where the right of inheritance of children whose legitimacy was derived from customary law were upheld<sup>143</sup>. For instance, *Alake v. Pratt* a child was born out of wedlock during the subsistence of a "Christian" marriage and yet the WACA upheld childly rights to share in the estate of the putative father, after it was proved that his paternity had been acknowledged-a fact which made him legitimate under the customary law. It must be noted that in *Smith v. Smith*<sup>144</sup> in an attempt to achieve judicial justice; the court based the choice of law rule on the "Manner of life" test.

The adoption of the doctrine of judicial justice as a principle of choice of law precludes mechanical application of legal rules. It ensures that the various law cooperate to bring about equal justice before the law regardless of race, creed or the arbitrariness that often

dictates the choice of court. It is for this reason that this approach is the one adopted in this work particularly for intestate succession.

The theory has the merit of allowing discretion to the court to achieve a just determination beyond the frontiers of strict legalism, but it suffers from the inherent defect as it gives no guidance as to how the discretion should be exercised. It provides for:

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<sup>138</sup> Friedman, Legal Theory (1960) p.243. For the present study it is desirable to label the approach as one of "Judicial Justice" as opposed to "Social Justice"

<sup>139</sup> This theory is a derivative from Cover's Principles of Preference or Result Selective. P 47; See also Harvard Law

Review pp 171, 190

<sup>140</sup> (1954) 14 W.A.C.A, 111

<sup>141</sup> (1961) A C 481

<sup>142</sup> (1955), 15 WACA 20

<sup>143</sup> The idea about "judicial justice" is a derivative from Cover's result selective approach which is concerned with justice of outcome.

<sup>144</sup> (1948) L J R 378

- i. Just solution though at the expense of certainty
- ii. Balancing the need for justice with the requirements of certainty
- iii. Ensuring equality of individuals before the law regardless of race or creed,
- iv. Promotion of convenience and the protection of reasonable expectation

The theory is concerned with treating like cases alike. For instance, if insult or adultery is an offence, this rule would impose the appropriate penalty on anyone found guilty of such offences regardless of their racial origin. However, where injustice is removed, the court will address its mind to the consequences of applying one particular system as against the other. Therefore, if the court foresees that application of one system of law will lead to injustice, then, that will be a sufficient reason for it to apply the other law. In *Savage v Macfoy*<sup>145</sup> where the application of English Law had the effect of invalidating a marriage contracted in good faith and without any known legal impediment such a result would have been avoided under this rule.

The court also obliges under this rule, to avoid an obviously unintended consequences arising from a formal interpretation of choice of law rules. Where two parties have, by agreement, indicated the applicable law but the court came to the conclusion that they have done so out of ignorance or in error the court would be able to, under the present rule, rectify the error and avoid injustice.

It may be impossible to determine all kinds of transactions under one particular system or the other system without leading to some hardship on either party. Therefore, if the court finds that it will be inappropriate to subject either in whole or in part, a particular transaction to any particular system exclusively, the court would be required under the rule of promoting convenience to achieve a determination without adhering to a specific system where such an approach would avoid this hardship. However, the court must satisfy itself that the said transaction is unmistakably hybrid and that it is not in the interest of the parties to determine the issue under a particular system. The hybrid characteristic refers to a situation where for instance, D enters C's land as a customary "kola" tenant, builds a house on the land and leases it (in English form) to E for a period of ten years. E who is not aware of the connection between C and D, commits adultery with C's wife. C now insists (legally under the customary law) that D must forfeit E's lease or have his own head-lease forfeited. It will be unhelpful to attempt a solution under the customary rule of tenancy or the English rules governing leases. The court may simply impose a reasonable fine on C instead

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<sup>145</sup> *Savage v Macfoy* (Ren 504)

of forfeiting the lease or denying C's customary right. To this extent, such decision appears to cause the least hardship on both parties <sup>146</sup>.

In addition, the court may adopt under this rule, a defense known to one system when a case is being decided under the other, if it is satisfied that to do otherwise may inflict unnecessary hardships on the defendant. To this end, the above rules are not intended to apply to the exclusion of the other. They must as a matter of fact, function complementarily. It is through this process that they can achieve the main objective of the science of choice of law which is primarily the protection of reasonable expectation of the parties. However, it is unfortunate that this theory cannot be used without recourse to other related theories. If not diligently apply by the courts in determining the issues brought by the parties, the objective of science of choice of law which is basically the protection of reasonable expectation of parties may not be achieved. Therefore, the weaknesses and the area of criticisms of the choice of law theories and other theories will be taken care of and avoided.

## 2.3 Historical Perspective of Land Tenure System in Nigeria

From time immemorial, it has been observed that Nigerian land tenure system has been in existence guiding how lands are allocated and alienated to individuals, corporate entities and families. This heading will consider the historical antecedent of land tenure since as follows:

- a. Land Tenure System Prior to Land Use Act
- b. Customary system of land tenure in Nigeria
- c. Customary Land tenure system in the Northern part of Nigeria
- d. Customary land tenure system in the Southern Part of Nigeria
- e. The Land Tenure Law of Northern Nigeria of 1962
- f. The Land Use Act of 1978

### 2.3.1 Land Tenure System Prior to the Land Use Act

At the beginning of the 20th century when Britain made a colony and protectorate of Nigeria, there was a multiplicity of land tenure systems in the country. This historical composition of the Nigerian

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<sup>146</sup> Agbede LO. Thesis p.268-67

society before the advent of the British is best captured by the Supreme Court in *Attorney General of the Federation v. Attorney General of Abia State and 36 ors*<sup>147</sup> where the court stated as follows:

*Until the advent of British colonial rule in what is now known as the Federal Republic of Nigeria...there existed at various times, various sovereign states known as emirates, kingdoms and empires made up of ethnic groups in Nigeria. Each was independent of the other with its mode of government indigenous to it...*

Apart from the system in the Lagos colony where an English freehold system had been established following its annexation in 1861, these diverse systems that existed across Nigeria were grouped broadly into two by Meek,<sup>148</sup> The first obtained in northern Nigeria where the colonial administration had placed all lands under the control and subject to the disposition of the Governor. This was on the basis that the Maliki Law operated by the Fulani over much of Hausa land in the 19th century confers on the colonial conquerors' rights to the land of the conquered. Without the consent of the Governor, no title to occupation and use of land was valid. An Ordinance of 1910<sup>149</sup> directed that the Governor shall hold and administer the land for the use and common benefit of the native peoples. Any native or native community lawfully using and occupying land in accordance with native law and custom enjoys a right of occupancy protected by the Ordinance and no rent is paid in respect of such rights. In the case of all other persons, no title is valid which has not been conferred by the Governor, who is empowered to grant rights of occupancy for definite or indefinite terms, to impose conditions and to charge a rent. The Ordinance lays down maxima of 1,200 acres for agricultural grants and 12,500 acres for grazing purposes. By contrast, in southern Nigeria, the second system recognised that land was owned by lineages or extended families. An attempt to explain this condition was made by *Viscount Halding in Amodu Tijani v. Secretary of Southern Nigeria*<sup>150</sup> where he held as follows:

*...The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief*

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<sup>147</sup> [2002] 6 NWLR (Pt.764) 264 at 640-941148

<sup>148</sup> See Meek C.K. (1957), *Land Tenure and Administration in Nigeria and the Cameroons*, London: HMSO, p. 43

<sup>149</sup> See the Land and Native Rights Proclamation (no.9) of 1910

<sup>150</sup> [1921]2 A.C.399

*or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner...This is a pure native custom along the whole length of this coast...*

Individuals have only right of use on such family land. Thus, Aina, Taiwo and Onakoya<sup>151</sup> rightly state that under the customary law, land was organized largely around the community and the family, this suffice to say that the alienation of same lies in the hands of the community and the family, the individual could rarely claim ownership of any part and could not alienate it without the consent of the family head or the community, land belonged to corporate bodies like the family, village, community and the members of these units are vested with *usufructory* rights to use and enjoy the property.

*At customary law, ownership of family land is vested in the past, existing and future members of the family. Thus, communal or family land belongs to all members of the... family and a member of the family who is a co-owner is therefore, not a stranger to any transaction purported to have been made in relation thereto*<sup>152</sup>

Oluyede,<sup>153</sup> much later puts this issue in perspective thus:

*Group ownership in African context is an unrestricted right of the individual in the group to run stock on what is held to be the common asset of land; the right of all in the group to claim support from the group's asset of land; the right of all in the group to claim support from the group's land and the tacit understanding that absolute ownership is vested in the community as a whole.*

In pre-colonial Nigeria, customary land tenure system was well-settled and structured, particularly among the Yorubas of the early centuries, the system and the structure were so well entrenched among the natives, that the initial British intervention was to expressly declared it be preserved.

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<sup>151</sup> A.A. Aina E.A. Taiwo and O.O. Onakoya, Land Administration and Economic Development in Nigeria, Law. *Democratization and Social Change*, Publication of the National Association of Law Teachers (NALT). (2012), 152.

<sup>152</sup> See *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt. 110) 417 at 444, Paras C-D

<sup>153</sup> P.O. Oluyede, *Modern Nigerian Land Law*, (Ibadan: Evans Bros, 1978), p.12

The Royal Charter (10 July 1887) granted to the National African Company by the British provides *inter alia* that:

*In the administration of justice by the company to the peoples of its territories, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class, or tribe, or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of lands.*

The only land held at the Governor's disposal was that which had been expressly acquired for public purposes as Crown land. The only control imposed by law on the lineages and other local land-holders was an obligation to seek the consent of Government when rights are being conveyed to aliens. This land tenure system of southern Nigeria created a number of problems for land management in the country. First, it encouraged the practice of multiple sales of the same land to different buyers by land-owning families in the absence of titling and appropriate registration mechanisms for transactions in land. Second, particularly after the nation's political independence, it led to tremendous land speculation and a sharp rise in the prices of land for urban and infrastructural development. Poor farming families were encouraged to part with their land for relatively small amount compared with what the speculators made from laying the land out for sale. This promoted increasing inequality in land ownership and increasing landlessness among the poorer segments of the population. Even after government had invoked its rights of eminent domain to compulsorily acquire and pay compensation for land for public purposes, the tendency grew for some owners of land to refuse to vacate their land. Based on the open system value of land which required cash compensation for land compulsorily acquired by government for public purposes, the increasing intervention of land speculators made the cost of acquisition to rise phenomenally. However, whether in northern or southern Nigeria, land was considered by the people themselves largely within the nexus of a pre-capitalist social formation. For such social formations, not only kinship but allegiance to a local sovereign determines man's relation to land. This is why in most Nigerian society, the position at the beginning of the 20th century was that land was not sold. To sell land to a stranger or migrant is to render the security of the

community concerned a hostage to fortune. Hence, when the colonialist came, everywhere he went he was told that there was no tradition of alienating land. Indeed, such was the situation that the British

Colonial Office had to set up a special Lands Committee to investigate the land tenure systems in all of its West African colonies in 1912 to confirm the general customary laws and practices with respect to land.

Yet, the extensive labor migrations that colonialism set in motion could not go on without land being alienated to strangers and migrants. Whether in the urban or rural areas, transactions in land gradually emerged in all parts of the country. Unlike in pre-capitalist society, such transactions also entailed the individualization of land. Such land remained in individual ownership until the demise of the owner when, through the inheritance law, it again became subject to multiple ownership claims. The introduction of perennial crops such as cocoa, rubber, planted oil palms, all of which meant fixed cultivation, replaced the transient traditional shifting cultivation under group control by an enduring right of individuals. By the same token, building a house in an urban area entailed establishing an enduring right on the particular plot of land. Thus, as the colonial era progressed, land alienation and sales not only grew in volume and geographical spread but also became the cause of considerable litigation and communal strife, often resulting in violent confrontation.

Meanwhile, it will be stated that by 1861, King Dosunmu of Lagos (13th in succession) signed a treaty dated 6th August, 1861 purportedly on behalf of himself and his chiefs, ceding to the British Crown "the port and island of Lagos with all the rights, profits and appurtenances whatsoever thereunto belonging"<sup>154</sup> Meanwhile, it is important to state the effect of the treaty on the nature of land rights in Lagos, in the first instance, from time immemorial, land in Lagos was never vested in the Oba of Lagos but rather vested in the white cap chiefs for their landholding families in Lagos<sup>155</sup> who could cede their rights to the king. However, the said treaty of cession could not validly cede anything since the king who signed the said treaty has no right to the said land and therefore,<sup>156</sup> could not cede same since it was never vested in him in the first place.<sup>157</sup> Subsequently, the system of Crown Grants was introduced in Lagos through the various Crown

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<sup>154</sup> See Smith I.O. (2013). Practical Approach to Law of Real Property in Nigeria, 2nd ed. Lagos: Ecowatch Publications Ltd.P.25.

<sup>155</sup> See T.O. Elias (2002), Nigerian Land Law, (4th ed, London: Sweet and Maxwell, 2002) p. 9.156

<sup>156</sup> See inter alia, Onisowo v. Attorney General of Southern Provinces (1912)2 NLR 77; Attorney general of Nigeria <sup>157</sup> v. John Holt and ors (1910) 2 NLR 1

Grant Laws 158with the aim of introducing English land tenure and individual ownership in Lagos, the effect of this is the introduction of the dualistic system of land tenure in Lagos.<sup>159</sup>

### **2.3.2 Customary System of Land Tenure in Nigeria**

In Nigeria and in fact, the whole of Africa, it is common knowledge that land is 'life and soul' of the communities hence, we describe Yoruba lands, Igbo lands, Edo lands, Ishan lands, Ijaw lands, Ashanti lands etc. The descriptions are often embodying the native laws and customary ways of the communities. This being so, lands also include, rivers and creeks. In Nigeria, it is generally accepted that land is the property of the family with the community as a corporate unit. In essence, land is the property of the living, the dead and the unborn members of the families and community by virtue of its transferability from generation to generation.

Although, there are basic rules of evidence applicable to land ownership in accordance with the prevailing natural laws of the location of the lands. In the south, historically, customary laws governed lands. In the north, Islamic laws regulated all landed properties. Section 16 and 18 of the Supreme Court ordinance of 1876 stated that Nigerian courts shall routinely recognise and safeguard the adherence of the rules of native laws and customs while adjudicating on land matters however, such native laws and customs must conform with natural justice, equity and goodconscience.<sup>160</sup> In the same vein, the Nigerian Evidence Act, 2011, at section 18(3) states inter alia:

*In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.*

The customary land tenure in Nigeria varies from the North and Southern parts of Nigeria, it can be examined under both headings.

### 2.3.3 Customary Tenure in the Northern Nigeria

The customary tenure in northern Nigeria suffered early disruptions by the Fulani jihadists, who introduced a kind of feudal tenure under which they claimed overlordship of the land after the

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<sup>158</sup> Crown Grants (Township of Lagos) Act No. 18 of 1947; The Arotas (Crown Grants) Acts No.19 of 1947: The Epetodo Land Act No. 20 of 1947 and the Glover Settlement Act No. 21 Of 1947

<sup>159</sup> See Smith Op. cit. p.27.

<sup>160</sup> Any evidence adduced from native laws and customs must undergo the repugnancy test. For example, in *Ukeje v. children from inheritance of their fathers' property* was void as it failed the basic repugnancy test and violated section

42(1) and (2) of the Nigeria Constitution, 1999 (as amended)

Islamic conquest.<sup>161</sup> Consequent upon the jihad, the Fulani took over all the lands in conformity with the Maliki school of Islam that stipulates that all lands that come into the hands of the faithful through conquest becomes *wakhf* that is, tied up immediately after conquest.<sup>162</sup> This concept of *wakhf* in Islamic law means that all land is vested in Allah such that no individual can claim radical title to it.<sup>163</sup> When the country became a colony of Britain, the colonial officials under the leadership of Lord Lugard, to whom land rights were ceded introduced a Public Lands Proclamation in 1902 which divided land in northern Nigeria into Crown land and Public land, they further introduced statutory regulation of land rights under the Lands and Native Rights Ordinances of 1910, as amended in 1916.<sup>164</sup> The 1916 Ordinance was also amended and substantially reenacted in the Land Tenure Law of 1962.<sup>165</sup>

This law declared certain lands in northern Nigeria as "native lands" and vested the management and control of these lands in the Minister (later Commissioner) for Lands and Survey to administer such lands for the use and common benefit of the natives.<sup>166</sup>

Section 6 of the 1962 law empowered the minister to grant rights of occupancy to natives. The consent and approval of the minister was also required for the occupation and enjoyment of land rights by non-natives.<sup>167</sup> Under this law, a non-native was defined as a person whose father was not a member of any tribe indigenous to northern Nigeria.

### 2.3.4 Customary Tenure in Southern Nigeria

Customary Tenure in southern Nigeria as regulated by customary law had its roots in the traditional conception of land. Traditionally, land had economic, social, political, and

religious significance. It was conceived of as a sacred institution given by God for the sustenance of all members of the community, and as such, it belonged to the dead, the living, and the unborn. Since the view was that the living merely held land as a kind of "ancestral trust" for the benefit of themselves and

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<sup>161</sup> The jihad (1804-1810) was led by Utman Dan Fodio and marked the beginning of the introduction of Islam into northern Nigeria.

<sup>162</sup> See F.H. Ruxton, (1916), Maliki Law, OUP cited in Smith I.O O. cit. p.28

<sup>163</sup> Ibid

<sup>164</sup> See T.O. Elias (2002), Nigerian Land Law, (4th ed. London: Sweet and Maxwell,2002) p. 9

<sup>165</sup> Ibid.

<sup>166</sup> I.O. Smith, Practical Approach to Law of Real Property in Nigeria, (2nd ed. Lagos: Ecowatch Publications Ltd. 2013), p.25.

<sup>167</sup> Ibid.

generations yet unborn, it was inconceivable for any individual to claim ownership of the land or part thereof or to sell it.

Indeed, testifying before the West African Lands Commission in 1908, Chief Elesi of Odogbulu, a traditional ruler, expounded the traditional conception of land thus:

*I conceive that land belongs to a vast family of which many are dead, few are living and countless members are still unborn.*

This group ownership of land seems to cut across the whole of the West African sub-region. In Nigeria, as in almost all of the former British colonies in West Africa, ownership of land in the accepted English sense is unknown. Land there is held under community ownership, and not, as a rule, by individuals. In the leading case of *Amodu Tijani v. Secretary of Southern Nigeria*, Viscount Haldane, delivering the opinion of the Privy Council, gave judicial impetus to the corporate ownership of land in southern Nigeria by adopting the following analysis of the indigenous system of land tenure:

*"The next fact which it is important to bear in mind in order to understand the native land law, is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual."*

This group ownership under the indigenous system gives rise to some distinctive features. All members of the group, community, village, or family have an equal right to the land,

but in every case the chief or headman of the group occupies a unique position in relation to the land. He has charge or control of it and, in a loose mode of speech, is sometimes called the owner. To some extent, he is in the position of a trustee, although not in the English law sense, and as such holds the land for the use of the group. Any member of the group who needs a piece of land for farming or residential purposes would go to the chief or headman for permission to use the land; but the land so given still remains the property of the group. Important disposition of land, however, cannot be made by the chief without consulting the elders of the group. For instance, the elders' consent must be given before a valid grant of the land can be made to a stranger. When such a grant is made, the stranger becomes the customary tenant of the group, giving rise to a very peculiar tenure under customary law, known as customary tenancy.

Under customary law of Southern Nigeria, land was considered to be held by its present owners in trust for future generations.<sup>168</sup> Thus, the Supreme Court in *Adejumo v. Ayantegbe*<sup>169</sup> stated that:

At customary law, ownership of... land is vested in the past, existing and future members of the family. Thus, communal...land belongs to all members of the society... and a member...

The idea that land is still considered the property of the original settler, and thus belonging to the past, present and the generation to come was held in the dissenting opinion of Chief Justice Kingdon in the supreme court in the case of *Balogun v. Oshodi*<sup>170</sup>;

*In passing I wish to refer to one point in connection with the question of changing law which should not be overlooked, I refer to the rights of future generations. Under native customary tenure an individual cannot alienate the land he occupies. Consequently, the rights of his descendants are safeguarded and cannot be realised by him...*

Elias also writes that there is perhaps no other principle more fundamental to indigenous land tenure system through Nigeria than the theory of inalienability".<sup>171</sup> Consequently, native law and custom do not recognize sale of land and the literature on this point is abundant.<sup>172</sup> This idea of indigenous land tenure system has been given judicial recognition in *Lewis v. Bankole*<sup>173</sup> where Osborne C.J. declared:

*it is perfectly well known that by strict ancient native law all property was family property and all real property was in alienable and it is equally well known that a very large portion of land upon which this town is built is now owned by individuals and that family ownership is gradually ceasing to exist.*

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<sup>168</sup> I.O. Smith, *The Land Use Act, Twenty Years After*, *University of Lagos Journal of Private and Property Law*, University of Lagos Press, Lagos (2003) p.200; *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt. 110)417 at 444

<sup>169</sup> *Supra*.

<sup>179</sup> *Balogun v. Oshodi* (1931)10 NLR 36 at p.58.

<sup>171</sup> Elias T.O. *Nigeria Land Law*, 4<sup>th</sup> Ed. (London: Sweet and Maxwell, 1971) p.147

<sup>172</sup> See Coker, *Family Property among Yorubas*, (London: Sweets and Maxwell.1966) p.40.

<sup>173</sup> *Lewis v. Bankole* (1908)1 NLR 82.

Smith observes that it is not clear whether what is meant, is that alienation was forbidden by positive rule of customary law or whether it was merely not the practice in earlier times.<sup>7</sup> Coker on the contrary explains that the notion of inalienability is said to be derived from a religious or magico-religious attitude towards the land regarded as a sacred trust of the living undertaking in memory of the dead.<sup>175</sup> Meanwhile, it is clear that no one member of the family has any disposable or attachable interest in the property, but the interest of all persons entitled at any one time to reside on the property are collectively exhaustive of the whole property. It follows, therefore, that in order to determine entirely family property by sale or alienation, the entire interest and absolute title must be disposed of, for it is not possible to sell one or the other of those interests.<sup>176</sup>

However, it is a well-known fact that under customary law, gift of land to close relations and friends is common. In addition to that, alienation of land may take the form of loan or borrowing, pledge and recently sale. So even though the above observations cannot be a justification for the origin of alienation in Nigeria, yet the consent principle has been the law and practice in alienation of family land. Meanwhile, the principle of alienation of land was practically introduced into Lagos State and the adjoining area, later to the entire southern Nigeria by the influx of slaves from Sierra Leone as well as European contact. Also, other factors such as the introduction of modern currency, cash crops, commercial and industrial developments, improved-communication system, the urge for urbanization, industrialization and globalization which western civilization brought forth, coupled with increased in pressure of population on the land led to the recognition of different transaction producing the grating, leasing, pledging, loaning and including the alienation of land.

