ALIENATION OF LANDED PROPERTY

AND

ITS EFFECT ON BUSINESS TRANSACTIONS

IN NIGERIA

BY

OGHENEGWEKE AKUDIHOR.

MAY, 1992.

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A thesis submitted to the Post-graduate School, Ahmadu Bello University, Zaria, in Partial Fulfilment of the requirement of:

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D E C L A R A T I O N

I hereby declare that this thesis has been written by me and that it is a record of my own research work. It has not been presented in any previous application for a higher degree.

All quotations are indicated and the sources of information are acknowledged by means of End notes and references.

OGHENEGWEKE AKUDIHOR

MAY, 1992.

D E D I C A T I O N

This Thesis is dedicated to the memory of Miss Deborah Akudihor, my late eldest sister who died in 1977; and to the efforts and desires of Mrs. Phebi Bazunu to stand firmly by our family as an able senior sister.

C E R T I F I C A T I O N

The thesis entitled ALIENATION OF LANDED PROPERTY AND ITS EFFECT ON BUSINESS TRANSACTIONS IN NIGERIA by Oghenegweke Akudihor, meet the regulations govern the award of the Degree of Master of Laws of Ahmadu Bello University, Zaria, and is approved for its Contribution to knowledge and literary presentation.

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ABSTRACT

The economic realities of these times have shown that utility of landed property, does not only result in the best use of the property, but also in the creation and accummulation of capital. It need not be over emphasised that the availability of capital is absolutely necessary to stimulate business growth and development in a society.

Landed property would effectively serve the above purpose through the mobility of rights and interest in such properties. This can easily be facilitated by the concept of alienation. But alienation does not exist in vaCuo nor does it have a universal content. It exist in response to the laws and rules of a particular land tenure system, which determines its relationship with business transactions in properties.

The aim of this thesis therefore, is to determine to what extent does the Nigerian Land Tenure System provides the necessary framework for alienation in landed properties. More importantly it examines to what extent does the rules of alienations provides the adequate incentives to stimulate business transactions in landed properties.

Chapter one gives a general introduction to the whole subject matter. It deals with the importance of land in the economic setting of both traditional and modern societies. It also discusses the concept

of alienation in Nigerian Land Tenure System and the existence of the inalienability theory of land rights in customary societies. The chapter also highlighted the relationship between alienation, business transaction and development in a polity.

In chapter two, the nature of property in Nigeria was discussed. This covers both customary and statutory land tenure systems. This approach is designed to understand the basic principles of the rules of alienation in both systems. The types of land holding in each system and the quantum of individual rights in each land holding was subject to systematic analysis.

Chapter three discusses the modes of alienation of landed property in Nigeria. These are modes of alienations which are by their nature, business transactions in landed properties. They are the ways by which holders of rights and interest in land, transter their property to raise income or capital as the case may be. Our discussions are not limited to urban land transactions which are popular but also with those practiced under customary law or in rural communities.

Chapter four is the crux of the thesis, it deals with the rules of alienation under the various method of landholding existing under the Nigeria Land tenure. The chapter examines the rational behind the rules, analysis the problems and difficulties associated with compliance of the rules and the effect of such rules on business transaction in landed property. The chapter further examines the justification of the rules within the socio-economic system under which the exist; with the intention of presenting a balanced view of the subject.

Chapter five is the summary and concluding chapter. It discusses the previously highlighted problems and difficulties, with a view of offering adequate solution. The chapter presented suggestions for reforms as the case may be, so that the rules of alienation can be more flexible to the dictates of business transactions in landed properties.

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30.	Property and Conveyancing Law, 1959 (Western Nigeria Cap 100) S.67	125, 126, 130
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36.	Registration of Titles Act (Law of Federation, Cap 121) S. 18	85
37.	State Lands Law (Western Nigeria, Cap 29	26
38.	State Lands Law (Eastern Nigeria, Cap 122	26
39.	Treaty of Cession, 1861	50

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Conveyancing Act, 1881 (England) ..	84, 85
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Land Control Act, 1967 (Kenya) ..	182, 206

LIST OF ABBREVIATIONS

LAW REPORTS

A.C.	.. .. ..	Appeal Cases
All N.L.R.	.. ..	All Nigeria Law Reports
App. Cases	.. ..	Law Reports, Appeal Cases
Ch. D.	.. ..	Law Reports, Chancery Division.
E. A.	.. ..	East Africa Reports
E.C.S.L.R.	.. ..	East Central State Law Reports
E.N.L.R.	.. ..	Eastern Nigeria Law Reports
E.R.L.R.	.. ..	Eastern Region Law Reports
Ex. D.	.. ..	Law Reports, Exchequer Division
F.S.C.	.. ..	Selected Judgements of the Federal Supreme Court of Nigeria.
K.B.	.. ..	Law Reports, Kings Bench.
L.L.R.	.. ..	High Court of Lagos Law Reports
M & W		
N.L.R	.. ..	Nigerian Law Reports
N.M.L.R.	.. ..	Nigeria Monthly Law Reports
N.N.L.R.	.. ..	Northern Nigeria Law Reports
N.R.N.L.R.	.. ..	Northern Region of Nigeria Law Reports
N.S.C.C.	.. ..	Nigeria Supreme Court Cases
N.W.L.R.	.. ..	Nigeria Weekly Law Reports
Q.B.	.. ..	Law Reports, Queens Bench
S.C.N.L.R.	.. ..	Supreme Court of Nigeria Law Reports
W.A.C.A.	.. ..	Selected Judgements of the West African Court of Appeal.
W.L.R.	.. ..	Weekly Law Reports
W.N.L.R.	.. ..	Western Nigeria Law Reports
W.R.N.L.R.	.. ..	Western Region of Nigeria Law Reports.