### **2.3.5 Land Ownership in Nigeria since Independence**

Nigeria gained independence from colonial rule in 1960 and became a republic in 1963. After independence, private ownership of land by individuals, families and communities was the predominant land tenure system in the Southern States of Nigeria while all lands in the territory comprising the Northern States of Nigeria were regarded as owned by the state, based on the

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<sup>174</sup> Smith Op. Cit. p. 200.

<sup>175</sup> Coker Op. cit. p. 40

<sup>176</sup> Coker Op. cit. p. 40

<sup>177</sup> Smith Op. cit. p.200

provisions of the Land Tenure Law of 1962. Two principal legislations have been enacted to regulate land ownership in Nigeria since independence. These are: -

- i. The Land Tenure Law of Northern Nigeria of 1962
- i. The Land Use Act of 1978

#### **1.3.5.1 The Land Tenure Law of 1962**

This law contains the basic principles as those in the Land and Native Right Act of 1916. It was enacted to replace the Land and Native Rights Act of 1916. The land Tenure Law provided that all lands in each of the states in Northern Nigeria whether occupied or unoccupied are "native lands" and are placed under the control, and are subject to the disposition of the Minister responsible for land matters, who holds and administers them for the use and common benefits of the "natives", that is to say, persons whose fathers were members of any tribes indigenous to each state in Northern Nigeria. This means that all other persons who are not indigenous to each of such states are "non-natives". Under this law, no title to the occupation and use of any such lands by a non-native is valid without the Minister's consent. The natives of Northern Nigeria were granted right of occupancy to land for a limited number of years. For the purpose of the law, a right of occupancy means a title to the use and occupation of land and includes both customary and statutory right of occupancy. An occupier enjoys exclusive right to his land against all persons other than the Minister. He may, with the Minister's consent, sell, mortgage or transfer any lawful improvement on the land. Also, on the determination of a statutory right of occupancy, all the improvements on the land revert to or vest in the Minister without payment of any compensation to the holder. Alienation of a statutory right of occupancy is prohibited without the Minister's prior consent. The Land Tenure law of 1962 was repealed and replaced by the Land Use Decree (now Act) of 1978.

#### **2.3.5.2 The Land Use Act of 1978**

Land Use Act No. 6 of 1978 was promulgated into law with effect from 29th March, 1978 as the nation's land policy document. Since then, it has remained so in the country till date. To all intents and purposes, the Act regulates the ownership, alienation, acquisition, administration and management of land within the Federal Republic of Nigeria. Section 1 of the Land Use Act vests all land comprised in the territory of each state in the Federation of Nigeria in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act. Section 5(1) of the Act empowers the Governor of a state to grant statutory right of occupancy to any person for all purposes in respect of land, whether or not in an urban area and issue a certificate of occupancy in evidence of such right of occupancy in accordance with the provisions of Section 9(1) of

the Act. Also, Section 5(2) of the Act provides that "Upon the grant of a statutory right of occupancy under the provisions of sub-section (1) of this section, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished." Thus, the statutory right of occupancy granted by a Governor is presently the highest right to land in Nigeria. This right of occupancy is a right which allows the holder to use or occupy land to the exclusion of all other persons except the Governor and is granted for a maximum holding period of 99 years, subject to the payment of ground rent fixed by the Governor throughout the holding period. Sections 21 and 22 of the Act prohibit alienation, assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever customary or statutory rights of occupancy in Nigeria without the consent and approval of the Governor of the state where such right of occupancy was granted.

Under the Land Use Act, the ownership of land was expropriated from the original owners (community, village and individuals) and was vested in the governor of each state who now holds the land in trust for Nigerians who intend to acquire an interest in the property. However, the right to use and enjoy land is still given to citizens, but no individual can claim an allodial title overland.<sup>178</sup> To make the above policy of expropriation effective, the land use Act provides for "right of Occupancy"<sup>179</sup> which gives the holder a mere right of possession and not ownership.<sup>180</sup> Under the land use act, the government makes all lands available for the benefits of Nigerians, the governor of a state is a trustee of all lands and Nigerians are left with equitable interest in the land and are beneficial owners.<sup>181</sup> More so, the Land Use Act conferred government with powers and control over land acquisition in Nigeria. Thus, Section 1 of the Act provides that:

*Subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in*

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<sup>178</sup> Ibid, section 5(1); see also, *Ezeanah v. Attah* (2004) All FWLR (Pt.202)1858 at P.1884.

<sup>179</sup> Taiwo, A. op. cit. p.208.

<sup>180</sup> Ibid. 210 - 21

<sup>181</sup> See *Abioye v. Yakubu* (1991) 5 NWLR (pt.190)130.

*accordance with the provisions of this Act.<sup>182</sup> From the foregoing provisions of the Act it can be established that right of occupancy is or state government.<sup>183</sup>*

Hence, two types of occupancies are provided for namely: Statutory Right of Occupancy (SRO) and Customary Rights of Occupancy (CRO),<sup>184</sup> A Right of Occupancy however was not defined under the Act, but some authors<sup>185</sup> and judicial decisions<sup>186</sup> have link to lease. Omotola<sup>187</sup> opined that a Right of Occupancy was a hybrid form of right, something between a personal and proprietary right. He however viewed that there was nothing wrong in the right being a new form of right as the categories of rights over land and need not be closed. A right of Occupancy was defined by Justice I.A. Umezululike<sup>188</sup> as the right to use and occupy land in accordance with the terms and tenure set forth by the state within the provisions of the Act.

The right of occupancy is evidenced in a Certificate of Occupancy (C of O) issued by a competent authority and raises the fact that the holder is in exclusive possession of the land, the specific features of the Act are:

- ii. The act vests in each governor, the power to hold and administer the land
- iii. It empowers the governor to grant a right of occupancy and easement appurtenant thereto for an agreed period
- iv. It empowers the governor to plan the use of the land
- v. It prohibits the alienation of the right on the land by way of transfer of possession, assignment, mortgage, sub lease without the consent of the governor first had and obtained

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<sup>182</sup> See generally Section I of the Land use Act cap L5 L.F.N 2004.

<sup>183</sup> Sections 1(2), 5 and 6 *ibid*.

<sup>184</sup> *Ibid*.

<sup>185</sup> T.O. Elias, *Nigerian Land Law and Custom*, (London: Sweet & Maxwell, 1971) p. 284, M.O. Onwuamaegbu, *Nigeria Land Law*. (London: Sweet & Maxwell, 1966) p.216

<sup>186</sup> *Director of Lands v. Sohan* (1952) 1 TLR 631, *Henvinchsorft v. Dodd* (1960) EAR 631

<sup>187</sup> Omotola Op.Cit.P.24.

<sup>188</sup> I.A. Umezululike, *The Land use Act, More Than Two Decades After, And Problems of Adaptive Strategies of Implementation*, Snapp Press Ltd Enugu (2004) 45.

It allows the revocation of a person's right to occupy the land on the ground of public interest subject to compensation.<sup>189</sup>

It can therefore, be stated that the right of a holder of right of occupancy cannot in anyway be compared to ownership since the owner of a property is the alpha and omega of same and he can do anything to improve or even destroy the property.<sup>190</sup> However, the holder of a right of occupancy cannot use the land in contravention of the covenants attached to the grant. More relevantly, the holder of the grant cannot alienate his right in the property or any part thereof, without the requisite consent required by the Land Use Act, the Act stipulates that those rights granted to holders can only be alienated when governor's consent is first had and obtained.<sup>191</sup> And failure to secure that consent may render any transaction or alienation null and void.<sup>192</sup> Summarily, it can therefore, be stated that the Land Use Act creates a special kind of trustee in the governor and holds a fiduciary relationship that renders him accountable for his actions and in-actions <sup>193</sup>

### **2.3.6 The Land Use Act and Pre-Existing Land Tenure in Nigeria**

Although there is no provision in the Land Use Act of customary Land Tenure such system as an institution, there are different provisions of the Act testifying to such preservation so that today there is no doubt (either in theory or in practice) that the institution exist.

While section 1 of the Land Use Act swept away all the unlimited rights and interest of Nigerians with regards to their land and substitute the for limited rights in form of right of occupancy, the transitional provisions recognise and protect existing rights on land in the limited form. Section1<sup>194</sup> provides;

*Subject to the provision of this Act, all land comprised in the territory of each state in the federation are now vested in the Governor of that state and such land shall be held in trust and*

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<sup>189</sup> O. Yerokun (2016), Casebook on Land Law. Lagos: Nigerian Revenue Project Publications, 2016), p.385.

<sup>190</sup> See Niki Tobi in Abraham v. Olorunfemi (1990) 1 NWLR (Pt. 165) 53.

<sup>191</sup> See generally s.22 of the Land Use Act cap L5 LFN 2004.

<sup>192</sup> S.26 ibid.

<sup>193</sup> J.O. Fabunmi (2006), Equiry and Trusts in Nigeria, (2nd ed. Ile-ife: OAU press Ltd,2006), p.202.

<sup>194</sup> Land Use Act, Cap L5, LFN, 2004.

*Administered for the use and common benefit of all Nigerians in accordance with the provision of this Act.*

Also, the definition section makes allusions to that institution in different ways: for example, a customary right of occupancy is defined as;

*The right a person or a community lawfully using or occupying land in accordance with customary law...<sup>195</sup>*

The definition section also defines an occupier as;

*Any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-lessee or sub-under lessee of a holder<sup>196</sup>*

The effect of the forgoing provision is that the right of any person or community using or occupying land in accordance with native law and custom are preserved thought in a limited form of a right of occupancy under the Act.<sup>197</sup> It is the right of occupancy that the customary land owners enjoy or pass to third party upon alienation.

By virtue of section 24 of the Land Use Act, the devolution of right under the customary on the death of the holder of a right of occupancy is preserved thereby sustaining the concept of familyproperty.<sup>198</sup> In relation to alienation of customary right of occupancy, section 21 of the act provides as follows:

*It shall not be lawful for a holder of 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 case where the property is to be sold by or under the order of any court under the provisions of sheriffs and civil process law; or*

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<sup>195</sup> Ibid. Section 51.

<sup>196</sup> Ibid.

<sup>197</sup> Smith Op. cit. P. 37.

<sup>198</sup> Ibid.

*b) in other case without the approval of appropriate local government.*

The effect of the above provision is that in any transaction relating to land as mention in the section. the consent of the governor must be had and obtain or that of the appropriate local authority. However, under the Yoruba native law and custom, in addition to the above requirement is the consent of the head of the family or the principal members of the family which must be had and obtain for a valid alienation to be carried out.

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**CHAPTER THREE**  
**MANAGEMENT OF LAND UNDER THE CUSTOMARY LAND TENURE**  
**SYSTEM**

3.0 Introduction

In *Huebner v. A.I.E and P.M co*,<sup>199</sup> Aka'ahs JSC held that Land is of fundamental importance in the traditional Nigerian society and it is communally owned as family ownership exist side by side with communal ownership. Actual physical control of native lands is vested in the families and only in the sense that it is an aggregate of the constituent family groups could the community or tribe be said to own the land.<sup>200</sup> A corollary of this is that a member has no dismissible right in the property either during his lifetime or under his will,<sup>201</sup> this is so is further proved by the fact that, although the king or the chief is held among the Nigerians to be the head of the tribe or community yet has no powers by himself to sell or alienate the lands at his disposal. He is bound by native law and custom to allocate to several families for their own use, portions of such lands; in many cases he can also allocate to strangers' portions of the lands at his disposal, against the payment of tribute. In the same vein, since family property is vested in the family as a whole and ownership of the land is joint and indivisible so that it is impracticable for every member to be a part of the controlling nucleus, the administration of the property is vested in certain members of the family<sup>202</sup> Against this background, this chapter will look at the various processes involved in the management of land and its alienation in the southwest, Nigeria.

**3.1 Temporary and Permanent Alienation**

Alienation is a voluntary transfer of interest in the property to another. Thus, generally the easiest identifiable form of alienation is parting with possession where a new occupier takes over the land as its new owner. Hence, transfer like mortgage, lease, sublease and sub under lease etc are regarded as temporary alienation while transfer such as sale, assignment, gift, etc are regarded as

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<sup>199</sup> (2017) 14 NWLR (pt. 1586) p. 397 at 434, Paras A-C

<sup>200</sup> Smith LO (2013). *Practical Approach to Law of Real Property in Nigeria*, 2nd ed. Lagos: Ecowatch Publications Ltd.P.25.

<sup>201</sup> See Nelson D (2008), Real Property Management in Nigeria, International Journal of Law and Contemporary Studies, Vol. 3 (1) and (2). P.83

<sup>202</sup> See Smith Op. Cit. p.67

permanent alienation.<sup>203</sup> It is however worth noting that by the provisions of 21 and 22 put together with the effect of Section 26 of the Land Use Act, any alienation transferring any interest on any person without the consent of the Governor or the Local Government as the case may be is null and void.

### **3.2 Alienation under Customary Law**

The history of alienation of land can be traced back to customary land tenure system. This is because it was not the practice in the past to alienate land. For land was considered to be held by its present owners in trust for future generations,<sup>204</sup> Thus, the Supreme Court in *Adejumo v. Ayantegbe*<sup>205</sup> stated that:

*At customary law, ownership of...land is vested in the past, existing and future members of the family. Thus, communal...land belongs to all members of the society... and a member...*

The idea that land is still considered the property of the original settler, and thus belonging to the past, present and the generation to come was held in the dissenting opinion of Chief Justice Kingdon in the supreme court in the case of *Balogun v. Oshodi*<sup>206</sup>;

*In passing I wish to refer to one point in connection with the question of changing law which should not be overlooked, I refer to the rights of future generations. Under native customary tenure an individual cannot alienate the land he occupies. Consequently, the rights of his descendants are safeguarded and cannot be realised by him...*

Elias also writes that there is perhaps no other principle more fundamental to indigenous land tenure system through Nigeria than the theory of inalienability<sup>207</sup> Consequently, native law and custom do not recognize sale of land and the literature on this point is abundant.<sup>208</sup> This idea of

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<sup>203</sup> H.Z. Babaji, *Alienation of Right of Occupancy in Developing Economy: A Critical Analysis of the Provision of the Land Use Act No.6 of 1978*(unpublished LL.M thesis) Faculty of Law, Ahmadu Bello University, Zaria (2008) p.44.

<sup>204</sup> I.O Smith op. cit. p.200; *Adejumo v. Ayantegbe* (1989)3 NWLR (Pt. 110) 417 at 444

<sup>205</sup> *Supra*

<sup>206</sup> (1931.)10 NLR 36 at p.58

<sup>207</sup> T. Elias (1971) *Nigerian Law*, (4<sup>th</sup> Ed. London: Sweet and Maxwell, 1971), 147

<sup>208</sup> See Coker, *Family Property among Yorubas*, (London: Sweets and Maxwell, 1966). p.40

indigenous land tenure system has been given judicial recognition in *Lewis v. Bankole*<sup>209</sup> where Osborne C.J. declared:

*it is perfectly well known that by strict ancient native law all property was family property and all real property was inalienable and it is equally well known that a very large portion of land upon which this town is built is now owned by individuals and that family ownership is gradually ceasing to exists.*

Smith observes that it is not clear whether what is meant, is that alienation was forbidden by positive rule of customary law or whether it was merely not the practice in earlier times<sup>210</sup> Coker on the contrary explains that the notion of inalienability is said to be derived from a religious or magico-religious attitude towards the land regarded as a sacred trust of the living undertaking in memory of the dead.<sup>211</sup> Meanwhile, it is clear that no one member of the family has any disposable or attachable interest in the property, but the interest of all persons entitled at any one time to reside on the property are collectively exhaustive of the whole property. It follows, therefore, that in order to determine entirely family property by sale or alienation, the entire interest and absolute title must be dispose of, for it is not possible to sell one or the other of those interests.<sup>212</sup>

However, it is a well-known fact that under customary law, gift of land to closed relations and friends is common.<sup>213</sup> In addition to that, alienation of land may take the form of loan

or borrowing, pledge and recently sale. So even though the above observations cannot be a justification for the origin of alienation in Nigeria, yet the consent principle has been the law and practice in alienation of family land. Meanwhile, the principle of alienation of land was practically introduced into Lagos State and the adjoining area, later to the entire southern Nigeria by the influx of slaves from Sierra Leone as well as European contact. Also, other factors such as the introduction of modern currency, cash crops, commercial and industrial developments, improved-communication system, the urge for urbanization, industrialization and globalization which western civilization brought forth,

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<sup>209</sup> (1908) 1 NLR 82

<sup>210</sup> Smith Op. Cit. p.200

<sup>211</sup> Coker Op. cit. p.40

<sup>212</sup> Coker Op. cit. p.40

<sup>213</sup> Smith Op. cit. p.200

coupled with increased in pressure of population on the land led to the recognition of different transaction producing the grating, leasing, pledging, loaning and including the alienation of land.

### **3.3. Family Property**

Normally the head of the family is no more intelligent than the other members of the group. Nor is he necessarily more knowledgeable than them, though an older man may be more familiar with the customs of the people. It can therefore not be said that he alone can judge what is good for the family. Therefore, his extraordinary powers cannot be justified by his alleged superiority. And we agree that "the idea that the head of the family can do no wrong has now become archaic".

As a rule, the eldest male member of a family is its head and takes office automatically and without any ceremony upon the death of his predecessor, this was the position canvassed by Agbaje JSC in *Yussuf v. Dada*.<sup>214</sup> In some communities-the Yoruba, for example if the family is small and has a few segments, a woman may sometimes act as its if she has a strong personality, reside in the family house and is the eldest living member of the group.<sup>215</sup> The person to manage the family property, in Yoruba custom is normally the oldest male member of the family, whether he is the first born<sup>216</sup> or if the oldest or

first child is female and happens to be a strong and influential character or if there are no other male members of the family old or pushful enough to assert a claim to the headship, female child senior enough may be made head of the family.

Again, if a person constitutes family property out of his own self-acquired property, he may himself appoint the head of the family upon his death. In the case of *Inyang v. Ita*,<sup>217</sup> Berkeley J., who upheld the election, observes that this was an innovation—a departure from the custom according to which headship devolves on the eldest male member of the group. It is therefore clear that the head of the family does not owe his position to any special qualities. Indeed, he may often be the member least qualified to exercise such powers, for very often he is old and senile and 'with little or no ostensible means of livelihood'

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<sup>214</sup> (1990) LPELR-SC

<sup>215</sup> *Ibid.* P.83.

<sup>216</sup> *Lewis v. Bankole* (1909)1 N.L.R.81

<sup>217</sup> *Inyang v. Ita* (1929) 9 N.L.R.84

there is no legal principle upon which these powers of the family head can be based. It is hardly satisfactory to justify them by assertion that he is significant member of the family, significant in the sense that he enjoys certain peculiar right and privilege to which certain duties are correlative. It is true that he is the chief priest of the group and presides over the meetings of the family, which are usually held in his house. He allocates land for farming and other purposes, and receives any income, such as rent, tributes or compulsory acquisition money, from communal lands.<sup>218</sup> He also takes action necessary to protect family property against unlawful interference and to recover family lands from stranger-occupiers who are in breach of some condition of their occupancy.<sup>219</sup>

Although, all the above mentioned functions are not unimportant, yet it is submitted that they do not justify the power of alienation; for in exercising the other functions, the head is subject to the will of the group expressed at its meetings. He does not override the decision of the group. If he becomes unpopular, he may be ignored by the members and

may even be removed. The power of alienation cannot be supported by the trust concept. The head of the family is often referred to as a trustee of the family property. But if he is a trustee then the other members of the family are beneficiaries of the trust. One of the cardinal rules of the law of trust is that if the beneficiaries are “sui juris” and absolutely entitled to the trust property they call upon the trustee to execute a conveyance of the legal estate as they direct.

As the law stands neither the principal members nor the entire family is legally entitled to compel the head to convey family land. Nor can it be said that in attributing these far-reaching powers to the family head the courts are employing an historical method of inquiry, applying traditional rules of customary law.

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<sup>218</sup> Onakoya O.O., op. cit. p.235

<sup>219</sup> Ibid.

### **3.3.1 Accountability of the Family Head**

In what appears to be an exception to a general rule of male hegemonic claim to the family headship, it should not be supposed that the most senior male member of the family is invariably and inevitably the family head, because it is possible for the family by a unanimous resolution to decide for good cause who should be the family head. Since the question of accountability is inextricably interwoven with the status of trusteeship, the controversy attending the position of the Head of the family as a trustee of his powers under customary law is whether he is generally accountable to the family for the rents and profits derived from family property.

Before the Supreme Court decision in *Taiwo v. Dosunmu*, the idea of non-accountability had always shocked judicial conscience in Nigeria. The earliest reference to the subjects

in Nigeria was made in the case of *Re Hotonu* where Smith C.J held that the head of the family as an administrator was not liable to render a strict account to members but added that:

*I do not, however, think custom of the country just or equitable and should under no circumstances hesitate to give the direct countenance of this court to reckless waste of the resources of a family, as time advances it is to be hoped that other ideas will prevail more consonant with natural justice.*

In *Kosoko v. Kosoko*, the plaintiff claimed as against the defendants an order of the court for an account of all rents and menses profits of the family property which the defendants as trustees had managed for about forty years before the action was brought. It was found that the plaintiff who had no support of brothers and sisters in bringing the action had deliberately absented himself from the family meetings for over thirty years since he left Lagos. The court held on those grounds that the plaintiff could not on his return claim an account from the Head of the family.

### **3.3.2 Principal Members**

The other family members whose consent is required for a valid alienation include the principal members of the family. These are the important members of the family. For an extended family

for example, the principal member of that family will be the eldest old man from each family. These are persons whom the other members of the family respect, fear and obey.

### **3.3.3 Nature of Rights and Duties of Members on Family Property**

Rights are obligations owed to another that must be satisfied while duties are claims, power and privileges, immunity secured to a person by law. Where there is a right, there must be a corresponding duty attached. Every family member is entitled to make physical

use of the land. Rights of the members could be enforced against a family head and any other member of the family who without just cause deprive him of such rights, which are considered natural and inalienable. Meanwhile, a member has no right to occupy any portion of the family property except the one allocated to him for use but he has exclusive possession of the part allocated to him and can maintain an action in trespass against other members interfering with his possession. The Supreme Court in *Thomas v. Thomas*<sup>220</sup> enumerated the rights of individual members as follows:

1. The right of residence
2. Right to have reasonable ingress and egress
3. Right to have a voice in the management of the property
4. Right to have a share in any surplus of income
5. Right to seek for partition or sale of the family property
6. The right to protect the family property
7. The right to possession and physical use of the family land and;
8. Right to devolve interest in family property to offspring.<sup>221</sup>

#### **1. Right to Improve Family Property<sup>222</sup>**

It is important to state that the improvement on the family property is basically the duty of the family head that does so from proceeds of the family transactions, Meanwhile, there are situations where the family head may make such improvements from his personal means or any of the family members may do so. The question here is whether such improvement will give the family head or member who effected same, a special interest above every other person. Responsively, it will be stated that a property does not cease to be a family property only because a member has made

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<sup>220</sup> (1932)16 NLR 5

<sup>221</sup> See generally, Osamolu, S.A (2008), *Real Property Law and Conveyancing Practice in Nigeria*. Lagos: Lawlords Publications, pp.26-28 cited in Onakoya Op. cit, p.226. See

<sup>222</sup> Smith Op. cit, p.78.

improvement via his private means.<sup>223</sup> Another instance may occur where the improvement made on the property is in form of erecting a building or crops on the land, in this kind of instance, the West Africa Court of Appeal (WACA) stated in *Sateng v. Darkwa*<sup>224</sup> that such property does not become family property. However, in *Alao v. Ajani*,<sup>225</sup> where a member erected a structure on a family land and granted a tenancy lease

to strangers, it was held that such lease is invalid and the property does not cease to be a family property.

## **2. Right of Residence**

The right of a member to reside on the family property is one of the most fundamental incidents of family property. It has been observed that in the ancient times, when the Yorubas are predominantly farmers or engaging in farming-related activities, and urbanization at its lowest ebb, it was hardly conceivable that buildings were put up for other than residential purposes. It is important to note that no matter how rich a man is, in landed properties, farmlands, cattle e.t.c., such a man is not fulfilled and reckoned within the society where he failed to provide shelter or residence for his family.<sup>226</sup> The family was the unit of existence and it was customarily considered an anomaly if the members of the family could not live together or lack a common place of abode. The court in *Coker v. Coker*<sup>227</sup> described a family house as a "residence." It was asserted that it is beyond debate or rhetorics that such a place must be capable of residence by members of the family. The court held further thus:

*All his children are entitled to reside there with their mothers and his married sons with their wives and children. Also, a daughter who has left the house on marriage has a right to return to it or deserting or being deserted by her husband. It is only with the consent of all those who reside in the family house that it can be mortgaged or sold.*<sup>228</sup>

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<sup>223</sup> See *Bassey v. Cobham* (1924)24 NLR 92; *Shelle v. Ashajon* (1957)2 FSC 65 at 67

<sup>224</sup> (1940)6 WACA 52

<sup>225</sup> *Supra*

<sup>226</sup> *Ibid*

<sup>227</sup> *Supra*

<sup>228</sup> *Ibid*, p.86

## **3. Rights of ingress and egress**

The rights of ingress and egress of the family members were previously judicially accorded members residing in the family house, not for family members residing

elsewhere.<sup>229</sup> However, it was in the latter case of *Thomas v. Thomas*<sup>230</sup> that it was decided that resident members had a reasonable right of ingress and egress to the family house, and that, except for the purpose of attending family meetings or other business of the family, non-resident members had no such right.

#### **4. Right to have a voice in issue of management of family property**

The right to be consulted, which is to have a voice in the management of family property is also one of the most ancient rights incidentals to family property. The rationale for the existence of this right is not far-fetched. It is apparent without affecting the rights of its members. It is not only unlawful but also immoral to keep substantial dealings with the family properties from the family members, particularly the members residing in the property. It is, even the position of court that, in a bid to get an order of the court for the partition of family property, it is required that all interested members are before the court. Osborne C.J alludes to this position of native law in the celebrated case of *Lewis v. Bankole*<sup>231</sup> as follows:

*The right to be consulted is in my opinion fully established, but this does not mean that each individual grandchild is entitled to participate in the consultation; the evidence goes to show that there can only be one voice and vote for all the children of the deceased.*

It could be gleaned from the aforesaid that the right to be consulted in all dealings affecting the family property has its limitations. Limitations could possibly due to infancy, physical infirmity etc. This right has been loosely referred to in some of the judicial decisions as the "right of the principal members of the family to be consulted."

#### **5. Right to have a share in any surplus or income**

It is the right of every member to share of the family income, whether it is rent, proceeds from the farmland or gifts to the family. This is usually done by dividing the income amongst branches and

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<sup>229</sup> Per Osborne C.J. in *Lewis v. Bankole* (Supra)

<sup>230</sup> Supra

<sup>231</sup> Supra

it is further divided within each branch amongst all its members. Any member excluded has a right to demand his share.

#### **6. Right to seek for partition or sale of family property**

It is a basic right of a family member to request that family property either be partitioned or sold, depending on the circumstance. Partition generally takes place along the lines of cleavages in the descent group produced by the process of segmentation. The property may be divided into as many stripes as exist; or it may be partitioned to each individual member of the family. Generally, Yoruba customary law recognizes the right of a family member to ask for partition as a fundamental incident of family property. It appears that a convenient avoidance of frequent family bickering is to partition the family property with the attendant consequence of the beneficiaries becoming absolute owners of respective portions granted to them.<sup>849</sup> It is important to state that the consents and participation of all the family members are sought and obtained to have a valid partition. The court in *Lopez v. Lopez & Ors*<sup>232</sup> justifying the rationale for partition held that:

*Where there has been a persistent refusal by the head of a family or by some members of the family to allow others enjoy their rights under native law and custom in family land, the court has exercised and will continue to exercise, its undoubted right to make such order as will ensure that members of the family shall enjoy their rights, and if such rights cannot be ensured without partitioning the land, to order a partition.*

#### **7. Right to Protect Family Property**

A member of the family can institute an action to protect family property or any interest therein where it is shown that the family head and principal members have failed to do so.<sup>233</sup> Generally, as an incident of a family members' right in the family property, each member has an inherent right to protect the family property and his interests therein, whether regarding the family house or family farmland. It is very important to note that this inalienable right of a member is required to be exercised timeously and prudently, as

any frivolous purported exercise of this right will not receive any judicial support. Similarly, such mischief may incur the wrath of the family head and

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<sup>232</sup> (1924)5 NLR 50

<sup>233</sup> *Mozie v. Mbamalu* (2006) 7 SC (PT II) 154; *Babyeju v. Ashamu* (1998)9 NWLR(Pt.567)546

other members of the family. In another sense, the action may be brought to invalidate transaction contrary to customary land tenure<sup>234</sup>

### **8. The right to Possession and Physical use of family land**

This is the right of every member of a family, once he is in occupation without breaching the terms of grant not even the head of the family can make a conflicting grant to another member on the same land.<sup>235</sup> Each member of the family has a usufructuary right to family land or in the family house; he is entitled to as much land or as many rooms (subject to the availability) as he needs, the determining factor being the number of his wives and children. The right of allotment is an integral right incidental to family land or house. In *Adagun v. Fagbola*,<sup>236</sup>the court held as follows:

*When the head of a family allots to a member of the family a portion of the family land for him to live on, that member becomes entitled to occupy and enjoy that portion during good behavior; but he does not become the owner of the land as against the family...*

Generally, a member of the family has equal right to a portion of family land upon which to reside and farm. Upon allotment, such member-allottee does not become the owner of the land but he enjoys exclusive possession, while the title still resides in the family.

### **9. Right to devolve interest in Family Property to Offspring**

It is important to state that the right to use the property may ensure for the lifetime of the individual and the family will permit his children to the same use as their parents as long as the circumstances of the family and the property permits.<sup>237</sup> Upon his demise for his shares and entitlements be devolved on his children as possessory and right of occupation, but certainly not ownership.<sup>238</sup> Such inherited right in non-alienable except on partition where such offspring will be entitled to their deceased father's share.<sup>239</sup> It is on the basis of this arrangement that Chief Elesi of Odogbolu stated in *Dawodu v. Danmole*<sup>240</sup> that, "...

land belongs to a vast family of which many are dead, few are living, and countless members were yet unborn." Land among the Yorubas are considered, and are indeed inheritable property, hence it does not belong only to the present generation for use

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<sup>234</sup> See *Alao v. Ajani* (supra) at 17-18, Para H and A-C

<sup>235</sup> *Adewoyin v. Adeyeye* (1963) 1 All NLR 5.P.28

<sup>236</sup> (1932), 11 NLR 110 at p. 111 per Kingdom C.J.

<sup>237</sup> See *Taylor v. Williams* (1935) 12 NLR 67

<sup>238</sup> *Onakoya Op. cit*

<sup>239</sup> See *Lambe v Aremu* [2014] All FWLR pt. 729 p. 1015 at 1110

<sup>240</sup> (1892) AC 644

and possession, but also for generations yet unborn in the family. The current generation could therefore be holding land in 'trust' and as a sacred heritage for their own use.<sup>241</sup>

It is imperative to put this issue in proper perspective, in ancient times, alienation of family land by way of sale was unknown to the Yoruba native law and custom, though a fraction of such parcel

of land might be given out as gift for various reasons.

In *Balogun v Oshodi* Kingdom C.J expressed a similar sentiment that such alienations are not only invalid but sacrilegious since such act amounted to an unlawful attempt by the living to defeat, forever the interest of the unborn generation.

### **3.3.4 Alienation of Family Property**

According to *Onakoya*,<sup>242</sup> under the Yoruba customary land tenure system, alienation in relation to family property means any form of transfer of family property which includes not only sale, but also lease, mortgage, pledge or any other form howsoever in which an interest in land may pass from one party to another. The basic principle is that neither the family head alone nor the principal members of the family can validly alienate the family land or give a good title to any person with respect to family land. The customary practice and procedure is that for the title in family property to pass to a third party purchaser, it must have been done with the consent of family head and principal members, representing the rest of the members.<sup>243</sup>

It is important to state that the alienation of family property by any group has its legal implication, it will be stated that the family being a corporation sole has members, the head and the representatives known as the principal members, it will therefore be important to discuss the legal implication of these three units of the family in the

alienation of family property. Generally, for alienation of family land to be valid, all members of the family must approve of same. However, since the structure of the family may make it impossible for the approval of all members of the family home and abroad, the law requires that each unit of the family will be represented by representatives called principal members whose consent will be sufficient as the consent of all members of the family. Thus, in *Lukan v. Ogunsusi*,<sup>244</sup> the Supreme Court in that case held with

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<sup>241</sup>

<sup>242</sup> Onakoya O.O(2015), Family Head Versus Family Members legal Issues In Management Of Family Land Under Yoruba Customary Law, Journal of Law, Policy and Globalization ISSN 2224-3240 (paper), Vol. 39, p. 33

<sup>243</sup> Ibid

<sup>244</sup> (1972) 5 SC p.40

Reference to consent in the alienation of family land that the head of the family cannot alienate family property without the consent of the family, it must be taken to mean that every member has whether the head of the family as against all principal members of the family, refused the alienation of family proper, the head cannot unreasonably with hold his consent for such a sale as against members of the family and the principal member of a family cannot give any title in the conveyance of the family property without the head of the family joining in the conveyance even though he may be in agreement

**i. Alienation by family head with the consent of Principal Members**

According to Lloyd, the opinion and course, the practice among the Yorubas is that the head of the family and the heads of each branch or segment of the group, should be signatories to any dealing, these men connoting the general support of the members of their own segment. He concluded therefore that, "this is the ideal arrangement."<sup>245</sup> It is therefore a fundamental requirement that in order to effect a valid sale of family land under customary law, the principal members of the family must also give their consent. Such mutuality of consents to the conveyance of family land has been held to be unimpeachable.<sup>246</sup> It follows therefore from the foregoing that any purported alienation of family property contrary to this above Yoruba customary law and practice, would either have the effect of rendering the transaction, either void or voidable, depending on the facts of each case.

Hence, in *Usaibafor v. Usaibafor*,<sup>247</sup> where the family head of a family alienates without the consent of the principal members thereby misrepresenting that the family land is his, the alienation is void. However, where he only alienated without their consent but did not misrepresent them that the land is his, the sale will be void.<sup>248</sup> Again, in the recent case of *Achilihu v. Anyatonwu*,<sup>249</sup> One Lazaus Oguevule, as the head of the Umuagbaghigba family, pledged family land to the respondent in 1968. The said transaction was witnessed by one Jacob Amalaha, a principal member of the family. In 1970, the pledge was surreptitiously converted into a sale in favour of the respondent.

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<sup>245</sup> Liloyd, P.C., (1962), Yorubas Land Law, London: Oxford University Press. P.84

<sup>246</sup> Adeniji v. Disu (1958), 3 F.S.C. 104

<sup>247</sup> (2005) 3 NWLR (part. 913) 665

<sup>248</sup> See Ekpendu v. Erika (1959) SCNLR 186

<sup>249</sup> (2013)1 MJSC (pt. II) p.2

The sole witness to the purported sale transaction was the wife of Lazarus. No principal member and established an oil palm plantation in the life time of Lazarus Oguevule. The respondent occupied and harvested the oil palm plantation without hindrance from anyone. Lazarus died in 1971 and in 1983, the appellant entered the said land at which point the respondent sued the appellants at Imo State High Court. The High Court gave judgment in favour of the plaintiff on, 14/10/1996. The defendants, now appellants, were aggrieved by the judgment and appealed to the Court of Appeal, Port Harcourt Division. The appeal was dismissed. Aggrieved, the appellants further appealed to the Supreme Court, the respondent crossed appealed. The Supreme Court held that the sale of a family property by the head of the family without the consent of other members of the family is voidable. Fabiyi, JSC went further to declare that:

*perhaps I need to further elaborate on the point being made by stating in a clear fashion that in order to effect a valid sale or alienation of family land, the head of the family with the majority of principal members must participate.*<sup>250</sup>

Aka"ahs, JSC was more elaborate in that besides stating the effect of alienation of family land without consent of the principal members, he reiterates on the role of family head in respect of management of family property. He said:

*The management of family property is put in charge of the family head and he acts as a trustees of such...He should exercise his power not for his own private advantage but for the benefit of the family and he does not enjoy absolute power in the management of family land per se. He is required to consult the other members of the family, and in case of important decisions such as sale of a family land, he must obtain the consent of the principal members of the family. As the head of the family cannot transfer family land as his exclusive personal property...*<sup>251</sup>

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<sup>250</sup> Supra p.29 paras. A-B.

<sup>251</sup> Supra p.15 paras D-G

## **ii. Unilateral Alienation by the Family Head**

In practice, there are two forms of unilateral sale of family property by the head of the family. They are (a) where the family head alienates the family property in his own name and as if the title to such property vests in him. (b)Where the family head purportedly alienates family property on behalf of the family, but without obtaining the consent of the principal members of the family to do so.<sup>252</sup> It is trite law that where the head of the family alienates family property as his personal property and in his own name, such transaction will be a nullity, that is, void ab initio.<sup>253</sup>

In *Solomon and Others v. Mogaji and Others*<sup>254</sup> where a family head sold family land as his own, the Supreme Court held that the purported sale was void. Similarly, where the family head made a gift of such land without the requisite consent, the gift is void and it makes no difference that the gift was made to a member of the family.<sup>255</sup>

In the same vein, where the head of the family purportedly alienates family property claiming to be representing the family when in fact he neither sought for nor obtained the consent of the principal members, such transaction is voidable. The legal implication is that the sale is *prima facie* valid and can only be set-aside at the instance of the non-consenting or aggrieved members of the family.

### iii. Alienation of family land by Members

Apart from unscrupulous family head who takes unilateral action of alienating family land, usually for selfish purpose, there are also dubious and ambitious family members who also engage in similar acts. It is a settled position of law that such act is ultra vires the erring members. The alienation is void, nullity and of no effect.

In *Atunrase v. Sunmola*<sup>256</sup> a principal member of the family, one Jabita described himself as the owner of the family land. On that premise he sold the land to an unsuspecting third party. The court held that the sale was void

*ab initio* and of no effect at all. It was further asserted by the Supreme Court in that case that;

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<sup>252</sup> See Onakoya, Op. cit. p.234

<sup>253</sup> See Oshodi v. Aremu (1952) 14 WACA 83. The rationale for this position is that such head of the family had no title, and on the basis of the principle of *nemo dat quod, non habet* (meaning no one could give what he does not have) such transaction will fail.

<sup>254</sup> (1982)11 SC 1

<sup>255</sup> Oshodi v. Aremu (Supra)250

<sup>256</sup> (1985) 1 NWLR (Pt. 1) 105

*the court has over the years laid down the principle that a sale by a member of the family without the concurrence of the head of the family is void. One hardly requires any authority for this well established position of the law.*<sup>257</sup>

In summary, the family head must approve all transactions involving the family property, otherwise such transaction is a nullity.

### 3.4 Legal Restriction on Alienation of Land

The Land Use Act and some other legislations have provided for certain restrictions on alienation or transfer of land. They are briefly explained as follows:

(i) Exceptions to the consent provision: Section 22 of the Act provides that any alienation of Right of Occupancy without the Consent of the Governor First had and obtained is null and void. This is however, the general rule, in that the exceptions to that are provided under paragraph (a)-(c) of the same section as follows:

(a) Governor's consent shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor. This section is problematic in where it exempts equitable mortgage from the series of transactions that require governor's consent, while section 51 of the same Act comprehensively defines mortgage to include equitable mortgage. This is a serious conflict that misleads courts to give controversial judgments.<sup>258</sup>

(b) It shall not be required to the reconveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Governor.

(ii) The Governor of a State cannot grant a statutory right of occupancy to a person under the age of twenty-one (21) years.<sup>259</sup> This provision also has an exception that where a guardian or trustee

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<sup>257</sup> Per kayode Eso JSC (as he then was)

<sup>258</sup> As in *Okuneye v. F.B.N PLC* (supra), where the Supreme Court without considering the comprehensive definition

of mortgage under section 51 of the Act (which includes equitable mortgage) decided that consent of the Governor is not required in equitable mortgage.

<sup>258</sup> Section 7, Land Use Act.

For a person under the aforementioned age has been duly appointed for such purpose, the Governor may grant or consent to the alienation of a statutory right of occupancy to such guardian or trustee on behalf of such person under age.<sup>260</sup> Moreover, the proviso goes further to stipulate that a person under the age of 21 years upon whom a statutory right of occupancy devolves on the death of the holder shall have the liabilities and obligations under and in respect of his right of occupancy as if he were of full age notwithstanding the fact that no guardian or trustee has been appointed for him.<sup>261</sup> However, it is our

humble view that this restriction maintains an old Common Law position, in that our legal system has since provided legal capacity to be 18 years. Thus, contractual capacity, capacity to vote etc is 18 years<sup>262</sup>

(iii) A person who is not a Nigerian citizen cannot be granted right of occupancy, nor can a right of occupancy be transferred to him, except with the approval of the National Council of States.<sup>263</sup>

**Superior Courts in Nigeria had held in various cases starting with the Supreme Court's decision in *Savannah Bank v. Ajilo*<sup>264</sup> that "under the relevant sections of the Land Use Act 1978, the Governor's consent is a mandatory requirement for any transfer or alienate of land within a state, and failure to do so renders the transfer or alienation null and void." However, the decision of the Supreme Court in *Yakubu v. Simon Obaje*'s<sup>265</sup> case represents a paradigm shift from the rule as we know it which has led to confusion and uncertainty for landowners, businesses and real estate practitioners who are unclear on the correct legal position.**

**The article aims to provide clarity on the position of the law and the impact of the new decision of the Supreme Court on real estate transactions.**

### **3.5 Alienation of Family Property under the Customary Law**

According to Onakoya,<sup>266</sup> under the Yoruba customary land tenure system, alienation in relation to family property means any form of transfer of family property which includes not only sale, but also lease, mortgage, pledge or any other form howsoever in which an interest in the land may pass

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<sup>260</sup> Section 7(a), Ibid

<sup>261</sup> Section 7(b), Ibid

<sup>262</sup> Section 1(b), Electoral (Amendment) Act (NO. 2), 2011

<sup>263</sup> See Section 46(1) of the Land Use Act

<sup>264</sup> (1989) N.W.L.R (Pt 97) 305

<sup>265</sup> (2005) LCN/1678 (CA)

<sup>266</sup> Onakoya O.O. Family Head Versus Family Members: Legal Issues In Management of Family Lanf Under Yoruba Customary Law, Journal of Law, Policy and Globalization ISSN 2224-3240 (Paper), Vol. 39. (2015) p. 233

From one party to another. The basic principle is that neither the family head alone nor the principal

members of the family can validly alienate the family land or give a good title to any person with to pass to a third party purchaser, it must have been done with the consent of family head and principal members, representing the rest of the members.<sup>267</sup> Mbaba JCA, in *Alaribe v. okwuonu*<sup>268</sup> held that family land can only be sold or disposed of with the consent of head/principal members of the family and where a family head makes the sale, he must receive the ratification of the other principal members.<sup>269</sup>

It is important to state that the alienation of family property by any group has its legal implication, it will be stated that the family being a corporation sole has members, the head and the representatives known as the principal members, it will therefore be important to discuss the legal implication of these three units of the family in the alienation of family property. Generally, for alienation of family land to be valid, all members of the family must approve of same. However, since the structure of the family may make it impossible for the approval of all members of the family home and abroad, the law requires that each unit of the family will be represented by representatives called principal members whose consent will be sufficient as the consent of all members of the family. Thus, in *Lukan v. Ogunsusi*,<sup>270</sup> the Supreme Court in that case held with reference to consent in the alienation of family land that the head of the family cannot alienate family property without the consent of the family, it must be taken to mean that every member has to give his consent. It is not enough if majority give their consent. The court further held that whether the head of the family as against all principal members of the family, refused the alienation of family proper, the head cannot unreasonably withhold his consent for such a sale as against members of the family and the principal member of a family cannot give any title in the conveyance of the family property without the head of the family joining in the conveyance even though he may be in agreement

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<sup>267</sup> Ibid

<sup>268</sup> (2016) 1 NWLR (Pt. 1492) p.41 at 68 pars E-F

<sup>269</sup> See also, *Okonkwo v. Okonkwo* (1998) LPELR,2487(SC); *Folami v. Cole* (1990) LPELR 1285 (SC)

<sup>270</sup> *Lukan v. Ogunsusi* (1972) 5 SC p.40

### 3.5.1 Alienation by family head without the consent of Principal Members

According to Lloyd, the opinion and course, the practice among Yorubas is that the head of the family and the heads of each branch or segment of the group, should be signatories to any dealing, these men connoting the general support of the members of their own segment. He concluded therefore that, "this is the ideal arrangement."<sup>271</sup> It is therefore a fundamental requirement that in order to effect a valid sale of family land under customary law, the principal members of the family must also give their consent. Such mutuality of consents to the conveyance of family land has been held to be unimpeachable.<sup>272</sup> It follows therefore from the foregoing that any purported alienation of family property contrary to this above Yoruba customary law and practice, would either have the effect of rendering the transaction, either void or voidable, depending on the facts of each case.