JOURNALS

A.B.U.L.J.	.. ..	Ahmadu Bello University Law Journal.
Columbia L.R.	.. ..	Columbia Law Review
H.L.R.	.. ..	Harvard Law Review
I.E.C.L.	.. ..	International Encyclopedia of Comparative Law
J.A.L.	.. ..	Journal of African Law
N.B.J.	.. ..	Nigeria Bar Journal
N.I.A.L.S.	.. ..	Nigeria Institute of Advance Legal Studies.
N.I.S.E.R.	.. ..	Nigerian Institute of Social and Economic Research.
N.J.C.L.	.. ..	Nigeria Journal of Contemporary Law
N.L.J.	.. ..	Nigeria Law Journal

CHAPTER ONE

1.0 GENERAL INTRODUCTION

1.1 Importance of Land

By all standards land is the single most important piece of property a person can own. It forms the basic and most essential element of subsistence for growth and development in human societies. A sound policy on land allocation and use, will no doubt enhance agricultural, commercial and industrial development within a polity.

In Nigerian traditional societies, land assumed a socio-political and religious pre-eminence. It is to be protected by each community and made available for the use and sustenance of each member and his family. Land in the first place was regarded as a gift of God or Allah,[1] meant for the use of man for sustenance. This was the economic bedrock of land, but it meant much more than this. Land was also regarded as a supreme deity.[2] It has a metaphysical content viewed as an inherent part of social relation process between people, society and gods.[3] This is not only true of Nigerian societies, but of most traditional African societies. Writing about the Akans in Ghana, Danquah[4] says that "it seems safe to say that the conception of land ownership was part of the general religious scheme, for the many ramification of ancestral worship would scarely had left land - the most valuable of all material possessions - free and unprotected within the categories of thing sanctified in religion".

Land was also conceived as not only belonging to the living, but also to many generations unborn. The rich abundant resources embeded in the land, should then be preserved and protected by each communities. According to the Elesi of Odegbolu "land belongs to the vast family of which many are dead, few are living and countless members still unborn"[5]. It is not suprising therefore, that many inter tribal wars and communal disputes and disagreements are recorded over land.[6] There is hardly any subject in which man is more sensitive than that of land, and normally quiet and submissive people can be aroused into violent action of desperation if they preceive that it is intended to deprive them of their land.[7] These attitudes and conceptions on land by the people, is somewhat related to the nature of land. Its permanence and immobility plays very important role; land remains where it is for generations. Furthermore, within the indigenous legal system these attitudes and conceptions on land forms the foundation of the rules of land tenure.

In the advent of modern societies; a blend of both colonial and traditional civilization, land assumed a greater importance. It became an economic power, assumed socio-political prestige and depicts wealth. To man, land matters remain important to him; his achievements is much affected by what he makes of the land.[8] All other properties have their sources or links to land. Tangible or intangible, movable or immovable, including valuable treasures can be found on land. Land has thus been described as the SOURCE OF PROPERTY, "a primary capital asset and generally the most durable serving as an almost

unlimited reservior of sustenance for man who has the use and enjoyment of a portion of it".[9]

In economic analysis, land possesses a fundamentally distinctive feature from other factors of production. The fact of immobility and that it is relatively fixed in supply attest to this.[10] In terms of production it is a source of primary products, and the primary products are inseparable attributes of land.[11] In development, it is a condition sine qua non in any form of productive human activities, and therefore constitutes a core of socio-economic development.[12] Within a developing polity "the reallocation of land resources is commonly considered to be an expedient instrument of achieving greater equity and social justice through the redistribution of income as well as a means of creating an economic system designed for increased productivity".[13] The economic importance of land, considers land not only as a source of human wealth, but also as a natural source of raw materials needed by any state to meet development requirement. Modern government has since realised this, and reforms are aimed to meet the collective needs not only in the present, but also for future generations yet unborn. The importance of land in all aspects cannot be over-emphasised.

1.2 The Concept of Alienation

For land to be of any utility, it must not only be available, it must present itself for use. Land must be capable of getting to the hands of the person intending to make the best use of it. The issue therefore, is the mobility of land to meet the modern demands of business

development. According to Simpson,[14] "if good development is to be assured, it must be possible for rights in land to be adjusted or transfered cheaply, quickly and with certainty, and according to economist, freedom and ease of transfer are absolutely vital to promoting the best use of land". Also Nwabueze discussing the integration of land law in Nigeria postulates that:

> The incidents of ownership should also be clearly spelt out, and in particular the power of disposal by outright sale, gift, lease or mortgage should be recognised ..... The objective should be to make land freely marketable, and no rule restricting or in any way prejudicial to this should be allowed in the integration law. 15

This raises the question on the concept of Alienation as a policy on land; and it forms a major theme in this work.