Hence, in *Usaibafor v. Usaibafor*,<sup>273</sup> where the family head of a family alienates without the consent of the principal members thereby misrepresenting that the family land is his, the alienation is void. However, where he only alienated without their consent but did not misrepresent them that the land is his, the sale will be voidable.<sup>274</sup> Again, in the recent case of *Achilihu v. Anyatonwu*,<sup>275</sup> one Lazaus Oguevule, as the head of the Umuagbaghighba family, pledged family land to the respondent in 1968. The said transaction was witnessed by one Jacob Amalaha, a principal member of the family. In 1970, the pledge was surreptitiously converted into a sale in favour of the respondent. The sole witness to the purported sale transaction was the wife of Lazarus. No principal member of the family witnessed the sale transaction. The respondent took possession of the parcel of land and established an oil palm plantation in the life time of Lazarus Oguevule. The respondent occupied and harvested the oil palm plantation without hindrance from anyone. Lazarus died in 1971 and in 1983, the appellant entered the said land at which point the respondent sued the appellants at Imo State High Court. The High Court gave judgment in favour of the plaintiff on 14/10/1996. The defendants, no appellants, were aggrieved by the judgment and appealed to the Court of Appeal, Port Harcourt Division. The appeal was dismissed. Aggrieved, the appellants further appealed to the Supreme Court, the respondent crossed appealed. The

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<sup>271</sup> Lloyd, P.C., Yorubas Land Law,(London: Oxford University Press 1962).P.843

<sup>272</sup> Adeniji v. Disu (1958), 3 F.S.C. 104

<sup>273</sup> Usaibafor v. Usaibafor (2005) 3 NWLR (part. 913) 665

<sup>274</sup> See Ekpendu v. Erika (1959) SCNLR 186

<sup>275</sup> Achilihu v. Anyatonwu (2013) 1 MJSC (pt. 11) p. 2

Supreme Court held that the sale of a family property by the head of the family without the consent of other members of the family is voidable. Fabiyi, JSC went further to declare that:

*perhaps I need to further elaborate on the point being made by stating in a clear fashion that in order to effect a valid sale or alienation of family land, the head of the family with the majority of principal members must participate.*<sup>276</sup>

Aka'ahs, JSC was more elaborate in that besides stating the effect of alienation of family land without consent of the principal members, he reiterates on the role of family head in respect of management of family property. He said:

*The management of family property is put in charge of the family head and he acts as a trustee of such ...He should exercise his power not for his own private advantage but for the benefit of the family and he does not enjoy absolute power in the management of family land per se. He is required to consult the other members of the family, and in case of important decisions such as sale of a family land, he must obtain the consent of the principal members of the family. As the head of the family cannot transfer family land as his exclusive personal property...*<sup>277</sup>

Hence, in practice, there are two forms of unilateral sale of family property by the head of the family. They are: (a) where the family head alienates the family property in his own name and as if the title to such property vests in him. (b)Where the family head purportedly alienates family property on behalf of the family, but without obtaining the consent of the principal members of the family to do so.<sup>278</sup> It is trite law that where the head of the family alienates family property as his personal property and in his own name, such transaction will be a nullity, that is, void abinitio.<sup>279</sup>

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<sup>276</sup> Supra p.29 paras. A-B.

<sup>277</sup> Supra p.15 paras. D-G.

<sup>278</sup> See Onakoya, Op. cit. p. 234

<sup>279</sup> See *Oshodi v. Aremu* (1952) 14 WACA 83. The rationale for this position is that such head of the family had no title, and on the basis of the principle of *nemo dat quod non habet* (meaning no one could give what he does not have) such transaction will fail.

In *Solomon and Others v. Mogaji and Others*<sup>280</sup> where a family head sold family land as his own, the Supreme Court held that the purported sale was void. Similarly, where the family head made a gift of such land without the requisite consent, the gift is void and it makes no difference that the gift was made to a member of the family.<sup>281</sup>

In the same vein, where the head of the family purportedly alienates family property claiming to be representing the family when in fact he neither sought for nor obtained the consent of the principal members, such transaction is voidable. The legal implication is that the sale is *prima facie* valid and can only be set-aside at the instance of the non-consenting or aggrieved members of the family.

There are conflicting authorities as to whether it is the consent of every principal member or just of a majority of such members which is necessary to effect a valid alienation. According to one line of authority, it is not necessary to get the consent of every principal member of the family but it is enough to if a majority of such members give consent. This is the view expressed by Ademola, C.J., in the case of *Adewuyin v. Ishola*<sup>282</sup> and it is supported by one of the leading practitioners at Bar who states categorically that "it is the consent of a majority [of family members] that is required to effect a valid disposition of family land".

According to the second line of the authority, a sale of family land requires the consent of all the principal members of the family, not just a majority. This view has been consistently upheld by the courts for a period of more than forty years. In the case of *Aganran v Olushi*<sup>283</sup> it was held that a sale of family land without the consent of one "necessary member" did not give an unimpeachable title. It was also held in the High Court of Eastern Nigeria, that when a family comprises of four branches, the consent of heads of each is necessary to effect a valid disposition of family land.<sup>284</sup>

With regards to consent, the important fact is that the consent of every important principal member available must be obtained before a valid alienation of land can be said to exist.

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<sup>180</sup> Solomon and Others v. Mogaji and Others (1982) 11 SC 1

<sup>281</sup> Oshodi v. Aremu (supra)

<sup>282</sup> Adewuyin v. Ishola (1958) W.N.L.R. 110

<sup>283</sup> Aganran v. Olushi (1906) 1 N.L.R. 66

<sup>284</sup> Onwuka v. Abiriba Clan Council (1956) E.N.L.R. 17; Esanv. Bakare Faro (1947) 12 W.A.C.A.135.

### **3.5.2 Alienation of family land by Members**

Apart from unscrupulous family head who takes unilateral action of alienating family land, usually for selfish purpose, there are also dubious and ambitious family members who also engage in similar acts. It is a settled position of law that such act is ultra vires the erring members. The alienation is void, nullity and of no effect.

In *Atunrase v. Sunmola*<sup>285</sup> a principal member of the family, one Jabita described himself as the owner of the family land. On that premise he sold the land to an unsuspecting third party. The court held that the sale was void ab initio and of no effect at all. It was further asserted by the Supreme Court in that case that;

*the court has over the years laid down the principle that a sale by a member of the family without the concurrence of the head of the family is void. One hardly requires any authority for this well established position of the law.*<sup>286</sup>

In summary, the family head must approve all transactions involving the family property, otherwise such transaction is a nullity.

### **3.5.3 The consent of customary tenants**

The consent of a customary tenant in possession of family land is required in order to effectively pass the portion occupied. This happen where a portion of family's land is allocated to a member of the family, whether he is a principal member or not, his grantee's consent is require for a successful alienation of that land. In *Manuel v.*

*Manuel*,<sup>287</sup> it was held that without his consent the portion he occupies is virtually inalienable.

If the consent of the customary tenant is not obtained the purchaser takes the land subject to his interest i.e. the purchaser gets the reversion,<sup>288</sup> as he can get no greater rights in the property than his vendors.

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<sup>285</sup> *Atunrase v. Sunmola* (1985) 1 NWLR (Pt. 1) 105

<sup>286</sup> *Per kayode Eso JSC* (as he then was)

<sup>287</sup> (1926) 7 N.L.R. 101

<sup>288</sup> *Esi v. Itsekiri* (1961) W.N.L.R. 15

#### **3.5.4 Essence of time when consent was granted**

The consent given at any time before the conveyance or transfer is effective and a valid title will be passed. However, various problems may arise when consent is given and then revoked, the following situations represent such instances

- a. consent after the agreement has been concluded, and if he does so while the other members go on to transfer the land to the purchaser, the later gets a good title.
- b. Where a consent which has been given, is revoked before a binding agreement is concluded (or transfer if there is no agreement), the revocation is valid and the purchaser should desist from completing.
- c. Where the purchaser had notice of the revocation either by express notification from the discontented member or by some other means, then the general rule that "consent once given cannot be revoked" should prevail.

#### **3.6 Acquisition of customary land by the State Government for overriding public interest**

It is a notorious fact that a chairman of a local government grants a customary right of occupancy to persons in charge of customary law in the South west and Nigeria at large. This position is the tenor of section 51 of the Land Use Act which provides among other things that:

the right of a person or community lawfully using or occupying land in accordance with customary law and includes a Customary Right of Occupancy granted by a Local Government under this Act.

This definition is vague in that it makes it as if it is only customary law that governs it and it excludes the Act from its operation. However, by Section 5(1)(a) the Governor can grant a Statutory Right of Occupancy whether or not the land is in urban area. Thus, in *Olagunju v. Adesoye*<sup>289</sup> the Supreme Court held that the Governor of a State has the power to grant Statutory Right of Occupancy whether or not the land concerned is in urban or non-urban area.

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<sup>289</sup> (2009)9 NWLR (pt.1146) 225

### 3.6.1 Express Grant

Notwithstanding the above decision, the Act empowers the Local Government to grant Customary Right of Occupancy in respect of land not in an urban area in any person or organization, for agricultural purpose or for other purposes ancillary to agricultural purpose such as grazing residential and other purposes.<sup>290</sup> Similarly, where a land was not in an urban area but such land was held and occupied for agricultural purposes, the holder after 1978 became entitled to continue to hold the land as if the customary right of occupancy had been granted to him by the local Government.<sup>291</sup>

Thus, in *Ogunleye v. Oni*<sup>292</sup> the Plaintiff claimed land based on document of grant made early 1978 and Certificate of Occupancy granted to him in 1983 by the Commissioner for Land. He asked for damages for trespass. The defendant on his part said he inherited the land from his father in 1936 for a valuable consideration. The court applied Section 34 of the Act and held that the plaintiff was not the holder of the land in dispute before 1978. The Certificate of Occupancy could therefore make him a holder of a Statutory Right from 1983. Again, since the defendant held the land before the Land Use Act came

into force, the defendant was deemed to be the holder of Statutory Right of Occupancy granted by the Governor. Since the holder did not revoke the defendant Deemed Right before making a grant to the plaintiff, the Plaintiff's right was invalid and against the letter and spirit of the Act.

The defendant therefore had a better title. The land is in Local Government, a non urban area, but the appellant (Ogunleye) had obtained a Certificate of Occupancy from the Governor and it is clear from Section 5 that a Governor can grant a Statutory Right of Occupancy both in urban and non-urban areas.

### **3.6.2 Deemed Grant**

A holder of a Customary Right of Occupancy is deemed granted if he holds such land prior to the commencement of the Land Use Act and he will be said to be as a holder rightly granted by the Local Government. Meanwhile, in this instance, the land which is a subject of Customary Right of Occupancy deemed granted can be divided into Agricultural land and developed land.

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<sup>290</sup> Section 6 of the Land Use Act1

<sup>291</sup> Section 36, LUA.

<sup>292</sup> (1990) 2 NWLR (Pt. 135) 745

### **3.6.3 Agricultural Land**

Section 36 (2)<sup>293</sup> provides that any occupier of such land, whether under customary right or otherwise however, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for us for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the custom of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil.

In affirming the right of a holder under a deemed grant, the Supreme Court held in the case of *Adole v. Boniface B. Gwar*,<sup>294</sup> that the Land Use Act was not promulgated with the objective of abolishing all existing titles or rights to possession existing prior to its promulgation. Rather, it reinforces or strengthens title of prior holders who are deemed

grantees but limits their interest to statutory or customary rights of occupancy as the case may be by removing radical title. So, Customary Right of title holder has not been taken away or extinguished with the coming into force of the Land Use Act. Meanwhile, the rightful holder in this case is the person in occupation before the promulgation of the Act even if he was a customary tenant on the land.<sup>295</sup>

#### **3.6.4 Developed Land**

In *CSS Bookshops Ltd & Ors v. Registered Trustees of Muslim Community of Rivers State & Ors*,<sup>296</sup> it was held that by virtue of Section 34 (1), (2) and (3) of the Act where a developed land in an urban area was vested in any person immediately before the commencement of the Act, the land shall continue to be held by that person in whom it was vested as if the holder of the land was the holder of a Statutory Right of Occupancy issued by the Governor under the Act. And where the land is underdeveloped, portion of the land not exceeding half of one hectare in area shall continue to be held by the person in whom the land was vested as if the holder of the land was the holder of Statutory Right of Occupancy granted by the Governor.

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<sup>293</sup> Land Use Act, 1978

<sup>294</sup> (2008) 11 NWLR (Pt. 1099) 562 (a) 588 & 606

<sup>295</sup> See *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 130.

<sup>296</sup> (2006) 11 NWLR (Pt. 992) 530 (a) 561-562 & 567 & 574 see also *Ilona v. idakwo* (2003) 11 NWLR (Pt. 830) 53

#### **3.6.5 Government acquisition**

It must be noted that a family property can be determined or brought to an end by a local government, state or federal government as the case may be compulsorily acquiring the land under the relevant and applicable laws and statutes<sup>297</sup>. It must be noted that this even become possible before the enactment of the Land Use Act, 1978, and under the Public Land Acquisition laws by compulsory acquisition but today, it will be deemed proper and valid by revocating the customary right of occupancy as granted under the Land Use Act, 1978 save it is for the purpose of overriding public interest and the family is also duly compensated.

#### **3.7 Objectives of the Land Use Act**

The Land Use Act aims principally at the effective and sustainable management and control of land in Nigeria particularly in a manner that gives government sufficient powers over the acquisition, transfer or otherwise assignment of land and land resources. In *Savannah Bank Ltd v. Ajilo*,<sup>298</sup> the Nigerian Court of Appeal stated that what the mischief aimed at resolving by the Land Use Act was the abrogation of absolute ownership or freehold interest by the community, the family and the individual. When Ajilo's case went to the Supreme Court, the Court described it as a revolutionary law intended to change land management in Nigeria. There are a number of objectives, which the Act sought to accomplish, and these may be encapsulated for the sake of clarity. First, the Act was intended to curb land speculation, which accounted for the astronomical rise in land values especially in urban areas. It was believed then that once ownership of land was vested in the government, speculators would be forced out of business and government would then be able to stabilize the value of land.

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<sup>297</sup> O.S. Obumeme, Customary Land Law and Nature of Family Property in Nigeria, *International Journal of Innovative Legal & Political Studies* 9(4):42-54, Oct-Dec, 2021 SEAHIP PUBLICATION, 2021 available at [www.seahipaj.org](http://www.seahipaj.org) last accessed 22/07/2023

<sup>298</sup> (1987) 1 NWLR (Pt. 413)

Second, the Act was intended to assist the citizenry irrespective of their social status to realize their ambitions or aspirations of owning the place where they and their families would live a secure and peaceful life.

Third, investing ownership of land in government sought to remove the difficulty which government encountered in acquiring land for public purposes. Section 51 of the Act now states specifically, those purposes which will qualify as public purposes and as such, the justification for public acquisition of a person's land has been laid down as a matter of clarity.

Fourth, the Act intended to harmonize the tenure systems throughout the country especially in the southern part of the country which lacked a coordinated and formalized tenure arrangement as was the case in the North under the Land Tenure Law 1962. In most parts of the South, the situation gave rise to multiple and endless litigations, which hampered economic development especially as it concerned the location of industries, the siting of infrastructural projects such as hospitals, schools, and the operation of mechanized agriculture. These problems, among others, were expected to be eliminated or at least drastically reduced by the enactment of the Land Use Act.

According to Ega:

*The stated primary objective of the Act is to facilitate rapid economic and social change in the country through efficient land use. The immediate aims include prevention of land concentration in both the rural and urban sectors of our economy, control of land transactions, land prices and land speculation, and the facilitation of access to land for the state as well as private individuals and thereby remove a cause of socio-economic inequality.<sup>299</sup>*

The Land Use Act itself gave an umbrella objective that it desires to achieve when it stated in its preamble that:

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<sup>299</sup> Ega L.A. (1985), Land Tenure as a Constraint on Agricultural Development in Nigeria cited in Nwocha M.E., (2016), Impact of the Nigerian Land Use Act on Economic Development in the Country, Acta Universitatis Danubius Administratio, 8 (2), P 117-128.

*Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved;  
And whereas it is also in the public interest that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to*

*provide for the sustenance of themselves and their families  
should be assured, protected and preserved;*

### **3.8 Nature of Ownership under the Land Use Act**

In a preemptive manner, the co-existence of the form of ownership under the Land Use Act and the structure under the Customary Land Tenure of the family ownership of land can be highlighted to have the following effects as it is the position upon the promulgation of the Land Use Act:

- i. The allodial title previously found in the family corporate no longer exists but had rather been expropriated in favour of the state
- ii. The trusteeship concept where the family head served as the trustee, manager, caretaker or administrator for the family property still exists after the promulgation of the Land Use Act but such role exists alongside and it is subject to the trusteeship role created for the governor who is the trustee for the whole state
- iii. All existing customary ownership including family property are deemed to be held by the existing occupiers of such land under a deemed grant of Customary Right of Occupancy. The Act, however, provides a window through which a deemed grantee of right of occupancy may be subject to the management and control of the governor/local government under the Act. This occurs where the deemed grantee voluntarily applies for issuance of certificate of occupancy.<sup>300</sup> Section 36 (3) & (4) of the Act provides a similar provision with respect to non-urban lands, on application to the local government by the person in whom the land was vested prior to the Act. Thus, the coming into the management blanket by a deemed grantee of a right of occupancy and

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<sup>300</sup> Otubu, Op. cit, p.99.

the issuance of a certificate of occupancy thereof is predicated on the holder making an application to the respective authority at his discretion. Though

converting a deemed grant of right of occupancy to actual grant is discretionary on the part of the holder.

- iv. Since the occupiers of family property are now referred to as a sort of *sui generis* tenants, the power of alienation does not totally reside with the family as a corporate sole alone but also subject to the consent of the governor under Section 28 of the Land Use Act, this is to say that despite that the alienation of family property must be done in accordance with the consent of the family head and the principal members, the consent of the governor has now been added to this requirements.

Under the Land Use Act, the ownership of land was expropriated from the original owners (community, village and individuals) and was vested in the governor of each state who now holds the land in trust for Nigerians who intend to acquire an interest in the property. However, the right to use and enjoy land is still given to citizens, but no individual can claim an allodial title overland.<sup>301</sup> To make the above policy of expropriation effective, the land use Act provides for "right of Occupancy"<sup>302</sup> which gives the holder a mere right of possession and not ownership.<sup>303</sup> Under the land use act, the government makes all lands available for the benefits of Nigerians, the governor of a state is a trustee of all lands and Nigerians are left with equitable interest in the land and are beneficial owners.<sup>304</sup> More so, the Land Use Act conferred government with powers and control over land acquisition in Nigeria, Thus, Section 1 of the Act provides that:

*Subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.<sup>305</sup> From the foregoing provisions of the Act it can be established that right of occupancy is*

<sup>301</sup> Ibid, section 5 (1); see also, *Ezeanah v. Attah* (2004) All FWLR (PL.202) 1858 at P.1884

<sup>302</sup> Taiwo, A. op. cit. p.208.

<sup>303</sup> Ibid 210-211

<sup>304</sup> See *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 130

<sup>305</sup> See generally Section I of the Land use Act cap L5 L.F.N 2004.

*subject to the control and management of the government be it local or state government.*<sup>306</sup>

Hence, two types of occupancies are provided for namely: Statutory Right of Occupancy (SRO) and Customary Rights of Occupancy (CRO).<sup>307</sup> A right of occupancy however was not defined under the Act, but some authors<sup>308</sup> and judicial decisions<sup>309</sup> have linked it to a lease. Omotola<sup>310</sup> opined that a Right of Occupancy was a hybrid form of right, something between a personal and proprietary right. He, however viewed that there was nothing wrong in the right being a new form of right as the categories of rights over land and need not be closed. A right of Occupancy was defined by Umezululike<sup>311</sup> as the right to use and occupy land in accordance with the terms and tenure set forth by the state within the provisions of the Act.

The right of occupancy is evidenced in a Certificate of Occupancy (C of O) issued by a competent authority and raises the fact that the holder is in exclusive possession of the land, the specific features of the Act are:

- vi. The act vests in each governor, the power to hold and administer the land
- vii. It empowers the governor to grant a right of occupancy and easement appurtenant thereto for an agreed period
- viii. It empowers the governor to plan the use of the land
- ix. It prohibits the alienation of the right on the land by way of transfer of possession, assignment, mortgage, sub lease without the consent of the governor first had and obtained
- x. It allows the revocation of a person's right to occupy the land on the ground of public interest subject to compensation,<sup>312</sup>

It can therefore, be stated that the right of a holder of right of occupancy cannot in anyway be compared to ownership since the owner of a property is the alpha and omega of same and he can

306 Sections 1(2), 5 and 6 *ibid*

307 *Ibid*

308 Elias, T.O. (1971) *Nigerian Land Law and Custom*. London: Sweet and Maxwell, p.284, Onwuamaegbu, M.O. (1966). *Nigerian Land Law and Custom*. London: Sweet and Maxwell, p.216

309 *Director of Lands v. Sohan* (1952) 1 TLR 631, *Henvinchsorft v. Dodd* (1960) EAR 631

310 Omotola Op. Cit. P.24

311 Umezululike, I.A. *The Land use Act, More Than Two Decades After, And Problems of Adaptive Strategies of Implementation*, Snapp Press Ltd Enugu (2004) 45  
312 Yerokun O. (2016), *Casebook on Land Law*. Lagos: Nigerian Revenue Project Publications. P. 3853

Do anything to improve or even destroy the property.<sup>313</sup> However, the holder of a right of occupancy cannot use the land in contravention of the covenants attached to the grant. More relevantly, the holder of the grant cannot alienate his right in the property or any part thereof, without the requisite consent required by the Land Use Act, the Act stipulates that those rights granted to holders can only be alienated when governor's consent is first had and obtained,<sup>314</sup> And failure to secure that consent may render any transaction or alienation null and void.<sup>315</sup> Summarily, it can therefore, be stated that the Land Use Act creates a special kind of trustee in the governor and holds a fiduciary relationship that renders him accountable for his actions and in-actions<sup>316</sup>

### **3.9 Nature of Right of Occupancy**

There have been divergent opinions as to the exact nature of interest created by Right of Occupancy. However, some writers view it as not a fee simple.<sup>317</sup> They base their argument on Section 1 of the Land Use Act which vests the government with the power and control of all land in the federation and this goes against the idea of fee simple estate under common law. For fee simple is highest interest an owner can have (radical title). Again, some of the sections of the Act tend to suggest that the interest created by the Right of Occupancy is a lease.<sup>318</sup> Thus, even Section 51 of the act defines "sublease" to include "a sub underlease" and the implication is that Right of Occupancy is a kin to lease.<sup>319</sup> However, this matter has been put to rest by the Supreme Court's decision in the case of *Ezeanah v. Attah*<sup>320</sup> where Niki Tobi JSC (as then he was) stated that a holder of Certificate of Occupancy holds the title to the property and subject only to the conditions stipulated in the Land Use Act. A Certificate of Occupancy creates a term of years absolute or a lease for a number of years stated therein. The greatest legal estate that can now subsist under the Land Use Act is a term of years. The grant of term of years under a Certificate of Occupancy is in substance a lease.