1.2.1 What is Alienation

Alienation of property is the transfer of the use, possession or ownership of property from one person to another. The transferor must have whatever interest he purports to transfer, otherwise there is no alienation. The interest to be transfered need not be total. What appears important is that an interest in property whether absolute or qualified, is transfered from one person or party to another.[16] Furthermore, where the property is one that is capable of being inherited; mere inheritance is not alienation. Alienation means diversion of the property from the course of devolution.[17] Alienation comes in different modes, a chapter in this thesis has been devoted to the modes of alienation having relation with business transactions.

The concept of alienation as a policy is based on

the fact that:

(i) land should be made available for persons who are capable of developing it;

(ii) those who have land or interest in it should not be unduly restricted in their bid to transfer the land for agricultural or commercial purposes, and

(iii) there should be a degree of certainty to creditors, so that landed property can be used as a security for loans needed by property owners to stimulate business growth.

The above policy means in a nutshell that individual initiative should be encouraged, freedom of alienation should be guaranteed and there should be security of tenure to allow commercial lending houses to feel free to give loans on the security of any landed property, belonging to any individual or group. According to Nwabueze "development can indeed be more effectively pursued under a system which permits free though regulated individual enterprise and initiative. There is little virtue in allocating land to a person who has no money to develop it or in withholding it from a person who can"[18]. Discussing this issue within the context of land tenure in the traditional law and custom and development, Yakubu[19] says as follows:

> The refusal of a alienation of land by the traditional law was objected.....The lack of individual capacity to deal with the land directly with third parties was criticised. Commercial Banks and other investment creditors are extremely reluctant to advance money to those who need it on the security of family or communal land which he holds. Thus not even a genuine businessman can raise money for the intending business. Thus individual initiative, freedom of alienation and security of tenure which are essential for development are very lacking in the traditional land law and creates a conflict between the law and development. 20

1.2.2 Restraint on Alienation

The importance of the concept of Alienation is borne out of the fact that alienation is restricted or sometimes prohibited. At other times, the prevailing rules are such that alienation of property is not easily facilitated. This is known as restraint on alienation. Under the customary land tenure existing in Nigeria, it is undoubtedly true that family and communal lands are now freely alienated on the strict compliance of the rules associated therein. However it has been seriously maintained that the idea of alienation of land was forbidden to native customary jurisprudence. That as a principle or rule no alienation was possible.[21] It was further contended by Elias[22] that "there is perhaps no other principle more fundamental to the indigenous land tenure system throughout Nigeria, than the theory of inalienability of land". There are also judicial pronouncement in favour of this view. In the often quoted words of Osborne, C.J. in LEWIS v BANKOLE[23]. "The idea of alienation of land was undoubtedly foreign to native ideas in the olden days".[24] Also in OLOTO v DAWODU,[25] the full court observed that "land were not in former times given away absolutely even to a war Chief, and it therefore must require very strong evidence to warrant the court to come to a conclusion contrary to this custom".[26]

There has been various rational for this rule or principle of inalienability of land in customary law. Some revolves around the religious sanctity and the deitification of land in traditional beliefs. What appears to have found favour with most writers is the desire to keep land for posterity. Land which belongs to the past, and present

generations was to be maintained intact for the future generation to come.[27] In supporting this view, Elias says:

> This is a simple socio-economic device to protect the interest of the present and future generation of the group, as otherwise the living might fritter away the contigent interest of their progeny; and the reference to the dead in the context is similar, to the duty incumbent upon them when alive not to compromise the rights of the present occupiers; it is not based on any religious or magical theory. 28

Closely related to this posterity theory is the argument that the living members could not make an outright alienation of communal or family land, because the totality of their interest does not amount to the ownership of it.[29] That any outright alienation is only an attempt to give what they have not got.[30]

It is doubted if this principle of inalienability of land is a rule under customary property law in Nigeria. The principle appears to be based on anthropological views about the primitiveness of African societies. Anthropologist regarded the African societies as purely primitive and considered the social forces that acted upon the African custom as "aspect of cultural changes" brought about by the influence of commercial economy of Western Europe.[31] Elias reiterated this position when he said that "under the traditional system of landholding no alienation was possible. Gradually, as a result of contact with Europeans, this rule was relaxed so as to permit the transfer of land".[32] It was this same anthropological reasoning that has led to the contention that the institution of pledge was unknown in West Africa before the establishment of British administration.[33] Accordingly, it was the resultant effect of the interaction with British ideas of property and the introduction of cash economy, that led to pledging of land. This

view was as usual supported by Elias who wrote that pledging and loaning of land w ere as a result of certain factors which acted like solvents to the rigid rule against alienation of land.[34] This view about pledges was hardly tenable, writing about pledges James maintained that:

> In West Africa as in other areas of Africa, it is possible in early times for a man to pledge his own person in return for the use of a piece of land; working for a number of days each week on the lenders farm and the remaining days of the week on the land borrowed. The reason for this type of pledge was to enable the pledgee to acquire land to farm for the sustenance of himself and family 35

Furthermore, the Supreme Court accepted, in NNAJIFOR v UKONO[36] that the institution of pledge was practiced by the ancient people of West Africa. Apart from pledging, there was also the institution of customary tenancy, practiced by the communities and families. This mode of alienation has no equivalent under English law.[37]

Within this principle of inalienability of land, it was vehemently maintained that outright alienation in form of gift or sale was prohibited or forbidden under customary property law. There are several decisions which supports this position. In OKIJI v ADEJOBI,[38] the plaintiff based his claim on the fact that his ancestors had bought the land in dispute 200 years previously. The trial court rejected the claim, that it was unlike Yoruba to sell land at that period of their history. Also in the case of LAGOS EXECUTIVE DEVELOPMENT BOARD v FEDERAL ATTORNEY GENERAL[39] a claim for an absolute gift of land alleged to have been made many years ago was dismissed. The court reasoned that if there was any gift at all it conferred only a right of occupancy. The rational behind the

application of this principle to gift is untenable. If the decision above was that the gift was not established, it would be better, rather than holding that if there was any gift, it never conferred absolute title. It must be emphasised that gift is as old as any human society; it is always presented as a form of gratitude or good neighbourliness. But the same may not necessarily be said about sale. There is no doubt that in some places sale of land was not known; even where it was known, its practice was rare. In some other places, sale may have been forbidden. The reason or evidence for this, may not strictly be because land was conceived as a gift from God, or is a sacred trust for posterity. There was free access to land for members of the community. Due to its availibility, there was hardly any scarcity of land, consequently, land lacked any exchange value, in fact, there was no market for land.

The above position notwithstanding, the unqualified and over generalised application of the principle of inalienability or rather the prohibition of outright alienation under native law and custom could hardly be correct. An assiduous investigation in Northern Nigeria by Yakubu[40] showed that save for some areas, sale was not entirely forbidden. Although, it was quite unknown, there are areas where it was merely frowned at. According to him:

> It is to be understood clearly that sale of land is not forbidden by the native law and custom of the community except the Jukun and Jaba of Gongola and Kaduna States respectively. In all other muslim and non-muslim areas sale of land was never an offence under native law and custom. 41

He argues further, that even in areas where they appears to be prohibition, such prohibitions were mere executive order

and not a legal one.[42]

Famiriyo, a renowned agronomist, in his own investigations conceded that there are some communities where outright alienation as sale were forbidden. But as he argues further, this does not create basis for the universality of the "concept" in Nigeria customary arrangement. In fact, he was prepared to contest the practical existence of the principle when he wrote:

> The "concept" of inalienability or inalienation of interest in land has constituted one of the pillars of Nigerian customary arrangement. The complexity of the "concept" and its lack of universal application even in all Nigerian communities makes any assertion about the existence of the "concept" appears more like a dogma than a fact. 43

In societies where sale or outright alienation was unknown or rare, it is questionable to conclude or assert that it was forbbiden or prohibited. Simpson quite succinctly put the argument that:

> It may be easy enough to prove positive custom - that a certain practice is allowed by custom - because several example of it can be found, but negative custom - that a practice is forbidden - is always questionable if it rest solely on the fact that no previous instance has occurred, it may be merely unknown but not forbidden at all. 44

It is absolutely desirable to distinguish between lack of willingness for example, to sell and the lack of capacity to do so. The fact that people of Nigerian Communities are unwilling to sell land, hardly means that they are forbidden to do so.

The bottomline of the application of the inalienability of land theory, is that later practice of alienation was as a result of the introduction of English law. As previously argued, this is a wrong conclusion. Even today when the transfer of property is actively practiced, there

are different procedures associated with the two types of laws. One may recount the observations of Bentsi - Enchill that those who assert that land could not be alienated in former times have yet account satisfactorily for the existence of indigenous and immemorial procedures for the alienation of land.[45] The structures for alienation have always been in place. The popularity and predominance of sale transactions was not due to the introduction of English law, but was the "result of a necessary reaction of society to contemporary circumstances".[46]

There are indeed judicial decision which supports the view that outright alienation did take place in the past. The case of OLOTO v DAWODU (Supra) was subject to consideration in JEGEDE v EYINOGUN.[47] In this case the defendant claimed absolute ownership to a piece of land granted about a 100 years ago, by the plaintiff's family in return of military service. The plaintiff however argued that the gift was not absolute, relying on the decision of OLOTO v DAWODU where the full court upheld a similar argument. The Federal Supreme Court upheld the gift as absolute. According to the Court "if the family is the absolute owner of the land, there is nothing to stop the family, if the head and all members agrees from transfering the totality of their interest in it".[48] Commenting on OLOTO's CASE, Mbanefo, F.J. said if it was meant to lay down the rule that native land cannot under any circumstance be transferred, it need some qualification.[49] The cases of GIWA v ERINMILOKU[50] and AKIWOLA v OLUWO[51] have both rejected the idea that outright alienation was forbidden. In the latter case a grant of land

made in the middle of the 19th century as a result of the Dahomey wars was held to be an absolute gift and a declaration was made to that effect.