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<sup>313</sup> See Niki Tobi in *Abraham v. Olorunfemi* (1990) 1 NWLR (Pt. 105) 53

<sup>314</sup> See generally s. 22 of the Land Use Act cap L5 LFN 2004

<sup>315</sup> S.26 *ibid*

<sup>316</sup> Fabunmi J.O. (2006), *Equity and Trusts in Nigeria 2<sup>nd</sup> ed. Ile-Ife: OAU press ltd. P. 202*

<sup>317</sup> Ezejiofor, G. (1997), *Land Use Decree: A Critical Review, Nigeria Judicial Review* (No. 2) pp. 1-21”

<sup>318</sup> See section 22 of the Land Use Act which provides that it shall not be lawful for the holder of the Statutory Right of Occupancy granted by the Government to alienate his Right of Occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise however without the consent of the Governor first had and obtained.

<sup>319</sup> See section 8 of the Act

<sup>320</sup> (2004) 7 NWLR (Pt. 873) 468 (a) 500-501 paras A-H

Therefore, Certificate of Occupancy is merely evidence that a grantee has a Right of Occupancy customary or statutory. Thus, in *Orlu v. Gogo Abite*<sup>321</sup> the Supreme Court held that a Certificate of Occupancy is never associated with title. A Certificate of Statutory or Customary Right of the Supreme Court held that a Certificate of Occupancy issued under the Land Use Act 1978 cannot be conclusive evidence of any right; interest or valid title to land in favour of the grantee. Right of occupancy introduced by the Act are:

- i. Statutory Right of Occupancy and
- ii. Customary Right of Occupancy.

Meanwhile, Yerokun<sup>322</sup> categorizes the right of occupancy as right of urban and non-urban occupancy. These rights of occupancy will be discussed *ad seratim*

### **Statutory Right of Occupancy**

Section 51 of the Act defines Statutory Right of Occupancy as a right of occupancy granted by the Governor under the Act. It will be stated here that statutory right of occupancy may be acquired expressly or by operation of the Act otherwise known as deemed grant.

#### **Express grant.**

Section 5 (1) (a) of the Act provides that

*it shall be lawful for the state Governor in respect of land, whether or not in an urban area to grant statutory rights of occupancy to any person for all purposes.*

However, this right is not absolute in that it is subject to some stipulations and conditions.<sup>323</sup> Thus, Section 8 of the Act provides that Statutory Right of Occupancy granted under the provisions of Section 5(1) (a) of this Act shall be for a definite term and may be granted subject to terms of any contract which may be made by the Governor and the holder not being inconsistent with the provisions of the Act <sup>324</sup> The implication of the

above section is that right occupancy has a life the Land Use Act, his right may be revoked. However, by the provisions of Section 5, it can be deduced that the power of the Governor to grant Statutory Rights of Occupancy is not limited to

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<sup>321</sup> (2010) 8 NWLR (Pt. 1196) 307 Sc

<sup>322</sup> Yerokun I(2016). Casebook on Land Law, Lagos: Nigerian Revenue Project Publications, P.201

<sup>323</sup> Section 8, LUA

<sup>324</sup> Ibid.

land in an urban area; he may also grant land in non-urban area.<sup>325</sup> It is submitted that the determining factor in this case is not the location of the land (urban and non-urban),but the status of the person who grants the right of occupancy i.e. either the Governor or the Local Government as the case may be.

section 47 of the Act provides that the Governor's power to grant a statutory right of occupancy cannot be challenged in any court notwithstanding anything including the constitution. However, judicial authorities have established that this provision is inconsistent with the jurisdiction of the High Court in line with Section 272 (1) of the Constitution. Thus, in *Lemboye v. Ogunsiji*,<sup>326</sup> Omololu-Thomas JCA relying on the earlier decision of the Supreme Court in *Nkwocha v. Governor of Anambra State*<sup>327</sup> held that:

*Section(s)... 47 of the Land Use Act, 1978 do no... have the same legislative force as Section 236 of the Constitution mainly because the Act is an existing law and therefore to the extent that those sections...are inconsistent with Section I of the Constitution, they are void.*<sup>328</sup>

### **Deemed Grant**

Land in urban areas held by persons before the commencement of the Act are said to be deemed to have been granted right of occupancy,<sup>329</sup> for the determination of the right of persons holding and before the commencement of the Act in an urban area, Land held before the commencement of the Act can be divided into developed and undeveloped land,<sup>330</sup> Where land in an urban area was developed before the commencement of the Act, it remains vested in that person as if the Governor had granted to that person a statutory

right of occupancy,<sup>331</sup> Meanwhile, the land will be said to be developed if it meets the requirements under section 51 of the Act which defines developed land as:

*Land where there exists any physical improvements in the nature of road development services, water, electricity, drainage, building,*

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325 Ibid.

326 (1990) 6 NWLR (Pt.155) 210

327 (1984) 6 SC 362

328 Ibid.P.224-225,Paras H-A

329 See section 34 (1), LUA

330 Smith Op. cit. P. 479

331 See section 34 (1), LUA

*structure or such improvement that may enhance the value of the land for industrial, agricultural or residential purpose*

Meanwhile, in the case of undeveloped land, the half hectare rule devised by the Act shall apply, this means that the holder of the land prior to 1978 will only be entitled to a portion or a plot not where the person has the land in different places across the state, the whole shall be considered together for the purpose of application of the half-hectare rule<sup>332</sup> Therefore, the distinction between actual and deemed grant is that where a grantee under actual grant holds a land subsequent to commencement of the Land Use Act a deemed grantee holds prior to the commencement of the Act, and it remains vested in him as if it were granted by the governor. However, in *Savannah Bank of Nigeria Ltd. v Ajilo*<sup>333</sup> the Supreme Court held that whether actual or deemed granted, Governor's consent is required for alienation. That notwithstanding the contention of Rotimi Williams that the provisions of sections 21 and 22 of the Act are not applicable to deemed grant as deemed grant is different from actual grant. The Supreme Court put it thus: The holder of a statutory right of occupancy granted by the governor, as contained in section 22 of the Act, includes the implied grant in section 34 (2) and 36 (2) of the Act. Any failure by a holder under section 34 (2) or 36 (2) of the Act to comply with the provisions of section 22 would attract the full regour of section 26 of the Act render a transaction or an instrument arising there from null and void. The implication of the above decision is that, for the purpose of application of sections 21 and 22 of the Act, there is no distinction between Deemed and Actual or Express grants. Consequently, the researcher is of the

view that terms that are specifically mentioned in the certificate of occupancy but not mentioned under the Act may serve as features of distinction between the two grants.

### **Customary Right of Occupancy**

Section 51 of the Act defines Customary Right of Occupancy as

*the right of a person or community lawfully using or occupying land in accordance with customary law and includes a Customary Right of Occupancy granted by a Local Government under this Act.*

This definition vague in that it makes it as if it is only customary law that governs it and it excludes the Act from its operation. However, by Section 5(1) (a) the Governor can grant a

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<sup>332</sup> Ibid. section 34(6).

<sup>333</sup> Sapra

Statutory Right of Occupancy whether or not the land is in urban area. Thus, in *Olagunju v. Adesoye*<sup>334</sup> the Supreme Court held that the Governor of a State has the power to grant Statutory of Occupancy whether or not the land concerned is in urban or non-urban area.

### **Express Grant**

Right of Occupancy in respect of land not in an urban area to any person or organization, for agricultural purpose or for other purposes ancillary to agricultural purpose such as grazing, residential and other purposes.<sup>335</sup> Similarly, where a land was not in an urban area but such land was held and occupied for agricultural purposes, the holder after 1978 became entitled to continue to hold the land as if the customary right of occupancy had been granted to him by the Local Government.<sup>336</sup>

Thus, in *Ogunleye v. Oni*<sup>337</sup> the Plaintiff claimed land based on document of grant made early 1978 and Certificate of Occupancy granted to him in 1983 by the Commissioner for Land. He asked for damages for trespass. The defendant on his part said he inherited the land from his father in 1936 for a valuable consideration. The court applied Section 34 of the Act and held that the plaintiff was not the holder of the land in dispute before 1978. The Certificate of Occupancy could therefore make him a holder of a Statutory Right from 1983. Again, since the defendant held the land before the Land Use Act came into

force, the defendant was deemed to be the holder of Statutory Right of Occupancy granted by the Governor. Since the holder did not revoke the defendant Deemed Right before making a grant to the plaintiff, the Plaintiff's right was invalid and against the letter and spirit of the Act.

The defendant therefore had a better title. The land is in Local Government, a non-urban area, but the appellant (Ogunleye) had obtained a Certificate of Occupancy from the Governor and it is clear urban areas.

### **Deemed Grant**

A holder of a Customary Right of Occupancy is deemed granted if he holds such land prior to the commencement of the Land Use Act and he will be said to be as a holder rightly granted by the

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<sup>334</sup> (2009) 9 NWLR (Pt. 1146) 225

<sup>335</sup> Section 6 of the Land Use Act

<sup>336</sup> Section 36, LUA.

<sup>337</sup> (1990)2 NWLR(PL.135)745

Local Government. Meanwhile, in this instance, the land which is a subject of Customary Right of Occupancy deemed granted can be divided into Agricultural land and developed land. **Agricultural Land**

Section 36(2)<sup>338</sup> provides that any occupier of such land, whether under customary right or otherwise however, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the custom of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil.

In affirming the right of a holder under a deemed grant, the Supreme Court held in the case of *Adole v. Boniface B. Gwar*,<sup>339</sup> that the Land Use Act was not promulgated with the objective of abolishing all existing titles or rights to possession existing prior to its promulgation. Rather, it reinforces or strengthens title of prior holders who are deemed

grantees but limits their interest to statutory or customary rights of occupancy as the case may be by removing radical title. So, Customary Right of title holder has not been taken away or extinguished with the coming into force of the Land Use Act. Meanwhile, the rightful holder in this case is the person in occupation before the promulgation of the Act even if he was a customary tenant on the land.<sup>340</sup>

### **Developed Land**

In *CSS Bookshops Ltd & Ors v. Registered Trustees of Muslim Community of Rivers State & Ors*,<sup>341</sup> it was held that by virtue of Section 34 (1), (2) and (3) of the Act where a developed land in an urban area was vested in any person immediately before the commencement of the Act, the land shall continue to be held by that person in whom it was vested as if the holder of the land was the holder of a Statutory Right of Occupancy issued by the Governor under the Act. And where the land is underdeveloped, portion of the land not exceeding half of one hectare in area shall continue to be held by the person in whom the land was vested as if the holder of the land was the holder of Statutory Right of Occupancy granted by the Governor.

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<sup>338</sup> Land Use Act 1978

<sup>339</sup> (2008)11 NWLR (PL.1099) 562 (a) 588 & 606

<sup>340</sup> See *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 130.

<sup>341</sup> (2006)11 NWLR (Pt. 992) 530 (a) 561-562, 567&574 See also *Ilona v. Idakwo* (2003)11 NWLR (pt.830) 53.

### **3.10 Alienation of Family Land under the Land Use Act**

By the provision of Section 22 of the Land Use Act, the holder of a statutory right of occupancy granted by the Governor cannot alternate the right of occupancy or part thereof without the consent of the Governor first hand and obtained. It follows therefore, that alienation of a customary right of occupancy must also be done by the requisite consent of the relevant Local Government Council<sup>342</sup> It then follows that having observed the Customary Law provisions on the concurrence of the family head and the principal members, the family through its representatives must apply to the requisite consent. Meanwhile, the Act further complicates things in Section 36 (5) which conflicts with Section 21 of the Act. The interpretation of Section 21 is that alienation of customary right of occupancy is alienable as long as the requisite consent is obtained. However,

Section 36 (5) prohibits the alienation of land in non-urban area (a subject of Customary Right of Occupancy) whether with consent or not, the said section provides below:

*no land to which this section applies shall be subdivided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested as aforesaid.*

### **3.10.1 Effect of the Land Use Act on Customary Pledge**

The term 'pledge' under Nigerian law refers to the customary pledge which is part of the local laws and customs. A customary pledge is defined under Nigerian customary law as an arrangement whereby the owner/pledgor of land in order to secure an advance of money or money's worth, gives possession and use of the land to the creditor/pledgee until the debt is fully discharged. The relevant issue in the Land Use Act restriction is the transfer of possession which occurs in pledge agreements between parties. Before any transfer of possession can be made by the debtor to the creditor, the requisite Governor's consent needs to be sought first and obtained.<sup>343</sup>

Nigerian law infuses two essential features into the customary pledge possessory interest in land.

Firstly, that the pledge provides the creditor/pledgee with security for the performance of the

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<sup>342</sup> See Section 21 (4), LUA, 1978

<sup>343</sup> See Section 34 (4), LUA, 1978

debtor/pledgor's obligation of repaying the money owed. Secondly, that the security takes the form of giving the creditor/pledgee possession of the debtor/pledgor's property.<sup>344</sup>

Customary pledges have sometimes been confused with mortgages on land and this has arisen due to a failure to use precise language to indicate the nature of the transaction. The distinguishing feature between a customary pledge and a mortgage is in the nature of the security granted. If the agreement seeks to grant the creditor a proprietary interest in

the secured property, then whether or not the creditor takes possession of the property under express stipulation or by operation of law, the transaction is a mortgage. If actual possession is to be given to the creditor under the agreement, then it is in fact a Nigerian customary pledge.

The Land Use Act has imposed certain restrictions on the transfer of property rights to land through pledge agreements and this has had an adverse effect on the protection accorded to private property rights of individuals within the Nigerian legal system. The first Land Use Act restriction which is applicable to a debtor/pledgor who had pre-existing rights to the land before the commencement of the Land Use Act relates to undeveloped land situated in an urban area, The Land Use Act restricts individual property rights by asserting that the debtor cannot pledge more than a half hectare of the land as that is the maximum quantum that he is entitled to by law.<sup>345</sup>

In relation to developed land situated in an urban area, the Land Use Act makes reference to the Nigerian federal capital and provides that land situated in the Federal Capital Territory of Nigeria can only be the subject of a statutory right of occupancy granted by the Governor of the Federal Capital Territory. Inevitably, the Minister's consent requirement is mandatory with regards to a Statutory right of occupancy where there is alienation or a transfer of possession of the land in question.

As Nigerian pledges involve the transfer of possession of the property, the consent requirement is needed by law in order to make the pledge agreement valid. In circumstances where there exists a

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<sup>344</sup> See the case of *Adjei v. Dabanka* (1930) 1 WACA, p. 66-67 where the distinguishing feature between a Nigeria pledge and a mortgage was highlighted. Michelin J. referred to the pledge in the property agreement as a "native mortgage" and stated that "it is an essential of a native mortgage (pledge) that possession should be given at the time when the transaction takes place between the parties. It is out of the possession granted under the agreement that the pledgee's right spring."

<sup>345</sup> Section 34 (5), LUA, 1978

customary right of occupancy, the consent of the Local Government of the land in question is also omandatory.<sup>346</sup>

The greatest restriction is contained in section 36 (5) of the Land Use Act which appears to prohibit any transfer of land in non-urban areas deemed granted. This sub-section seems to imply a total ban on "transfer of land" transactions on land situated in a rural area where the rights of occupancy on the land are deemed granted. The issue of whether the blanket ban of "transfer of land" is applicable to a pledge which is in essence the transfer of possession of landed property between parties to a transaction is one that is still being argued under the Nigerian legal system.

### **3.10.2 Effect of the Land Use Act on Customary Gift**

Gifts of landed property involve a transfer of possession of property between two parties. A gift signifies the voluntary transfer of property from one person to another without valuable consideration.<sup>347</sup> When land is transferred by way of a gift between parties, the requisite consent of the Governor is needed in order to validate the property transaction,<sup>348</sup>

The Land Use Act's imposition of the consent requirement encroaches on the private property rights and prevents individuals from transferring property rights as gifts without first and foremost obtaining consent from the Governor of the respective State within which jurisdiction the land which is the subject matter of the gift is situated. The issue of whether the blanket ban imposed by section 36(5) of the LUA which refers to all "transfers of land" is also applicable to gifts of landed property from a donor to a donee remains unclear.

The Nigerian courts are still unable to determine whether section 36 (5) applies to gifts of land granted between parties. It is apparent that there are considerable restrictions imposed by the Land Use Act on any transfer of property between parties to property transaction and these limitations restrict the ability of individuals to freely alienate and deal with their interests or rights in property.

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<sup>346</sup> See generally section 34 of the LUA. The implication of these provisions is that customary pledge agreements can only be created over land which is the subject of a statutory right of occupancy. As land in Federal Capital Territory does not qualify as non-urban or rural land, therefore customary rights of occupancy are not possible in the Federal Capital Territory (Abuja).

<sup>347</sup> Ike Don N (1984), *The System of Land Rights in Nigerian Agriculture*, American Journal of Economic and Sociology, Volume 43 (4) at p.469-480

<sup>348</sup> *Ibid*

**CHAPTER FOUR**  
**COMPULSORY ACQUISITION AND ALIENATION OF LAND UNDER**  
**CUSTOMARY**  
**LAND TENURE IN NIGERIA**

**4.0 Introduction**

Compulsory acquisition is founded on the existence of private property rights.<sup>349</sup> The compulsory acquisition process is a confirmation and recognition of the fundamental right to private property; in that it gives a-priori recognition to private property rights. Going by the ordinary meaning of the concept, it presupposes the existence of ownership rights in other persons outside the government and the public in general. It comes into play when the government now decides to compulsorily acquire the property belonging to another for the common good of the society. This usually arises when the government needs land for government developmental purposes and the need to provide public infrastructures by itself and or through the agency of private commercial enterprise (PPP). Legal and jurisprudential justification of the compulsory acquisition process can be found in the argument that compulsory acquisition is "balancing the needs of the few with the needs of the many".<sup>350</sup>

The corollary to compulsory acquisition is compensation paid to the victim of compulsory acquisition in the form of monetary compensation or resettlement. To a large extent the law seeks to compensate the victim based on the quantum and value of his loss. The compensation paid to the affected is probably premised on the philosophy that no individual should be personally and exclusively be burdened by the need to provide for the common good of all in the society. It is thus a process of equitable redistribution of societal burden on all, since the compensation is paid from the common pool of the State.

**4.1 Acquisition of customary land by the State Government for overriding public interest**

It is a notorious fact that a chairman of a local government grants a customary right of occupancy to persons in charge of customary law in the South west and Nigeria at large.

This position is the tenor of section 51 of the Land Use Act which provides among other things that:

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<sup>349</sup> Section 43 constitution of federal Republic of Nigeria 1999 cap. C23 Laws of Federation of Nigeria 2004

<sup>350</sup> Marcus Jacobs: Law of Compulsory land Acquisition Law Book Co. UK 2010 p 24

*the right of a person or community lawfully using or occupying land in accordance with customary law and includes a Customary Right of Occupancy granted by a Local Government under this Act.*

This definition is vague in that it makes it as if it is only customary law that governs it and it excludes the Act from its operation. However, by Section 5 (1) (a) the Governor can grant a Statutory Right of Occupancy whether or not the land is in urban area. Thus, in *Olagunju v. Adesoye*<sup>351</sup> the Supreme Court held that the Governor of a State has the power to grant Statutory Right of Occupancy whether or not the land concerned is in urban or non-urban area.

The death knell on private ownership of land in Nigeria is brought to fore by the fact that the Governor has no obligation to renew any right of occupancy on the effluxion of time of the grant, thus where the period of your grant expires the absolute ownership right of the State over the land becomes obvious.<sup>352</sup> The consequences of this position of the Act on compulsory acquisition process is grave and ominous on individual property right, State control and management of land, land conflicts and litigation, national growth and sustainable development in the country, as will be seen soon.<sup>353</sup>

Thus, as cost follows event, compensation follows compulsory acquisition of land from the individuals by the state. Compensation in this respect is seen as recompense for deprivation of individual private property rights. This theoretical postulation probably informed the constitutional provision that guarantees that every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria,<sup>354</sup> And the subsequent provision that

No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things-  
(a) requires the prompt payment of compensation therefore and...<sup>355</sup>

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<sup>351</sup> (2009) 9 NWLR (pt. 1146) 225

<sup>352</sup> Tunde Otubu 'Land Reforms and the Future of Land Use Act In Nigeria' *Nigerian Current Law Review* 2007 - 2010

<sup>353</sup> *infra*

<sup>354</sup> Section 43 Constitution of Federal Republic of Nigeria 19994

<sup>355</sup> *Ibid* section 44(1)

The kernel of this provision is the recognition of private property right and the need to compensate the individual where such right is lost to State acquisition process. Though the constitution says 'prompt compensation'<sup>356</sup> without reference to its adequacy or otherwise, it is however, a generally accepted norm<sup>357</sup> that compensation payable goes as far as it can to put the injured party into the position he was before the State acquisition of his property right.<sup>358</sup>

#### **4.2 Criteria for Compulsory acquisition of Land in Nigeria**

Before there could be a valid compulsory acquisition, it is the law that there are four underlying conditions that must be met. This is the tenor of the Supreme Court of Nigeria in the case of *Olatunji v. Military Government of Oyo state of Nigeria*.<sup>359</sup> The conditions are asset out below;

- a. There must be a valid notice which must be personally served on the owner
- b. Compensation
- c. Overriding Public Interest
- d. Gazette

The above conditions as set forth shall be discussed seriatim.

##### **4.2.1 Personal service**

It is gratifying to note that some of the rigours in the Act are been addressed through judicial activism and positive interpretation of the law and the constitution in this regard. For instance, the issue of non-issuance and service of pre-acquisition notice and service of acquisition notice generally has been addressed by the courts. In *Osho V Foreign Finance and Another*<sup>360</sup>, the

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<sup>356</sup> This is unlike the provision of S.31 of the 1963 Republican Constitution of Nigeria that provided for the payment of adequate compensation to the victims of compulsory acquisition.

<sup>357</sup> See: the famous English court case *Horn v Sunderland Corporation* (1941), in which Scott L.J. held that a dispossessed person is entitled to compensation and to be put, "as far as money can do it, in the same position as if the loss imposed on him in the public interest, but, on the other [hand], no greater."

<sup>358</sup> Notable exception is to be found in the provision of the Land Use Act on compensation

<sup>359</sup> (1994) LPELR-14116

<sup>360</sup> (1991) 4 NWLR (Pt 184) 157

Supreme Court that the notice of revocation must contain the grounds for revocation, must first be served on the holder of a right of occupancy and must give the holder an opportunity to challenge the rightfulness or otherwise of the revocation in accord with fair hearing provisions in section 33 of the 1979 constitution of federal republic of Nigeria.<sup>361</sup> Anything short of this would render the revocation invalid,<sup>362</sup> and it is immaterial that the purpose is obvious and the right holder is deemed to know of it.<sup>363</sup> The purport of this decision is to the effect that the revocation notice is not immutable except it affords the right holder a prior right of hearing and an opportunity to query the revocation order. Also, this revocation notice must be served personally on the holder of the customary occupancy and must be served via substituted service as enunciated in the case of *Chief Commissioner Eastern Province v. Ononye*<sup>364</sup>. This essentially is a judge made law based on precedents, though not expressly provided for in the Land Use Act.