The most recent judicial consideration of this subject was by the Supreme Court in ARE v IPAYE.[52] This is quite an interesting case and it may be necessary to set out the important facts in details. In the High Court the Appellants as plaintiffs instituted an action against the Defendant claiming inter alia:

(i) declaration of title to the piece of land in dispute according to native law and custom;

(ii) declaration that the Defendants had incurred forfeiture of their holding on portions of the said land, by reason of misconduct under native law and custom;

(iii) an injunction restraining the Defendants from entering the land.

From the evidence before the court, it was a common ground that the land in dispute was originally owned by plaintiffs ancestors who made a grant of it to the Defendants ancestors. The crux of the matter therefore, was whether or not the land granted to the Defendant was an absolute grant or limited on payment of ishakole. The trial judge held that the grant was absolute and the Defendants have been exercising such numerous and positive acts of ownership on the land. The Plaintiff's appeal to the Court of Appeal was dismissed, where upon they further appealed to the Supreme Court. In the Supreme Court, the Plaintiffs/Appellants contended inter alia that:

(i) the onus of proving absolute grant was not discharged by the Defendants,

(ii) the courts below erred in not paying regards, that in early times outright alienation or sale was improbable, relying on OKIJI v ADEJOBI.[53]

The Supreme Court unanimously dismissed the appeal and affirmed the decisions of the lower courts; that there was evidence to satisfy the finding by the judge that the grant to the defendant was an absolute one. On the question of the decision of OKIJI's CASE, the court held that it was wrong to say absolute grant was impossible in the early days. The court reasoned that:

> The highest one can say of it is that in those times because traditionally land belongs to the community and not to the individual, an outright sale by an individual was then improbable. At best it creates a rebuttable presumption. In this case any presumption against outright sale has been rebutted by positive evidence called at the trial. 54

It is also important to highlight a point which have been used to support the bias against absolute alienation, that is the payment of tribute. Olawoye says that the payment of tribute, though not regarded as a consideration for the grant, it serves as the grantee's acknowledgement of the grantor's reversionary right, and it is a clear evidence of the existence of the relationship of landlord and tenant.[55] Also in ADELEKE v ADEWUSI[56] a declaration of title was made in the Appellant's favour since it was established that the Respondent predecessors in title paid tribute to the Appellants father. This rationale has been rejected in ARE v IPAYE (Supra). The Supreme Court clearly distinquished between two forms of tributes, one of which is consistent with the claim of absolute grant.

According to Nnaemeka-Agu, J.S.C.:

> It is important, I believe to appreciate the basic difference between /the/ two. Tribute is paid as a mere mark of respect for a previous overlord: It's payment does not signify a substance of the overlord's reversionary interest. Rather it is a customary incident of occupation of land by a stranger and usually voluntary and does not depend upon any agreement. When tribute is paid to an Oba or other paramount Chief, it is called "ISIN", a mere customary token for loyalty and fealty, ISHAKOLE on the other hand depends an agreement upon grant of the land. 57

It can therefore be seen that the dogmatic theory of inalienability of land under native law and custom does not have such general applicability nor is it a fundamental rule under customary property law, as contended by some authorities. In any case the theory seems to give alienation a restricted meaning relating only to outright grant. But this is not so, alienation involves all forms of transfer of interest in land. It may be permanent as in sale or temporary as in pledges. Alienation may be of all interest or estate in the property or it may be limited to some particular estate or interest.[58] The concept of alienation has always been with the Nigerian indigenous communities, they have traditional institutions or elaborate structures in their socio-political system to implement alienation, whether absolute or limited.

The anthropological view which forms the basis of the inalienability theory has been rejected. Such views may have been due to a misconception as to the nature and meaning of the land tenure. It may be a lack of understanding of how particular societies organised themselves, and in certain cases an inaccurate

interpretation of observed facts and way of life of other people.[59] One negative aspect that this view and the inalienability theory has brought about, was the misconceived denial of the concept of ownership in customary land tenure. Fortunately, this contention has been rejected by many known authorities on land law.[60] Ownership is a relative term, it has its own meaning within any conceptual framework. It is not a word with a natural and universal content.

What seems certain under customary land law is that there are rules which seems to place restraint on the alienation of land. The policy of restraint on alienation met the need of corporate ownership. This was the major (though by no means the exclusive) characteristic form of ownership that existed in Nigerian indigenous communities. There was the need to restrict the movement of land which had remained previously in the control of their ancestors. The people share this sentiment on the land. They take pride in the fact that the land they now occupy, was that which their ancestors had occupied and which also will be occupied by their future generation. If for any reason, the rights of the future generation is to be defeated, then the decision must be unanimously taken by all those whom are presently living. The policy also met the need to regulate the acceptability of strangers who intend to live and settle within the community. A single person cannot, on his own bring a stranger to settle or stay in the community. Such a stranger must receive general acceptability, especially from the elders. Restraint on alienation

therefore serves within a socio-political context, the people living together in the land and sharing the same sentiments to preserve the land.

Another form of restraint on alienation in Nigeria land tenure, is that imposed by statutes. The alienation of land rights acquired by virtue of statutory grant is subject to the consent or approval of the granting authority. The origin of this form of restraint is traced to the land and Native Right Ordinance, 1916, applicable then only in the Northern Region of Nigeria. Section 11 of this ordinance provides that:

> Except as may be otherwise provided by the regulations in relation to Native occupiers, it shall not be lawful for any occupier to alienate his right of occupancy or any part thereof by sale, mortgage, transfer of possession, sub lease or bequest or otherwise howsoever without the consent of the Governor first had and obtained, and any such sale mortgage, sub lease transfer or bequest effected without the consent of the Governor shall be null and void.

When this law was repealed and replaced by the Land Tenure Law, 1962, the policy of restraint on alienation was still maintained. It was contained in sections 27 and 28 regard customary and statutory rights of occupancy respectively.

When the Land Use Act was enacted in 1978, to have universal application in the whole of Nigeria, it still adopted this policy. The Act specifically reproduced sections 27 and 28 of the Land Tenure Law in sections 21 and 22. Section 21 provides:

> It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession sub lease or otherwise howsoever -

(a) Without the consent of the Governor in cases where the property is to be sold by or under the order of any court .... or

(b) In other cases without the approval of the appropriate local government.

Section 22 have equivalent provision for holders of statutory right of occupancy granted by the governor. By virtue of section 26 of the Land Use Act, "any transaction or instrument which purports to confer on or vest any person interest or right over land other than in accordance with the provisions of this Act shall be null and void". The scope of these provisions have been subject to several judicial consideration. What appears very certain is that, the consent provision applies to all rights of occupancy, whether actually granted or deemed to have been granted under the Land Use Act.[61]

This statutory restraint on alienation, enables government to monitor land transactions, control activities of land speculators and to know the ownership structure of land in Nigeria; it also have planning and developmental implications. The interpretation, operation and application of these provisions will be subject to evaluation and analysis later in this thesis. It is however important to note that in the south of Nigeria, before the Land Use Act, leasees of State Land (formerly Crown lands) were also required to obtain the consent of the governor before they could effect any sub-letting or assignment of the lease.[62]

1.3 BUSINESS TRANSACTIONS IN LAND AND DEVELOPMENT

Business transactions in land is based on the mobility of rights and interest in land. Mobility of land rights and interest has in many cases been linked with the stimulation of development. Land should be made available for those who can develop it. The occupier or owner of land should not be unduly restricted or prevented from transfering his land, in order to raise money for himself and pass it on to a person who can put the land to a better use. It serves little purpose, if a man who is capable of developing a land to be prevented from acquiring rights over such land. Any meaningful development which the land can be used for will no doubt serve the interest of the larger society. Alienation of land forms a veritable source of the mobility of land rights and interest. It will therefore be proper that business transactions in land can be effectively facilitated by alienation. This is especially so, when it is used in its loose sense as in mortgages, where there is an illusory transfer of property or title.

Business and development can be effectively facilitated by land transactions. Apart from making landed property available for proper utility, for example, as where the present income from the property is shared between the grantor, who receives a fixed amount and a grantee, taking an undefined residue of profit arising from his exploitation or use of the land. Land also serves the needs of creditors as security for loans, which the holder or owner could use for other business ventures or investments. Land transactions is thus a

stimulant for development. The ability to use land through business transactions will lead to increased productivity. This in fact under lines the importance of land to man. According to Sheddick:

> Land becomes significant only in so far as it lend itself to human use. The land and its resources are significant in that they present certain opportunities for human utilisation .... People tend to be first interested in land and its latent resources, for what they consider they can extract from it, ... they are interested in its productive potentialities. 63

The productive potentials can only be realised through business transactions in landed properties.

The land tenure law therefore, must be such that land should be used to play this increased productive role in business and economic development, through the stimulation of land transactions. Yakubu writing on land law and business development, maintains that:

> Business development in land tenure law will imply the use of land and its law to increase production and maximise profit. In otherwords the relation between land law and business, simply means the use of land and its law like tangible commodity for the purpose of sale, mortgage, assignment and lease. Land law can play a role in business development through alienation by way of mortgages, leases, sale, transfer or conveyance and sub-lease. 64

This already stressed fact above cannot be put better. The above position has rightly indicated that land tenure alone does not create the needed development, rather they create the rules upon which business and economic development can thrive. The rules of alienation specifically determines the level of mobility on land interest or rights, and how effectively it can be made an object of business transaction.

1.4 SCOPE OF RESEARCH

This research is centred on the alienation of landed property and business transactions in Nigeria. The general introduction has explored the conceptual basis of alienation and the relationship between land business transaction and development. However, it may be necessary to touch some salient issues which the scope of the research will examine. The scope is within the land tenure system in Nigeria. These are principally, the customary land tenure and statutory land tenure systems. Except in property transactions, English tenure system has no relevance in Nigeria any more. The purpose of the research is to examine how far does the rules of alienation within the land tenure systems facilitates business transactions in landed properties. A critical exposition of the rules will be made. The rules in both system of land holding are more or less well settled. Focus will be on certain policy or reasons behind these rules and their relevance within the present socio-economic and political development in Nigeria.