#### **4.2.2. Compensation**

Compensation is an integral part of the process of compulsory acquisition of land in Nigeria. Its importance cannot be over emphasized as failure to compensate the occupier renders the acquisition a nullity. The prompt payment of compensation is provided for

both statutorily<sup>365</sup> and by judicial pronouncements. Where a right of occupancy has been revoked in compliance with existing law, the occupier or holder is entitled to be paid compensation promptly and the law gives to any person claiming such compensation a right of access to a court or tribunal or body having jurisdiction for the determination of his interest in the property and the amount of compensation payable.

In *National Universities Commission v. Oluwo*,<sup>366</sup> the Court of Appeal held that where land has been compulsorily acquired the person whose land has been so compulsorily acquired is entitled

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<sup>361</sup> Now section 36 of the 1999 constitution.

<sup>362</sup> See *Nitel v Ogunbiyi* (1992) 7 NWLR (Pt. 255) 543; *A.G. Lagos State v Sowande* (1992) 8 NWLR (Pt 261) 589. See also Chianu E. Land Use Act and Individual Land Rights in Smith. I. O. (ed) Land Use Act: Twenty-Five Years After. Unilag, 2003. pp133-134.

<sup>363</sup> *Nigeria Engineering Works Ltd V Denap Ltd* (1997) 10 NWLR (525) 481.

<sup>364</sup> **(2018) LPELR-45067 (CA)**

<sup>365</sup> Chianu E. Land Use Act and Individual Land Rights in Smith. I. O. (ed) Land Use Act: Twenty-Five Years After. Unilag, 2003. pp133-134.

<sup>366</sup> (2001) 3 NWLR (PL.699) at p.90.

to a reasonable compensation. The right to own property by an individual is well entrenched in the

constitution of the Federal Republic of Nigeria and it carries with it, the right to dispose of the said property. The government with all its might cannot acquire the land of an individual without paying adequate compensation to the dispossessed citizen.<sup>367</sup>

Government has a duty to comply with the procedure for acquisition of land. This duty was emphasized by the Supreme Court of Nigeria in *Goldmark (Nig.) Ltd. v. Ibaforon Co.Ltd.*<sup>19</sup> in the following words:

The court has always emphasized that government has the right to compulsorily acquire property on payment of compensation. There is no argument about such constitutional power. There are statutes which provide for the procedure of acquiring property by the government. Government is expected to comply with those statutes which it has enacted. Where government disobeys its own statute by not complying with the laid down

procedure for acquisition of property, it is the duty of the courts to intervene between the government and the private citizen.

Flowing from the above, failure to comply with the legal requirements for revocation of existing rights to land renders a subsequent certificate of occupancy on such land a nullity on the age long principle of *nemo dat quod non habet*.<sup>368</sup> The existence of a certificate of occupancy is merely prima facie evidence of title to land it covers and does not validate a spurious or fraudulent instrument of title or a transfer or grant which in law is patently invalid or ineffective. The mere issuance of a certificate of occupancy does not and cannot confer title in respect of land in a person where no such title either existed or was available to be transferred to anyone.<sup>369</sup> Therefore, for there to be a valid acquisition of land by government, there must be notice of revocation of the existing title followed by payment of the statutorily prescribed compensation.

Conceptually when private property is acquired by the State, compensation is paid not only for the actual loss of the land but also for other socio-economic losses occasioned by the

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<sup>367</sup> Chianu E. Land Use Act and Individual Land Rights in Smith. I. O. (ed) Land Use Act: Twenty-Five Years After. Unilag. 2003. pp133-134.

<sup>368</sup> This is a Latin word which means 'you cannot give what you don't have'

<sup>369</sup> Chianu E. Land Use Act and Individual Land Rights in Smith. I. O. (ed) Land Use Act: Twenty-Five Years After. Unilag. 2003. pp133-134.

Act.<sup>370</sup> In fact heads of compensation includes compensation for the land taken, for development on the land, severance, injurious affection,<sup>371</sup> disturbance, special value and damages<sup>372</sup> The valuation of payable compensation is usually a function of the provisions of the Acts, Decrees and other relevant statutory enactments guiding the process. This framework usually specifies the basis and methods of assessment, as well as the procedures, heads of claim and roles of respective parties. It is influenced by the level of socio-economic development of particular nations; their development needs, cultural norms and land-use patterns. Also, influential is the level of development of the appropriate national professionalbody.<sup>373</sup> It should be noted however that valuation for

compensation is not only expected to satisfy professional standards of valuation but in addition, constitutional provisions and international requirements for just, fair, adequate and equitable value must be met.<sup>374</sup>

In the United States, the market value of the subject property is generally held as just compensation for the dispossessed landowners.<sup>375</sup> In contrast, in the United Kingdom, compensation is based on the principle of value to the owner or the principle of equivalence. The principle of equivalence in the words of Scott L.J in *Horn v Sunderland Corporation*<sup>376</sup> is the right of the owner to be, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater.” The value to the owner compensation principle is made up of market value together with other

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<sup>370</sup> In UK compulsory acquisition is seen as the State seeking to retain its right to recover that which it considers its own, when and wherever it is required for public purposes, In so doing, it offers compensation to the current holders by way of payment for whatever interest held in the lands taken, and some consideration of inconveniences caused, income lost or injury suffered (disturbance), and the reimbursement of expenses incurred in recovering such compensation.

<sup>371</sup> Injurious affection is, in broad terms, the effect of acquiring part of someone’s land on the value of any remaining land; it is the loss in value to the remaining land of the landowner arising out of a taking from those lands. See *Coshburn*, R.S. Injurious affection in the absence of a taking: A historical analysis in the Canadian (B.C.) context available at: [http://www.expropriationalaw.ca/articles/art02000\\_files/art02002.asp](http://www.expropriationalaw.ca/articles/art02000_files/art02002.asp) accessed 24/08/2023

<sup>372</sup> Umeh, J.A.: *Compulsory Acquisition of Land and Compensation in Nigeria* sweet & Maxwell 1973 p. 39-48

<sup>373</sup> Viitanen, K & Kakulu, I. ‘Global Concerns in Compulsory Purchase and Compensation Processes’ paper presented at the FIG Working Week in Stockholm, Sweden 14-19 June 2008 available at: [http://www.fig.net/pub/monthly\\_articles/February\\_2009/February\\_2009\\_vitanen\\_kakulu.html](http://www.fig.net/pub/monthly_articles/February_2009/February_2009_vitanen_kakulu.html) → accessed 24/08/2023

<sup>374</sup> Knight, R. Land Tenure Studies Series Guide to Compulsory Land Acquisition and Compensation. Available at: <http://www.tkk.fi/Yksikot/kiinteisto/FIG/pdf-files/07092007knight> accessed 24/08/2023

<sup>375</sup> See generally: Eaton J.D. *Real Estate Valuation in Litigation*, 2<sup>nd</sup> edition, Appraisal Institute. (1995)

<sup>376</sup> (1941) 2 KB 26, at p. 42

losses suffered by the claimant.<sup>377</sup> This principle is broadly followed in most Commonwealth countries and regions such as Australia<sup>378</sup> and Hong Kong.<sup>379</sup> The heads of compensation include:

- a. the value of the land and any buildings erected thereon at the date of acquisition;

- b. the value of any easement or other right in the land resumed, owned, held or enjoyed by a claimant at the date of acquisition;
- c. the amount of loss or damage suffered by any claimant due to the severance of the land acquired or any building erected thereon from any other land of the claimant, or building erected thereon, contiguous or adjacent thereto;
- d. the amount of loss or damage to a business conducted by a claimant at the date of acquisition on the land acquired or in any building erected thereon, due to the removal of the business from that land or building as a result of the acquisition;
- e. (i) the amount of any expenses reasonably incurred by him in moving from any premises owned or occupied by him on the land acquired to, or in connection with the acquisition of, alternative land or land and buildings,<sup>380</sup> but excluding any amount to which paragraph (d) applies; (ii) the amount of any costs or remuneration reasonably incurred or paid in employing persons to act in a professional capacity in connection with such offer or claim.<sup>381</sup>

It is also customary that where there is dispute as to the quantum and or adequacy of compensation paid the law allows an aggrieved party to approach the court for the determination of the issue.<sup>382</sup> In Hong Kong, in the event that an agreement as to the amount of statutory compensation (if any) cannot be reached between the claimant and the

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377 Denyer-Green B. *Compulsory Purchase and Compensation*, 4<sup>th</sup> edition, Estates Gazette. (1994),

378 Rost R.O. & Collins H.G. *Land Valuation and Compensation in Australia*, Australian Institute of Valuers and Land Economists. 1993,

379 Cruden G.N. *Land Compensation and Valuation Law in Hong Kong*, Butterworths Singapore. (1986)

380 *Glasgow Corporation v. Anderson* (1976) SLT 225

381 Pang L.H.C.: *Resumption & Valuation In Hong Kong* available at:

<http://www.hkis.org.hk/hkis/general/events/cpd-201289a.pdf> accessed 24/08/2023

382 See: section 44 of the constitution of federal republic of Nigeria 1999 (As amended); KEOGH. J.: The 'Special Value' of Land in Compulsory Acquisition Cases. Paper Delivered At Pacific Rim Real Estate Society Seventh

Annual Conference 21st-24th January 2001 Adelaide, Australia.

Government, either party may submit the claim to the Lands Tribunal for a determination of the amount of the compensation. The figure awarded will then be binding on both the

claimant and the Government. In the interim Government will offer to the claimant 100% of the statutory valuation assessed by the Government as a provisional payment together with interest pending the outcome of the determination by the Land Tribunal <sup>383</sup>

#### **4.2.2.1 Compulsory acquisition Process and procedure**

Compulsory acquisition is a power of government, but it is also the process by which that power is exercised. Attention to the procedures of compulsory acquisition is critical if a government's exercise of this power is to be efficient, fair and legitimate. In line with the FAO studies in Landtenure,<sup>384</sup> a well-designed compulsory acquisition process should include the following steps: Planning, that is determining the different land options available for meeting the public need in a participatory fashion. The exact location and size of the land to be acquired is identified. Relevant data are collected. The impact of the project is assessed with the participation of the affected people. Notice of intending acquisition is published to inform owners and occupants in the designated area that the government intends to acquire their land. People are requested to submit claims for compensation for land to be acquired. The notice must describe the purpose and process, including important deadlines and the procedural rights of people. Public meetings are called to provide people with an opportunity to learn more about the project, and to express their opinions and needs for compensation.

The process should also include valuation and submission of claims by the affected parties while also permitting negotiation between the parties. Compensation for the land to be acquired is determined at the stated date of valuation. The land is valued by the acquiring agency or another Government body. The acquiring agency considers the submitted claim, and offers what it believes to be appropriate compensation. Following that, the government pays people for their land or resettles them on alternate land, after which the government takes ownership and physical possession of the land for the intended purpose. Also, owners and occupants are given the chance

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<sup>383</sup> Guidelines on land resumption and compensation in Urban Area in Hiong kong available at: [http://www.landsd.gov.hk/en/images/doc/ulm\\_resumption.pdf](http://www.landsd.gov.hk/en/images/doc/ulm_resumption.pdf) accessed 24/08/2023

<sup>384</sup> Supra n.4

to contest the compulsory acquisition, including the decision to acquire the land, the process by which the land was acquired, and the amount of compensation offered, Lastly the process should offer opportunity for restitution of land if the purpose for which the land was used is no longer relevant. Any process or procedure falling short of the above process is likely to yield in justice and breed friction between the acquiring authority and individual property owners.

The remaining part of the study is devoted to the examination and the review of the Nigerian scenario from pre-colonial times to the present with a view at rationalizing the process within the conceptually accepted international standard.

#### **4.2.3 Overriding Public Interest**

The Governor may also revoke a right of occupancy for overriding public interest,<sup>385</sup> What then can be classified as overriding public interest? The answer to this question can be viewed from two perspectives namely, in the case of a statutory right of occupancy or a customary *right of occupancy*. Overriding public interest in the case of a statutory right of occupancy means the requirement of the land by the Government of the State or by a Local Government in the State. In either case, for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation; the requirement of the land for farming purposes or for the laying of oil pipelines or for any purpose connected therewith.<sup>386</sup> On the other hand, overriding public interest in the case of a customary right of occupancy means the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation; the requirement of the land for mining purposes or for the laying of oil pipelines or for any related purpose. The major difference between a statutory right of occupancy and a customary right of occupancy is that the former relates to lands in urban areas while the latter relates to lands in rural areas. Other grounds for compulsory acquisition include the requirement of the land for the extraction of building materials and the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sub-lease, bequest or otherwise of the right of occupancy without the requisite consent or approval.<sup>387</sup> The acquiring

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<sup>385</sup> Umeh, J.A: *Compulsory Acquisition of Land and Compensation in Nigeria* Sweet & Maxwell 1973, p. 39-48.

<sup>386</sup> Ibid

<sup>387</sup> Ibid

authority is required to state one or a combination of the public purposes for which the Land was being acquired in his notice to the holder of a right of occupancy to enable the holder or occupier to challenge the acquisition. In *Olatunji v. Military Governor of Oyo State*<sup>388</sup> the Court of Appeal, per Salami JCA (as he then was) held as follows:

The Appellant can legitimately protest the acquisition if the purpose for which the land was being acquired was not within the confines of definition of public purpose as defined in Section 50 of the Act. The acquiring authority failed to state the public purpose for which the property was acquired. He kept it up his sleeve. In this connection Waddington, J., said in the case of *Chief Commissioner, Eastern province v. Ononye*<sup>389</sup> 17 NLR 142 at 143 thus-"the notice merely states" for public purposes" and I find it difficult to understand why the particular public purpose is not stated. When the matter comes into court it has to be admitted that there is no public purpose involved at all; and the impression is liable to be conveyed, no doubt erroneously, that there was something ulterior in the failure to make the purpose public.

The Court went further to hold that the holder of land compulsorily acquired by government is entitled to know the ground(s) for the government's acquisition of his interest in the land. The learned justice of the Court of Appeal further explains that:

The appellant is not entitled to speculate or fish for the ground or grounds for acquiring his interest in the property in dispute. The best he would do in the circumstance is to lie patiently in waiting until the acquiring authority manifest[s] its true intention. Before manifestation of the acquiring authority's intention he is helpless not only himself would be helpless the court to which he has constitutional access to would equally be left in complete helplessness.<sup>390</sup>

Also, a land compulsorily acquired for public purpose can be vitiated where it was subsequently diverted to serve private need. If a property is ostensibly acquired for public purpose and it is subsequently discovered that it has directly or indirectly been diverted to serve private needs, the acquisition can be vitiated. The acquiring authority cannot 'rob

Peter to pay Paul' by divesting one citizen of his interest in a property only to vest same in another. If the acquiring authority can no

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<sup>388</sup> Supra.

<sup>389</sup> Supra.

<sup>390</sup> Chianu, E. Land Use Act and Individual Land Rights in Smith, LO. (ed) Land Use Act: Twenty-Five Years After. Unilag. 2003.pp 133-134.

longer find a public purpose for the land so acquired the only avenue open to it is to de-acquire it and let the same revert to the person in whom it was already vested.<sup>391</sup>

Aside from overriding public interest, the Governor may revoke a right of occupancy on the ground of a breach of any of the provisions which is contained in a certificate of occupancy; a breach of any term contained in the certificate of occupancy or in any special contract made and a refusal or neglect to accept payment for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Governor,<sup>392</sup> For an acquisition to be valid certain preliminary steps must be taken.

#### **4.2.4 Gazette**

A notice must be issued by the Governor. The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Governor and notice there of shall be given to the holder. Where such notice whether by or on behalf of the president declares a land to be required by the Government for public purposes the Governor shall revoke the right of occupancy. Upon receipt of the notice, the title of the holder of the right of occupancy shall be extinguished immediately, or on such later date as may be stated in the notice. Failure to serve notice in the manner prescribed by the Land Use Act<sup>393</sup> would be tantamount to a substantial non-compliance which renders the acquisition bad and the acquiring authority cannot be vested with any interest in the land until the subsisting interest is revoked. The reason for this outcome is that there can be no concurrent possession by two parties claiming adversely.<sup>394</sup> Personal Service is also sine qua non of revocation of interest in land and cannot be dispensed with because it is after the service in the manner prescribed in the legislation that the right of holder of the right of occupancy is revoked. The requirement of

publication of notice of revocation in the gazette constitutes a notice to the whole world and is not a substitute for the personal service enjoined by

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391 Tunde Otubu 'Land Reforms and the Future of Land Use Act In Nigeria' Nigerian Current Law Review 2007 – 2010

392 Ibid.

393 1978.

394 Chianu E. Land Use Act and Individual Land Rights in Smith. I.O. (ed.) Land Use Act: Twenty-Five Years After. Unilag. 2003. pp 133-134.

the legislation. In *Olatunji v. Military Governor of Oyo State*<sup>395</sup> for instance, the court stated as follows:

A very careful reading of sections 28 and 44 of the Land Use Act would disclose that publication in Gazette and local newspapers are not mode or manner of effecting service under Land Use Act. It does appear to me that omission of publication in the Gazette and newspaper is to further emphasize to acquiring authorities that the legislature has in mind personal service only as it left the acquiring authority with no option. Publication in the Gazette or newspaper is a mere grafting of a manner of serving notice prescribed under section 9 (3) of Public Land Acquisition Law on the provisions of section 44 of the Land Use Act. For a notice to be valid it has to be served in accordance with the provisions of the Land Use Act<sup>396</sup>.

In light of the foregoing, for there to be a valid acquisition notice of revocation of the right of occupancy must be served on the holder by personal service. The Act provides for situations where it is impracticable after reasonable inquiry to ascertain the name or address of a holder or occupier of land on whom it should be served, by addressing it to him by the description of "holder" or "occupier" of the premises to which it relates, and by delivering it to some person on the premises or, if there is no person on the premises to whom it can be delivered, by affixing it, or a copy of it, to some conspicuous part of the premises.

### **4.3. History of compulsory acquisition and compensation in Nigeria**

#### **(a) Pre-colonial era.**

In pre-colonial Nigeria compulsory acquisition process was carried out in different communities and tribal kingdoms based on existing sociocultural patterns and political hegemony existing in the various communities.<sup>397</sup> The right of the State to extinguish private ownership rights in land was well recognized and well documented in traditional cultures and native language expressions. The power was essentially used for establishment of public institutions like village shrines, markets and grooves. The process was also used as a punitive expropriation scheme as part of the

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<sup>395</sup> Supra

<sup>396</sup> 1978.

<sup>397</sup> These includes the Town, Village, community and groups which performed functions similar to those of a modern state.

Traditional machinery for public justice.<sup>398</sup> In acquiring the property the individual affected was usually carried along and was usually convinced of the need to relinquish his land for communal use. Thus, the process was devoid of disputes and or disagreement between the acquiring authority and the land owners.

During this period compensation was mostly by way of resettlement and allocation of alternative land to victims of compulsory acquisition, except when the acquisition was done in furtherance of administration of communal justice. In the later circumstance the acquisition in penal nature and therefore devoid of any compensation. The alternative land so offered needed neither to be comparable with the land taken nor to be an adequate quid pro quo for it.<sup>399</sup>

#### **(b) Colonial**

The inception of the colonial rule in Nigeria did not immediately terminate the customary mode of compulsory acquisition and compensation scheme; it continued for a considerable period until the full establishment of colonial rule by the British imperialist in what later became known as Nigeria. The coming British administration initially acquired land for its administration in Nigeria through a variety of ways including conquests, purchases, gifts and treaties.<sup>400</sup>

Statutory compulsory acquisition was introduced in Nigeria in 1863, in connection with the town improvement scheme in Lagos. 1876 saw the introduction of the Public Lands Ordinance with the first general powers of acquisition in Lagos, which extended to southern Nigeria in 1906 and was made to cover the other parts in 1917. The Ordinance permitted government to compulsorily acquired land needed for public purposes and pay compensation.

In the Northern region of Nigeria the situation was much different. The incoming British administration met and inherited a monolithic tenurial system, which recognized the suzerainty of the caliphate in land administration.<sup>401</sup> It was therefore not difficult for the incoming the administration to step into the shoes of the conquered Fulani's. In the words of Lugard "the

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<sup>398</sup> For example where oath deities acquired lands and other assets of culprits.358 ẽ

<sup>399</sup> Umeh.J.A.op cit n33No

<sup>400</sup> ibid, see also Aghalino S.O: Dynamics of Constitutional Development in Nigeria,1914-1999 in Ojo EO (ed.) Challenges of sustainable Democracy in Nigeria. Ibadan: John Archer 2006 P. 300-314

<sup>401</sup> Atilola O: Land Administration Reform Nigerian: Issues and Prospects available at: [http://www.fig.net/pub/fig2010/papers/inv04/inv04\\_atilola\\_4758.pdf](http://www.fig.net/pub/fig2010/papers/inv04/inv04_atilola_4758.pdf) accessed 24/08/2023

government will in future hold the rights in land which the Fulani took by conquest from the people and if the government requires land it will take it for any purpose'.<sup>402</sup>

The British declared all lands in the North to be native land and put the management and control of all land under the chief executive of the region for the benefit of all the people, thus exercising the powers of trusteeship of the land in accordance with native laws and customs.<sup>403</sup> Based on the Northern Nigerian land committee report<sup>404</sup> the colonial administration promulgated the Land and Native Rights Proclamation of 1916<sup>405</sup> which was repealed and replaced with the Land and Native Rights Ordinance of 1916.<sup>406</sup> The Land Tenure Law of 1962 later replaced this Ordinance.<sup>407</sup> All these succeeding legislation were *impari* material in concept, content, scope and application.

Under the Land Tenure Law, the absolute ownership rights of the natives over land was subjugated and circumscribed to a mere right of occupancy, which is a limited right of use over land for a determinable period. This management power was so expansive to the

extent, that even the limited right of use of the land is revocable by the chief executive without compensation in some cases. And where compensation was payable it was only for the improvement or development on the land and not the land itself or any other ancillary rights.

Meanwhile the Public Land Ordinance of 1917 provided for the procedure for compulsory acquisition and the payment of compensation for such land acquisition in the southern part of the country. The Act provided for the taking of preliminary investigation by the acquiring authority and the consent of the land owner before any entry could be made into the land.<sup>408</sup> It also required the acquiring authority to serve a notice of intention to acquire the land on the land owner prior to the acquisition,<sup>409</sup> including a mandatory obligation to serve a notice specifying a period of not

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<sup>402</sup> See McDowell C.M. An Introduction to the Problems of Land Ownership in Northern Nigeria 1964

<sup>403</sup> Section 4 of the Land Tenure Law provided that "all native lands and all rights over the same are hereby declared

to be under the control and subject to the disposition of the minister charged with responsibility for land matter and

<sup>404</sup> CMD 5102 of 1910. See Rimdam D.D. op. cit for a detailed examination of the purpose for which the committee was established.