The main objective is to embark on a systematic analysis of the effect of these rules of alienation on business transactions in landed properties. One will have to examine to what extent these rules provide adequate incentives towards the stimulation of business and economic development. This no doubt, requires the rules to be flexible, for where the rules are cumbersome and rigid and the result of non-compliance are frustrating, there will definitely be a clog in the wheels of land transactions. A lot literature has been written on these rules. Many authors have contended that the rules

in the form they exist in Nigerian land tenure, do not provide the necessary framework upon which land can be used as a vehicle for business development. Their views and that of other writers will therefore be evaluated and analysed. It is not contended that this is going to be the best exposition or analysis, rather this is honest attempt based on the writers understanding.

The scope also covers the modes of alienation having relevance with business transactions in landed property. As such a systematic evaluation is then made on each of these modes of alienation. Basically the modes of alienation applicable in Nigeria are both English transactions which formed part of the former received laws;[65] and customary transactions. The nature of these modes and their formal requirement within their particular context will be examined. There are views by some authors that some modes of alienation could not support the necessary growth and dynamism in Nigerian financial and business sector. That the nature of these transactions do not meet the requirement of financial institution to provide loans and advances, for the development of landed property and other business ventures. It will suffice to say here that Nigeria does not comprise of urban centres alone. Modes of alienation used in rural communities also have their own importance. Such transactions are preferred by people of the local communities, no doubt, because of their better understanding of such transactions.

On the whole, the thesis seek to examine particular problems and offer solutions. Suggestions for reforms on

the present position of the law will be made where inadequacies exist, at the end of the thesis.

1.5 METHODOLOGY

The methodology of approach in this thesis is first to examine the nature of the land tenure system in Nigeria. A proper understanding of the nature and principles in the land holding systems is necessary as a back ground to the rules of alienation. A lot of work in this area exist in the major land law books. The approach in this area is rather hollistic in nature, although very recent pronouncement on this area of the law as adopted from recent decisions of courts are well added. With regards to the rules; although it may be said that customary law, chief characteristic is flexibility,[66] its rules seems to have acquired some form of certanity. There exist a comprehensive body of case law establishing these rules. Recourse is therefore made to these cases including the very recent decisions on the issue. The position of statutory rules of alienation is easier. The rules are in the principal statute, the Land Use Act, 1978. It is therefore quite clear that the focal point are the opinions of text writers, judges in cases, and a systematic analysis of their decision as it affect the environment of business development.

In the preparation of this thesis a lot of time has been spent in the libraries of Ahmadu Bello University, especially the law section of President Kennedy's library and documents section in Kashim Ibrahim Library. It is

also important to mention, the library of the centre for Social and Economic Research. Other materials and useful articles were collected from the Universities of Lagos and Benin law libraries. Equally very helpful is the law series from the Nigerian Institute of Advance Legal Studies. This publications contains the most recent views and positions of well established authorities, concerning contemporary legal problems in Nigeria. However, some field work was carried out in ascertaining the views of financial experts and the position of some financial institutions with regards to the rules of alienation. Some of these views have been adopted as part of the writer's, and where it is necessary, appropriately acknowledged.

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CHAPTER TWO

2.0 THE NATURE OF PROPERTY LAW IN NIGERIA

2.1 INTRODUCTION

Since this thesis concerns alienation, business transactions and development within the Nigerian land tenure system, it becomes imperative to have a basic understanding of the nature of the Nigerian land tenure. In appreciating the rules of alienation, one can hardly deny that they do not exist in vacuo. These rules exist, in responds to the need and requirements of the particular land tenure system. There are two types of land tenure systems in Nigeria, namely the customary and the statutory tenure systems. The treatment of this chapter follows necessarily this division. The chapter examines the nature of each system of land tenure, starting with their historical development. Focuses will be made on the types of landholding, control and management of land in each system and determing the rights of individuals in the different system.

2.2. CUSTOMARY PROPERTY LAW

In order to determine and appreciate the meaning of customary property law, one must necessarily fall back to what customary law is. Customary law is the body of rules and obligation which regulates the conduct or activities of the members of a community, village or tribe. It is a product of the behavioural patterns of the people. One of the perculiar characteristics of customary law is that it derives its strength and enforceability from the acceptance by members of the community, village or tribe as obligatory and binding on themselves. "It is the assent of the native community that gives a custom its validity" as such a custom "must be shown to be recognised by the native community whose conduct it is suppose to regulate"[1] Customary property law must be viewed as such. It is the rules of conduct which have developed out of the general consciousness and attitudes of the people concerning and governing their relationship with land; which have

become acceptable and binding among them.