<sup>405</sup> No.9 of 1910 cap 96 Laws of Northern Nigeria 195890

<sup>406</sup> No 1 of 1916

<sup>407</sup> Cap 59 Laws of Northern Nigeria 1963

<sup>408</sup> Section 4 (1) Public Land Ordinance of 1917. The authority must give at least a 7 days' notice to the land owner before entering the land.

<sup>409</sup> Ibid. s.5 The notice of intention to acquire must inform the land owner of his right to make presentation of his right and/ or interest in the property to the acquiring authority within 6 weeks of receipt of the notice otherwise such and would be treated as *bona vacanti*.

less than 6 weeks within which the land owner must yield possession of the land. The Act also stipulated the methods and media for effective transmission of notices issued under it and required that the notices must, after being served, be published in the official gazette of the State.<sup>411</sup> To crown it all the constitution granted the land owner the right of access to court for the determination of his interest in the property and amount of compensation payable to him for the loss of his property right. Conversely, similar procedural provisions were made to guard against the acquiring authorities being deliberately or unreasonably held to ransom by the land owners.<sup>412</sup>

For all acquired land under the Act there were provisions for compensation. The heads of compensation included compensation for damages caused on entry the land for preliminary investigation,<sup>11</sup> cost and damages for consequences of the authority's withdrawal of notice of intended acquisition. Compensation was also payable for land, estates, interest or profits taken and for land not taken in the nature of severance and injurious affection and other losses flowing from the acquisition process.<sup>415</sup> The measure of compensation payable was constitutionally stated to be 'adequate compensation'<sup>416</sup> which has been statutorily<sup>417</sup> and judicially<sup>418</sup> interpreted to be the fair market value of the land.

The compulsory acquisition and compensation process under the Act was not immutable as it was defective conceptually and administratively. There existed a lacuna in the series of statutory notices expected to be issued and served under the Act; whilst the Act provided for the issuance of two separate notices, only one is provided for in the schedule to the Act. In fact, the administrative officers charged with the responsibility for issuance of these notices usually used one and the same notice to serve the two separate purposes stated in the Act.<sup>419</sup> The Act did not apply to all parts of the country as its jurisdiction was confined to Southern Nigeria. Northern Nigeria was catered for by the Land and Native Rights Ordinance of 1916 and later by the 1962

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<sup>410</sup> Ibid.s.8 (1)

<sup>411</sup> s.9(1) & (2)

<sup>412</sup> s.4(1),10,11

<sup>413</sup> s.4

<sup>414</sup> s.18(1)

<sup>415</sup> s.15(d)

<sup>416</sup> 31(1)a Constitution of Federal Republic of Nigeria 1963.

<sup>417</sup> s.15(b) Public Land Ordination of 1917

<sup>418</sup> Commissioner for Lands v. Adeleye 14 NLR 109, Chairman L.E.D.R Joye 15 NLR 50

<sup>419</sup> Umeh. J.A. supra n33 p.35

Land Tenure Law whose modus operandi was diametrically different from the policy and intentment of the Public Land Ordination of 1917.

The land Tenure Law declared all land in the North as Native Land and vested the same in the government of the region for the benefit of all Northerners,<sup>420</sup> Individuals only have a user right of a limited duration over the land in his possession. Thus, when land is

taken over by the government in the North it is not compulsory acquisition but State resumption of ownership and reversionary rights in the property. Compensation was thus paid only for any unexhausted improvement on the land and for inconveniences caused by their disturbance but not for the land itself.<sup>421</sup> Where the right of occupancy is revoked for penal reasons the holder gets no compensation under the law.<sup>422</sup> The processes and procedure set out under the Public Land Ordinance for compulsory acquisition were not applicable under the Land Tenure law. Under the latter law, the procedure for revoking a right of occupancy was set out in subsections 5 and 6 of section 34 of the law. It merely required that the revocation shall be signified under the hand of a public officer duly authorized by the Minister and that a notice thereof shall be given to the holder of the right of occupancy upon which his title and interest in the land shall be extinguished forthwith. Service of the notice shall be effected as stated in section 45 of the law. No statutory requirement that the notice shall be published in the State gazette or that it shall contain explicit information on good cause or public purpose need of the acquired land.

**(c) Post Colonial period.**

The extant legislations on the subject during the colonial period continued after independence and until the military takeover of 1966. Given the prevailing socio-economic realities of the time and the need to fast track economic development of the country while also tackling the ills of the Society in land management, the military government, in quick succession, promulgated 3 Decrees to tackle land acquisition and compensation issues in the country; namely, the Requisition and

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<sup>420</sup> Except non - Native lands governed by the provisions of the Public Land Acquisition Act.<sup>420</sup>

<sup>421</sup> s.35(1) Land Tenure Law 1962 进

<sup>422</sup> Ibid.s.20(2)

other powers Decree<sup>423</sup> the State lands (compensation) Decree<sup>424</sup> and the Public Land Acquisition (Miscellaneous Provisions) Decree.<sup>425</sup>

The Requisition and other powers Decree was promulgated during the emergency period of the civil war and it authorized a requisitioning authority to requisition land and other things for a definite or indefinite period of time in pursuit of public purpose within the meaning of Public Land Acquisition Act.<sup>426</sup> The law authorized the payment of compensation for the action of the State and where same is refused it directed its payment into the court.<sup>427</sup> The State lands (compensation) Decree<sup>428</sup> and the Public Land Acquisition (Miscellaneous Provisions) Decree<sup>429</sup> addressed the issue of compensation for compulsory acquisition process. The Public Land Acquisition (Miscellaneous Provisions) Decree not only addressed the lacuna and incongruous provisions in the previous law but fundamentally changed the rules governing compensation in the country. It zoned the whole country and stipulated the maximum compensation payable in each zone as stated in the schedule to the law. It established land tribunals with an exclusive jurisdiction and changed the method of compensation valuation for building and structures from open market or investment method to replacement cost valuation principle less depreciation. The Decree also introduced resettlement of displaced persons in lieu of compensation for the first time in the country.

The Decrees revolutionized the compulsory acquisition process particularly the compensation process in the country. The fundamental and iconic processes and procedure required for compulsory acquisition and compensation were distorted and consigned to the dustbin of history. In its wake a regime of draconian legislation devoid of equity and fairness was lunched on the Nation by the ruling military junta, all in the quest to acquire land for the state without payment of adequate compensation and recognition of property rights and interest in land. Under the Decrees both the acquisition and compensation processes were faulty. There was no provision for the service of adequate notices and no room for objection or public participation in the process. On the compensation side, many otherwise recognizable proprietary interests were ignored and not

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<sup>423</sup> No. 39 of 1967

<sup>424</sup> No. 38 of 1968

<sup>425</sup> No. 4 of 1976

<sup>426</sup> s.10 (1) of Decree 39 of 1967

<sup>427</sup> Ibid s. 10 & 13

<sup>428</sup> No. 38 of 1968

<sup>429</sup> No. 4 of 1976

compensated, while the quantum of compensation paid were grossly inadequate. The letters and spirit of the provisions of the constitution on the subject were totally disregarded and ignored. Such was the scenario when the Land Use Act was promulgated as uniform land legislation in the country in 1978

#### **(d) Land Use Act**

The promulgation of the land use act was foreshadowed by the existing scenario in land use management in the country as evident in land speculation, huge land compensation bill, land boarding and vagaries in land tenure and management approaches in different parts of the country. The Nigerian land-use Act, promulgated on 29<sup>th</sup> March 1978, has many social, economic and political objectives. There are four main objectives derivable from the Act<sup>430</sup> and these are:

1. To effect structural change in the system of land tenure;
2. To achieve fast economic and social transformation;
3. To negate economic inequality caused by the appropriation of rising land values by land speculators;
4. To make Land available easily and cheaply, to both the government and private individual developers

With respect to the fourth objective, the Act provided for a unique land acquisition and compensation process hitherto unknown to native land tenure system. Firstly, the act vested all lands in the state in the Governor in trust for the benefits of all Nigerians<sup>431</sup> and thereafter created a property interest in land less than ownership known as a right of occupancy<sup>432</sup>; which interest is not only of limited duration but also de-feasible under certain conditions. From the inception of Act, the reversionary interest in all lands in the country became vested in the state. This policy informed the compulsory acquisition process adopted by the Act, to the extend that what the state compulsorily acquires is not the land *Simpliciter*, but unexhausted development on the land at

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<sup>430</sup> SERAC: Implications of the Land Use Act in Lagos State available at: <http://www.serac.org/SERAC-LANDUSEACT.doc> accessed 24/08/23

<sup>431</sup> s. 1 Land Use Act

<sup>432</sup> Though the Act did not define the expression 'right of occupancy' but its precursor the Land Tenur Law of Northern Nigeria defines it in section I as 'title to the use and occupation of land...'

The point of acquisition. Thus, what operates under the Act is the revocation of the right of occupancy earlier expressly or deemed granted by the State.<sup>433</sup>

The provisions of the Act on compulsory acquisition process are found in sections 28 and 29, to wit:

28 (1) It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest.

(2) Overriding public interest in the case of a statutory right of occupancy means--.

(a) the alienation by the occupier by assignment, mortgage, transfer of possession, sublease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made thereunder;

(b) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation;

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

(3) Overriding public interest in the case of a customary right of occupancy means-

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<sup>433</sup> ss. 28 & 38 Land Use Act

- (a) the requirement of the land by the Government of the State or by a Local Government in the State in either case for public purpose within the State, or the requirement of the land by the government of the Federation for public purposes of the Federation.
  - (b) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith;
  - (c) the requirement of the land for the extraction of building materials;
  - (d) the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval.
- (4) The Governor shall revoke a right of occupancy in the event of the issue of a notice by or on behalf of the (Head of the Federal Military Government) if such notice declares such land to be required by the Government for public purposes.
- (5) The Military Government may revoke a statutory right of occupancy on the ground of-
- (a) a breach of any of the provisions which a certificate of occupancy is by section 10 deemed to contain;
  - (b) a breach of any term contained in the certificate of occupancy or in any special contract made under section 8;

(c) a refusal or neglect to accept and pay for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Military Governor under subsection (3) of section 10.

(6) The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorised in that behalf by the Governor and notice thereof shall be given to the holder.

(7) The title of the holder of a right of occupancy shall be extinguished on receipt by him or a notice given under subsection (5) or on such later date as may be stated in the notice.

29. (1) If a right of occupancy is revoked for the cause set out in paragraph (b) of subsection (2) of section 28 or (c) of subsection (3) of the same section, the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements.

(2) If a right of occupancy is revoked for the cause set out in paragraph (c) of subsection (2) (2) of section 28 or in paragraph (b) of subsection (3) of the same section the holder and the occupier shall be entitled to compensation under the appropriate provisions of the Mineral Act or the Mineral Oils Act or any legislation replacing the same.

(3) If the holder or the occupier entitled to compensation under this section is a community the Governor may direct that any compensation payable to it shall be paid

- (a) to the community; or
- (b) to the chief or leader of the community to be disposed of by him for the benefit of the community in accordance with the applicable customary law; or
- (c) into some fund specified by the Governor for the purpose of being utilised or applied for the benefit of the community.
- (2) Compensation under subsection (1) of this section shall be, as respects-
- (a) the land, for an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupancy was revoked;
- (b) building, installation or improvements thereon, for the amount of the replacement cost of the building, installation or improvement, that is to say, such cost as may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer less any depreciation, together with interest at the bank rate for delayed payment of compensation and in respect of any improvement in the nature of reclamation works, being such cost thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer;
- (c) crops on land apart from any building, installation or improvement thereon, for an amount equal to the value a prescribed and determined by the appropriate officer.
- (3) Where the land in respect of which a right of occupancy has been revoked forms part of a larger area the compensation payable shall be computed as in subsection (4) (a) above less a proportionate amount calculated in relation to that part of the

area not affected by the revocation but of which the portion revoked forms a part and any interest payable shall be assessed and computed in like manner.

(6) Where there is any building, installation or improvement or crops on the land to which subsection (5) applies, then compensation shall be computed as specified hereunder, that is a respects-

- (a) such land, on the basis specified in that subsection;
- (b) any building, installation or improvement or crops thereon (or any combination or two or all of those things) on the basis specified in that subsection and subsection (4) above, or so much of those provisions as are applicable, and any interest payable under those provisions shall be computed in like manner.

For the purposes of this section, "installation" means any mechanical apparatus set up or put in position for use or materials set up in or on land or other equipment, but excludes any fixture in or on any building.

The provision of section 28 provides for 2 variants of the power of the governor to revoke a right of occupancy; non penal revocation for overriding public interest<sup>434</sup> and penal revocation for failure of the holder to fulfill the terms of the grant one way or the other.<sup>435</sup> Revocation under the first leg will entitled the holder to compensation as provided under section 29 of the Act, while revocation under the latter regime confers no compensation on the holder under the Act. Revocation under section 28(1)-(3) must be premised on overriding public interest for its validity, while revocation under subsection (5) need not be premised on any overriding public interest but on the breach of the terms of the grant and or the provision of the Act. Revocation under subsection (4) is only expected to meet the requirement of defined public purposes'. Outside the provisions of section 28 of the

Act, the Land Use Act also provides for revocation and/or forfeiture and expropriation of land from individuals and or communities to the State. This scenario can be found in the 1/2hectare rule <sup>436</sup> and the provision relating to non-urban land not covered by the 500/5000

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434 s.28 (2)b & c. (3)a, b & c and (4)

435 s.28(2)a,(3)d and (5)

436 34(5)(6). This section provides that no person shall have more than ½ hectare of any undeveloped land in urban area and that any land in excess of that is automatically forfeited to the state

hectares rule. All these vagaries have consequences on land tenure, land rights and compulsory acquisition process in the country.

The Act also provides for novel procedural steps to be taken by the state to affect the revocation of right of occupancy under it. By the provision of section 28(6) of the Act, the revocation of the right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Governor and notice thereof shall be given to the holder. Thereafter the title of the holder of the right of occupancy shall be extinguished on receipt of the notice and or on the effective date stated therein.<sup>437</sup> The expected notice under this provision is expected to be served personally or by prepaid postage and or pasting on the affected premises in deserving cases,<sup>438</sup>

Sequel to the preceding procedure the Governor is expected to pay compensation in line with the provisions of section 29 of the Act. Principally, compensation is premised on payment for any unexhausted improvement on the land, return of the current rent paid for the year, and in the case of building or installation, the replacement cost less depreciation and collateral advantages. The valuation is done exclusively by the appointed state official and or government appointee. As an alternative to monetary compensation the Act provides for resettlement of displaced holders of right of occupancy in alternative accommodation.

The provisions of the Act on land acquisition and its implementation conceptually breeds inequity, discord and vagaries in land administration in Nigeria. The law did not provide for uniformity in the justification for public takeover of private land and interest therein, resulting in divergent approaches to the appreciation of the subject. While some revocation merits compensation, others do not. The Act does not provide for pre-acquisition notices to be issued and or served on the affected citizens, thus engendering ambushing tactics, executive tyranny and surprise conducts on encourage public participation in the acquisition process; the exercise is shrouded in secrecy and the determination of adequacy or otherwise of the compensation payable or paid.<sup>439</sup> The Act gives

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<sup>437</sup> s. 28(7) Land Use Act

<sup>438</sup> Ibid s. 44

<sup>439</sup> Ibid. s.47(2)

much discretionary power in the Governor and state officials involved in the acquisition process particularly in relation to power of revocation and compensation payable to victims of revocation.

On compensation plane, the valuation procedure and policy exhibits grave injustice against the victim of state revocation. Not only is there no compensation for bare undeveloped land irrespective of whatever cost incurred at acquiring the land either from the state or the community; but the valuation is done by the state without any input by the victim in terms of representation and or raising objections against the whole process. Compensation recoverable for unexhausted improvement on the land is pegged at replacement cost less depreciation, meaning that the compensation payable will be insufficient to replace the installation anew. To worsen the matter the Act did not recognize the need to pay compensation for severance, though it recognizes that there may be severance;<sup>440</sup> no compensation for injurious affection and any other incidental and collateral losses suffered by the victim of state revocation. In fact the whole process is

skewed against the citizen and in favour of the state. For instance, revocation does not extinguish any accrued debt to the State in respect of the land, but where the victim opts for resettlement in lieu of compensation it extinguishes all rights and claims of the victim against the State irrespective of the value of the resettlement vis a vis the value of compensation otherwise payable. Unfortunately, the reverse is not the case as the victim must pay the differential where the value of the resettlement is greater than the compensation otherwise payable.

The land Use Act makes separate provisions for payment of compensation in respect of compulsory and revocation of land for oil<sup>441</sup> and minerals<sup>442</sup> licenses. Parties affected under these legislations are to be compensated under the relevant expropriating law affecting their proprietary rights. The compensation regime under this other legislation is better than what is offered under the provisions of the Land Use Act on the subject. Unlike the provisions of the Land Use Act, these latter legislations suffered by the party as heads of compensation for the purpose assessing the amount of compensation payable to the affected person(s) and or community.

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<sup>440</sup> Ibid s. 29(5)

<sup>441</sup> Oil Pipelines Act. Cap. 338. Laws of the Federation of Nigeria, 1990.

<sup>442</sup> Nigerian Minerals and Mining Act 2007

It is gratifying to note that some of the rigours in the Act are been addressed through judicial activism and positive interpretation of the law and the constitution in this regard. For instance, the issue of non-issuance and service of pre-acquisition notice and service of acquisition notice generally has been addressed by the courts, In *Osho V Foreign Finance and Another*,<sup>443</sup> the first be served on the holder of a right of occupancy and must give the holder an opportunity to challenge the rightfulness or otherwise of the revocation in accord with fair hearing provisions in section 33 of the 1979 constitution of federal republic of Nigeria.<sup>444</sup> Anything short of this would render the revocation invalid,<sup>445</sup> and it is immaterial that the purpose is obvious and the right holder is deemed to know of it.<sup>446</sup> The purport of this decision is to the effect that the revocation notice is not immutable except it affords the right holder a prior right of hearing and an

opportunity to query the revocation order. Also, this revocation notice must be served personally on the holder of the customary occupancy and must be served via substituted service as enunciated in the case of. This essentially is a judge made law based on precedents, though not expressly provided for in the Land Use Act.

The courts have also successfully challenged the ouster clause provision in section 47(2) of the Act. In *Kanada V Governor of Kaduna State and Another*,<sup>447</sup> the court of Appeal declared section 47(2) void for being inconsistent with the provision of section 40(1) of the 1979 constitution of the federal republic of Nigeria,<sup>448</sup> in so far as it purports to deny persons claiming compensation for compulsory acquisition of his property access to court of law or tribunal or body having jurisdiction in that part of Nigeria. The consensus of legal opinion is to the effect that the provision of section 47(2) of the Act should be expunged from the Act.<sup>449</sup>

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<sup>443</sup> (1991) 4NWLR (Pt 184) 157

<sup>444</sup> Now section 36 of the 1999 constitution

<sup>445</sup> See *Nitel v Ogunbiyi* (1992) 7 NWLR (Pt 255) 543; *A.G. Lagos State V Sowande* (1992) 8 NWLR (Pt 261) 589. Chianu, E. *Land Use Act and Individual Land Rights* in Smith, LO. (ed) *Land Use Act: Twenty-Five Years After*. Unilag. 2003. pp 133-134.

<sup>446</sup> *Nigerian Engineering Works Ltd V Denap Ltd* (1997) 10 NWLR (525) 481.

<sup>447</sup> (1986) 4 NWLR (Pt 35) 361

<sup>448</sup> Now section 44 of the 1999 constitution

<sup>449</sup> Obaseki O.A. *Proposal for the amendment of the Land Use Act* 'in *Workshop papers on the reform of the land Use Act. Law reform commission*. 1991 pp 11-12. See also: Justice Idoko. *Review and reform of the Land Use Act*. Op.cit.

Though, the courts have tried to tackle headlong issues in the compulsory acquisition process under Nigeria law, unresolved issues are still fundamentally enormous; and for now beyond the purview of courts.<sup>450</sup> There is a need for statutory intervention in form of legislative reform to address the problems.

There is the need for uniform and comprehensive legislation in the country that addresses all segments of compulsory acquisition issues and provides uniform compensation regime to the affected. The new law should address uniform revocation process by adopting and adapting the decision of courts in a legislative context and providing for pre-revocation notice, pre-revocation inspection, provision for claims and objection to proposed

revocation,<sup>451</sup> notice of revocation and payment of compensation. It should also abolish penal revocation as it is derogation from the constitutional provision on property right since the right to compensation is a constitutional right.<sup>452</sup> The law should also provide for payment of compensation not only for unexhausted improvement on the land, but also for all other incidental and collateral injuries and losses suffered by the victim of revocation. Such heads of compensation as severance, injurious affection, cost of acquisition of the undeveloped land,<sup>453</sup> and the cost of disturbance arising from the revocation. There is also the need for the law to address the issue of assessment of compensation. The new law should move away from the assessment principle of replacement costless depreciation to assessment based on investment principle. The latter principle is more attuned to equitable and fair compensation scheme than the former which tended to deprive the land holder the current replacement value of the improvement.

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<sup>450</sup> By nature court only reacts based on disputes placed before it, thus where there is no dispute place before the court and pronouncement from the court is either and or an academic exercise devoid of any sanctifying authority.

<sup>451</sup> This will allow for public participation in the process and provide an avenue for both the holder and the acquiring authority the opportunity to air their views on the proposed project and probably reach an amicably consensus on the issue. The process will engender and foster peaceful resolution of disputes and the evolution of participatory.

<sup>452</sup> s. 44(1) of the constitution of Federal Republic of Nigeria 1999

<sup>453</sup> In Lagos State allocation of State of Land is currently based on per square metre rate determined by the *lex situs*

#### **4.4 Analysis of Governor's consent under customary land tenure system**

It has been submitted that subsequent judgement of both the Supreme Court and the Court of Appeal are now in support of equities of a case rather than strict interpretation of Land Use Act which may lead to injustice<sup>454</sup>. Thus, in *Adedeji v. National Bank of Nigeria Ltd.*<sup>455</sup> the Court of Appeal refused a mortgagor who sought to rely on the provisions of the Land Use Act to invalidate a mortgage to which no Governor's consent

had been obtained. The court distinguished the case from Ajilo's case and held as follows: "apart from the principle of law involved in this case, it is morally despicable for a person who had benefited from an agreement to turn round and say that the agreement is null and void".<sup>456</sup> In the case of *Attorney General of the Federation & Others v. Sode & Others*<sup>457</sup> A leasor pleaded that a lease agreement could not be enforced on ground of non-compliance with the provision of the Land Use Act. Thus, he raised the issue of the maxim "*exturpi causa non oritur actio*" in which he contended that the Court lacked jurisdiction to hear the case. However, Belgore, JSC, held that the principle of *exturpi* could have been applied in *Ajilo's* case if it had been canvassed by counsel to the appellant and he would have applied it also in *Sode's* case but for the ouster provision in the statute governing the matter before the court.

It is therefore worth noting that equity inclines itself to conscience, reason and good faith. It implies a system of law disposed to a just regulation of mutual rights and duties of a man in a civilized society. More so, it does not envisage a sharp practice, undue advantage of a situation or intentional refusal to honour reciprocal liability arising therein. It is therefore surprising that the Supreme Court which is the pinnacle of justice in Nigeria could find itself so helpless and

<sup>454</sup> A. Taiwo, *The Nigerian Land Law*, (Ababa Press Lt. Ibadan, Nigeria, 2011) p.224.

<sup>455</sup> (1998) 1 NWLR p.212

<sup>456</sup> Adedeji (Supra) pp 226 and 227

<sup>457</sup> (1990) WWLR p.500

<sup>458</sup> Taiwo A. op cit. p.225

would refuse to raise an equitable point suo motu even when the point was present in the mind of justice simply because it was not canvassed by the Appellant<sup>459</sup>. The court should do more than that and move forward to do substantial justice and provide answers to

social problems to enable the law grow<sup>460</sup>. However, there seems to be a wave of change and Nigerian courts are now inclined to doing substantial justice rather than relying on technicalities. Thus, in *Chief Belonwo Ugochukwu v. Cooperative and Commerce Bank Nigeria Ltd*<sup>461</sup>, The Supreme Court frowned at conducts similar to that in Ajilo's case. In that case, the appellant filed a suit seeking declaratory reliefs and challenged the validity of the deed of mortgage on the ground of non-compliance with the Land Use Act relying on the Supreme Court's decision in *Savannah Bank v. Ajilo*.

The Supreme Court's reliance on its earlier decision in Ajilo is without foundation, in that it has to consider the distinction between the case of Ajilo and that of Ayodare. This is on the strength of the facts in Ajilo, the issues canvassed therein and the consequent decision of the court in Ayodare are tenuous. Again, the Supreme Court ought to have distinguished the facts in Ayodare with that of Ajilo before deciding the way it did.

The main issue before the Supreme Court in *Savannah Bank v. Ajilo* was whether the provision of section 22 of the Land Use Act applied to a person who was deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of his being deemed such holder

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<sup>459</sup> Omotola, J.A. "Interpreting the Land Use Act", (1992) *Journal of Nigeria Law* 108 at 110 (1992)

See also *Savannah Bank v. Ajilo* at 354 where Belgore J.S.C held "that the feature of appeal is that the issue based on the grounds of interpretation of section 32 and 22 of the Act. This is unfortunate as this court must confine its decision to the argument of the parties. To do otherwise will amount to raising issues Suo Motu for the parties. Otherwise, all equities were not canvassed.

<sup>460</sup> J.A. Yakubu, "The Equal and unequal scale of Justice" Vol.3 *Journal of Private and Business Law* Pp. 194-210

<sup>461</sup> (1996) 6 NWLR (pt.456) 524

The question whether a mortgagor who failed to obtain consent to a mortgage deed could later rely on the initial wrong to assert that a mortgage deed was void for lack of consent was not canvassed before the Supreme court. In

Ayodire, the main issue for determination was whether a Delegate can Sub delegate. And going by doctrine of judicial precedent, the Supreme Court could rely in Ajilo if 'its facts were the same with that of Ayodire. Thus, major point of distinction between Ajilo and Ayodare was not identified by the Supreme Court. Consequently, the court's pronouncement in Ajilo that "the express provisions of the Land Use Act makes it undesirable to invoke the *maxim ex turpi causa non oritur* action (an action cannot flow from a bad cause) was made abiter and therefore not binding on the court in Ayodare.

Also, where as in Ajilo, governor's consent was not obtained, in Ayodere, requisite consent was communicated via a letter to the holder/mortgagor, but was alleged to be invalid on the ground that the consent was communicated either by an unauthorized person to whom no power was expressly delegated by the Governor, or by a person in respect of whom the law recognizes no delegation by the Governor facts unknown to the mortgagee and factors over which the mortgagee had no control. Thus, for proper understanding of the distinction between the facts in Ajilo and that of Ayodire, the contents of the letter conveying Commissioner's consent is reproduced as follows:

Again, the respondent (Ayodire) did not contend that there was no consent; neither produced any witness or adduced any evidence to the effect that the Governor did not give consent but only that it was not given by the person authorize by law. However, the content of the respondents"

pleadings did not indicate that the consent obtained was invalid but only that it was communicated by a Chief Land Officer for the Permanent Secretary for and on behalf of Commissioner for Land.

It is therefore submitted that a mortgagor who sought and obtained consent from a person not authorized by law and then later turned round to assert that the mortgage deed was void is more fraudulent than one who did not obtain consent at all. We again submit that the recent position of the Supreme Court will impose serious hardship on the mortgagee who is now put under an unfortunate obligation to inquire about the regularity of the consent obtained by the mortgagor, with the latter at liberty not only to refuse to obtain consent, but also given the latitude to remain indifferent about the regularity of the consent obtained, knowing full well that the Courts will allow him to benefit from the wrongs he might have committed. Therefore, the equitable jurisdiction of the Court is Jettisoned with the rough edges of the law preserved, and all hopes of the mortgagee dashed.<sup>462</sup>

This could be seen in the recent case of *Pharmatic Industrial Project Ltd v. Trade Bank Nig Plc 84 others*<sup>463</sup> (coming barely two years after the Supreme Court decision in Ayodere where the Court of Appeal was faced with similar facts as in Ayodere though the Court frowned at the mortgagor's conduct, it nevertheless allowed the mortgagor to "benefit from his own wrongful conduct.

Thus, the facts of the case were that the 1<sup>st</sup> and 4<sup>th</sup> respondents granted loan and overdraft facilities to the appellant. The appellant executed the deed of loan, mortgage agreement and mortgage debenture in favour of the 1<sup>st</sup> respondent. The appellant in essence charged all its fixed and floating

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<sup>462</sup> Statutory Requirement of Governor's Consent in Mortgage Transactions: The Journey So Far. [www.diaryfasmartlawyer.wordpress.com/2012/06/15](http://www.diaryfasmartlawyer.wordpress.com/2012/06/15). Last visited on 10/10/2023 at 5:00 pm.

<sup>463</sup> (2009) 12 NWLR (pt.1159) p.577

assets as collateral security to the 1<sup>st</sup> and 2<sup>nd</sup> respondent. After utilizing the facilities, the appellant defaulted in repayment. Now the 1<sup>st</sup> respondents re-called its investment and in exercise of its powers, appointed the 2<sup>nd</sup> respondent as a receiver for the appellant. The 2<sup>nd</sup> respondent gave notice of his appointment to the appellant and called for the submission of the statement of affairs.

He also notified the general public, particularly the secured creditors of the appellant. The appellant failed to react to the notice and also failed to avail the receiver of any statement of its affairs. The 2<sup>nd</sup> respondent therefore took physical possession of the appellant's fixed and floating assets charged in favour of the 1<sup>st</sup> and 4<sup>th</sup> respondents, and sold them.

The appellant by a suit challenged the appointment of the 2<sup>nd</sup> respondent as a receiver based on the deed of appointment. By another suit, the appellant challenged the deed of appointment granted to the 2<sup>nd</sup> respondent by the 4<sup>th</sup> respondent. The suits were consolidated and they went to trial, at the conclusion of the trial, the trial court dismissed the suit.

Dissatisfied with the trial Court's decision, the appellant appealed to the Court of Appeal. The kernel of the appellant's case on appeal was that the mortgage transaction between the appellant and the 1<sup>st</sup> and 4<sup>th</sup> respondents were null and void under the Land Use Act because the Governor's consent to the same was conveyed by a person other than the commissioner to whom the Governor delegated his power to grant consent under the Land Use Act.

In determining the appeal the Court of Appeal considered sections 22 and 26 of the Land Use Act and 393(1) of CAMA and court held such alienation was null and void

It is a sad commentary on the current state of our jurisprudence that in spite of the unconscionable consequences suffered by the respondents as a result of the appellant's failure to obtain the necessary consent from the Governor before embracing on the entry into the Mortgage Agreement and Deeds of Debenture, the appellant can turn round to benefit from his fraudulent act which culminated into the derivation of value consideration in the form of loans.

By the recent judgment of our apex court in *U.B.N. v. Ayodare & Sons (Nig.) Ltd*<sup>464</sup>, particularly the dictum of My Lord **Muktar J.S.C**; equity has not only remained silent on the reserve bench while the Land Use Act, is actively at play but equity now lies prostrate and has bitten the dust while the harshness of the Land Use Act, is being exploited and shall continue to be on rampage as a vehicle for the perpetration of fraud by persons of the appellant's ilk and other smart elects. However, as my Lord has penultimate Courts to at all times abide by aptly put it, we are bound as the magisterial pronouncements of the apex court whether we are persuaded or not by the reasonability or otherwise of the interpretation of the sections of the Land Use Act, 1978, in question, nay any other enactments, in view of the impregnable doctrine of stare decisis and the indubitable reality of the finality of such decision by the Supreme Court<sup>465</sup>.

It is therefore our humble view that the above controversial decision of the Court of Appeal hinged on *Ayodare & Sons (Nig.) Ltd*<sup>466</sup>, It turns things upside down and puts the lower courts in a dilemma as to which of the Supreme Court's decisions to apply<sup>467</sup>, and this shows with due respect, to the Supreme Court justices a level of inconsistency in the interpretation of section 22 of the

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<sup>464</sup> (2007) 4 KLR (Pt.235) 2022: (2007) 13 NWLR (PL.1052) 567

<sup>465</sup> at pages 645-646 paras E-B:

<sup>466</sup> (2007) 13 NWLR (PL.1052) 567

<sup>467</sup> This is because the decision in *UBN v. Ayodare* conflicts those of *Awojugbagbe Light Industries Ltd. v. Chinukwe* (supra) and *Alh Ayo Tunde Seriki v. Sefi" u Olukorede* (supra), despite the fact that both of the two cases were the decisions of the Supreme Court.

Land Use Act. As such, it is rather unfortunate that the Supreme Court gives judgment that conflicts its earlier decision without making reference to the previous one. This we think leaves penultimate court to act without proper direction.

We submit that even though one case can be distinguished from another, the court should not be helpless in deciding issues as in *Pharmatek*. There has to be equity in courts and the court of equity always tries to provide a remedy for any given problem.

Thus, we suggest that fraudulent people like those in *Ajilo's* and *Pharmatek's* cases should not be allowed to benefit from their own wrong i.e. they should not be allowed to either invalidate a transaction as a result of either irregularity obtaining consent or failure to obtain the consent. This we view will stop people with unclean hands from seeking justice under false pretence.

This state of hopelessness was one time attempted to be addressed in a Bill submitted before the National Assembly (2009) for the amendment of the Land Use Act<sup>468</sup>. The proposed Bill seeks to restrict the requirement of Governor's Consent to permanent alienation such as an assignment, thus, effectively excluding mortgage transactions from the ambit of the existing consent provisions. If the Bill is eventually passed into law, the

existing trap set against the mortgagee bylaw will be removed and sanity consequently returned to mortgage transactions.

By the provision of Section 22 of the Land Use Act, the holder of a statutory right of occupancy granted by the Governor cannot alienate his right of occupancy or part thereof without the consent of the Governor first hand and obtained. It follows therefore, the alienation of a customary right of occupancy must also be done by the requisite consent of the relevant Local Government

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468 Adebutu op. cit. p.67 [www.diaryfasmartlawyer.wordpress.com/2012/06/15](http://www.diaryfasmartlawyer.wordpress.com/2012/06/15). Accessed 10/10/23.

Council<sup>469</sup>. It then follows that having observed the Customary Law provisions on the concurrence of the family head and the principal members, the family through its representatives must apply to the requisite consent. Meanwhile, the Act further complicates things in Section 36(5) which conflicts with Section 21 of the Act. The interpretation of Section 21 is that alienation of customary right of occupancy is alienable as long as the requisite consent is obtained. However, Section 36 (5) prohibits the alienation of land in non-urban area (a subject of Customary Right of Occupancy) whether with consent or not.

Meanwhile, it is trite that the Land Use Act does not in any way vitiate customary law.<sup>470</sup> It, therefore, follows that for any effective disposition of family or communal Land, a two-fold consent would be required namely, those of the family or community head and the principal members, and that of the governor or Local government as the case may be. The consent of the governor or the local government will not validate a disposition of family property that is not in accordance with this rule.<sup>471</sup> For the above reasons, most

holders of right of occupancy evade the consent provisions leading to multiplicity of titles.<sup>472</sup>

However, the above position that provides that governor consent must first be had and obtained inalienating customary land does not represent the true position of the law of *Yakubu v. Simon Obaje's*.<sup>473</sup> where the court held that "consent is only required for land covered by statutory right of occupancy."

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<sup>469</sup> See Section 21 (b), LUA,1978

<sup>470</sup> See *Abioye v. Yakubu* (1991) 5 NWLR (pt. 190) 130 SC

<sup>471</sup> F. Elujekor, "The Effect of the consent Requirement for a mortgage under Land Use Act" (1990) 1 (2) *The Calabar Law Journal*, 1990

<sup>472</sup> Nigeria:As Land Use Act Undergoes Amendment 2 (1) available of [www.allafrica.com](http://www.allafrica.com), courtesy of this day online, accessed on 10/09/2023

<sup>473</sup> (2005) LCN/1678 (CA)

It is a notorious fact that both the family head and the principal members as a matter of law must give their consent before the sale of the family land property, where this is not done, the sale may be void or voidable depending whether such sale is with the consent of the family head alone or with the consent of the principal members without the consent of the family head. In the latter, the sale is voidable at the instance of the principal members of the family while in the latter, the sale is void *ab initio*. It is also a notorious fact that the consent of the governor must be first had and obtained in the alienation of land in Nigeria as pronounced and judicially noticed in the celebrated case of *Ajilo v Savannah Bank*<sup>474</sup>. Meanwhile, the same apex court had ruled that governor's consent is dispensed with and no longer required in the alienation of customary land as judicially noticed in the case of *Yakubu v. Simon Obaje's*.<sup>475</sup>

<sup>474</sup> (1989) N.W.LR (Pt 97) 305.

<sup>475</sup> (2005) LCN/1678 (CA)

## CHAPTER FIVE

### SUMMARY, CONCLUSION AND RECOMMENDATION

#### 5.1 Summary

This study has discussed the problem associated with family property under the customary land tenure system in Nigeria. The study has revealed from the course of the study that the question as to customary right of occupancy in relation to customary land in the south west in Nigeria has not been properly answered. The study further acknowledges the fact that the Land Use Act creates a *sui generis*<sup>476</sup> leasehold system between the governor and individuals or governor and family members couched in form of a customary right of occupancy granted in furtherance of the a right known as Right of Occupancy over the land which gives a holder a right to possession of a land. The study

further looks into the ownership structure of land holding under the customary law in Nigeria, in the words of Oluyede,<sup>478</sup>

Group ownership in African context is an unrestricted right of the individual in the group to run stock on what is held to be the common assets on land; the right of all in the group to claim support from the group's land and the tacit understanding that absolute ownership is vested in the community as a whole

The study further looks at the nature of the right of occupancy under the Act being by implication akin to lease.<sup>479</sup> The study further looks at the mode of alienation both under the customary law and under the Act, under the customary law, the description is represented by the decision of the Supreme Court in *Adejumo v. Ayantegbe*<sup>480</sup> where the court stated that:

At customary law, ownership of... land is vested in the past, existing and future members of the family. Thus, communal...land belongs to all members of the society...and a member...

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<sup>476</sup> That is, In a class of its own

<sup>477</sup> See Section 8, LUA

<sup>478</sup> See Oluyede (1989), *Modern Nigeria Land Law*, Evans Bros. (Nigeria Publication) limited. P.12

<sup>479</sup> See section 8 of the Act

<sup>480</sup> *Supra*

Also, the provision of the Land Use Act, the holder of a customary right of occupancy granted by the Governor or the local government authority cannot alienate his right of occupancy or part thereof without the consent of the Governor first hand and obtained. The state can also compulsorily acquire a family property for overriding public interest while the family in question is compensated by the government.

## **5.2 Conclusion**

It is found from the study that sections 21 and 22 of the Land Use Act are full of complex provisions that create and continue to create controversies of both application and interpretation by our courts. Although, in a bid to preserve and maintain government control over transactions on land in Nigeria, it is obvious that the provision relating to governor's consent is surrounded with strict principles that are capable of creating hardship in land transaction even on customary land law tenure system in the South west in Nigeria and as such can inadvertently slow down the economic development since Land availability is central to economic development being the source of livelihood of man where he lives when he is alive and after his death, he is buried underneath. The difficult consent provisions of the Land Use Act have generated conveyancing practices that are fraught with risks in relation to customary right of occupancy attached to customary land tenure system. Meanwhile, it has been discussed in this study that customary land does not require consent provisions. The power of the governor to acquire land is not absolute as it must be for overriding public interest, there must be notice in person and compensation must be paid

### **5.3 Recommendation**

Consequent upon the foregoing discussion, it is recommended that the courts especially the Supreme Court of Nigeria ones should judicially and judiciously look at their previous decisions on consent provision before judging on subsequent cases. This will minimize problems of conflict of interpretation faced by the lower courts. Also, the courts should make use of stare decisis principle in order to have a consistent and firm decision. The consent clauses under Sections 21 and 22 of the Act should completely be removed or there should be a time limit within which Governor should give consent. If the time expires and the governor did not give it should be deemed that consent is granted. This

will bring sanity to land transactions and will reduce unnecessary delay that hinders the development of land transaction in Nigeria. Most importantly, people engage in land transactions without compliance of the requirement of the law will now comply.

Meanwhile, it is also important to state here that one of the problems associated with the Land Use Act is the absence of review even as it is now as old as 41 years from the time it was enacted (1978), the difficulty in its review can be seen the toga worn on it by the provision of Section 315 of the Constitution which places the Act on the same pedestal in the case of amendment, the Act can only be amended by employing the procedure for amending the constitution.<sup>481</sup> It is against this backdrop that it is suggested that this status be removed from the Act as a way of ensuring frequent amendment and making it amenable to the dynamics of our society. All member of the family should have equal right and such right should not be vested with the family head and principal members of the family. Overriding public interest should be for public purposes and compensation should be subject to a standard uniform rule of value at a particular time and area

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<sup>481</sup> Section 9, Constitution of the Federal Republic of Nigeria (CFRN), 1999

## **BIBLIOGRAPHY**

### **TEXTBOOKS:**

- ABUGU, U. Principles of the Land Use Act, 1978.
- EGWUMMUO, J.N. Principles & Practice of Land Law, 1999.
- ELIAS, T.O. Nigerian Land Law (4th Ed.), Sweet & Maxwell,  
London,1971.
- GARNER, B.A(Ed.) Black's Law Dictionary, (8th Ed.)
- NDUKWE, O Comparative Analysis of Nigerian Customary Law,  
Unical Press, Nigeria,1999.
- NWABUEZE, B.O. Nigerian Land Law, Nwamife Publishers,1982.
- OLAWOYE, C.O. Title to Land in Nigeria, Evans Brothers Ltd,  
London,  
1974.
- OLUYEDE, Modern Nigerian Land Law. Evans Bros (Nigeria)  
Publications Ltd,1989.
- OMOTOLA, J.A.(Ed.) Essays on the Land Use Act, Lagos University Press,  
1980
- SAGAY, I.E. Nigerian Law of Contract, Spectrum Law Series  
(2nd Ed.), Ibadan,2000.
- UTUAMA, A.A. Nigerian Law of Real Property, 1990.
- YAKUBU, M.G. Land Law in Nigeria, MacMillian, London,1985.

## ARTICLES, JOURNALS & NEWSPAPERS

- ADEDIPE, et al; 'Rural Communal tenure regimes and private Landownership in Western Nigeria'([www.fao.org](http://www.fao.org)).
- AKINWALE A.; 'Governor's power of consent hampers real estate Development',2009.([www.yourlogo.com](http://www.yourlogo.com)).
- AMIKO & AMIDU; 'Women and Land Rights Reforms in Nigeria', 2006. ([www.oauife.edu.ng](http://www.oauife.edu.ng)).
- AMODU; 'Efficiency of Mortgage Transactions under the Land Use Act: Myth or Reality',2009. ([www.rougandco.org](http://www.rougandco.org)).
- AZEEZ, SANNI; 'Yar'Adua set to Review Land Use Act',2009. ([www.goodlife.com.ng](http://www.goodlife.com.ng)).
- DADA, M; 'Land Reforms in Nigeria: The lingering Debate, Vol.1', Daily Independent Newspaper, January,10th 2010.
- ELUJEKOR; The effect of the consent requirement for a mortgage Under the Land Use Act', The Calabar Law Journal, 1990.

- INAM, W;  
case Enhancing Nigeria's Economic Development: A  
for Institutional & Regulatory Reforms in Nigeria  
Banking Sector',2005. (www.proshareng.com).
- LAW REPORT; 'Illegitimate Land transaction is incurable even with  
Governor's consent', This Day Newspaper, Tuesday,  
July 14th,2009.
- MABOGUNJE; 'Land Reform in Nigeria: Progress. Problems &  
Prospects',2009.  
(www.siteresources.worldbank.org).
- MAMMAN, A.B;  
MBAN; 'Land management in Nigeria'  
Memorandum submitted to the Senate Ad-hoc  
Committee on Constitution Review in Amendment  
Of the Land Use Act, October, 14th 2009.
- NNAMANI; 'Land Use Act: The aim is Humane but the Deed is  
Rancorous'. The Guardian, March, 31st 1980.
- NWABUEZE, R; 'Equitable Bases of the Land Use Act'  
(2010)54 Journal of African Law 1.
- OLUSOLA, ADUN; Investing in Real Estate in Nigeria: Land  
Procedures,  
A Lagos Example',2010.(www.ngex.com).
- OLUYEDE, P.O;  
Land Legal Development in Nigeria since 1960: The  
Use Act,1978', UnilagPublication,1992.

- OMOTOLA, J.A: 'Law & Land Rights: Wither Nigeria?  
Unilag Inaugural Lecture Series,1988.
- ONYIKE. J.A: Addressing the Urban Housing Problems in Nigeria  
In the 21" Centur"',2009. (www.niesv.org.ng)
- OSUNDARE, N: 'Songs of the Market Place',1983.
- THISDAY EDITORIAL; 'As Land Use Act undergoes Amendment  
This Day Newspaper, April, 26th 2009.  
(www.allafrica.com)
- UNITED NATIONS; Declarations on Human Settlement,1996.
- UWAEGBULAM: Estate Surveyors fault proposal for Land Use Act  
Amendment',2009. (www.nigeriabestforum.com)
- WORLD BANK; The standard requirement for accessing property in  
Cross-Rivers State,2009. (www.doingbusiness.com).
- YAKUBU, M: Principles of property Law

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