It may be with some caution that one ventures to embody as a system the rules of customary land tenure. For as with customary law generally, it is characterissed with diversities and variations from community to community, village to village or tribe to tribe. Taking into consideration the number of tribes and communities in Nigeria, it is arguable that there is bound to be some multiplicities of various customary tenures. Emphasing the point, Obaseki, J.S.C. in OTOGBOLU v OKELUWA,[2] maintains that:

> At this stage of our knowledge of native land tenure system acquired from cases coming to our courts, I can safely say that there is no uniform customary land tenure system spanning the lenght and breadth of Nigeria. The knowledge of the customary land tenure of each locality is perculiarly within the knowledge of the members of that community.

While it is perfectly correct that it is the members of a community that have a better knowledge of the customs within their locality. There is however, no real evidence of major diversities and variations with regards to the broad principles of customary property law in Nigeria. It must be noted that the people of Nigerian communities share common conceptions and attitudes. They lived within the same kind of subsistence economy. It follows that, similarities do exist in the broad and basic principles of their customs. "Among the people inhabiting a contiguous land, and whose mode of life and general out look are generally the same, the land or land tenure bears very close resemblance.[3] Closely related to the above fact, is the flexible nature of customs. This makes it adaptable to one another. Thus a good number of customary laws of smaller ethnic groups gradually disappears as a result of assimmilation of these groups into larger ones by a process of inter marriage and increasing movements.[4]

More importantly is the extraneous unifying factor of the custom. There exist in Nigeria a single system of courts that has been charged with the administration of local customs. These courts have been able to

address native law and customs under one umbrella. According to James:

> The courts are laying down uniform principles, rules and presumptions which are applied unless a contrary local variation can be proved to exist. This form the working basis of a general system of Justice, and courts are constantly pursuing the process of reconciliation and harmonisation. Local divergencies, which are always respected, still exist, but then do not impair the symmetry of the main fabric. 5

It is this broad and general principles of land tenure that exist as a system; and capable of applying throughout Nigeria. "A departure from such principles is possible if it is established by evidence that the native law and custom of that area differs from the general principles".[6]

However, there exist in Nigeria a more stable system of customary land tenure which admits no variation. It is trite law that Islamic law is part of the customary law in Nigeria.[7] It is effectively documented in the Holy Quoran, and regulates the muslim's life in all spheres including land. This will be discussed later in this chapter.

2.2.1 Historical Development of Customary Property Law

The development of land law in Nigerian communities evolved through a number of stages. In the earliest stage, there was no form of control of land acquisition and use. Land was regarded as a gift from God made available for every body to enjoy its natural fruits. This was the period when there was vast land and the communities were sparcely populated. Land was mainly used for dwelling, farming and hunting purposes, any other use was hardly known. In this stage, there was no form of actual ownership. The only law that governed land then was that the first to settle in any parcel of land, was the user absolutely. No one can occupy the same piece of land except by the settler's agreement or the land was abandoned. The politics of land ownership at that time was absent. No one knew the economic value of land and in fact it has none.[8]

It was at this stage that land acquisition by settlement was developed. The first to occupy the land remains and continue to use it. The intention of occupation was indicated by cultivation, building of either temporary or permanent structures and creation of artificial lakes. Acquisition of land by settlement became a primary mode of establishing title to land.[9] In AJALA v AWODELE,[10] the court observed that "settlement is one of the traditional modes of acquiring land, and it is irrelevant to argue that the title is defective, because his ancestors have no grant from any person". In any action for land acquisition therefore, ownership or title must go to the first settlers in the absence of any evidence that both parties jointly settled on the land.[11]

The second stage was when villages and communities began to be formed. It became expedient to protect the territorial integrity of the communities or villages. The proper delineation of boundaries within natural lines became necessary. The authority of the chief, elders or heads of the community villages and families became recognised. The delineation and protection of boundaries and the assertion of the authority of the chiefs, elders or head in the communities, villages and families, necessitated the establishment of more rules for land acquisition and use. This stage saw the era of acquisition of land by expansion and conquest[12] resulting from inter tribal and communal conflicts. More importantly, this stage saw the begining of communal and family ownership.

It was at this stage the distinction between members of a community and non-members was drawn in relation to land. Members have a right to communal, village or family lands and can acquire virgin land by clearing and cultivation.[13] In order to safequard the social fabric and the land of the community, a stranger could not acquire land except by the consent and grant of the community, village or family.

The power of the chief or head to allot land became recognised. Lord Lugard depicts this stage as the tribal stage. According to him, "when the tribal stage was reached the control of land became vested in the chief who allots land at will, but it is not justified in dispossessing any family or person who is using land"[14]

The chief or head now assumed a role of social and political pre-eminence over land matters. He was saddled with the control of land allocation, management and protection of communal property. He was also in the position of receiving tributes, gifts and services from members and strangers. But members obligation to present tributes and services were not part of the land tenure system. According to Bentsi-Enchill, such services are not part of the property holding, "it arises from a political or jurisdictional authority rather than from the assertion of proprietary rights."[15] Some commentators have tended to assume that such privileges were part of the land tenure system, but this is not so. Customary land tenure did not know of any payment of tribute in terms of value for a land by a member . "A gift might have passed to the chief from a peasant, but that was not given as a price or tribute for the land".[16] This stage saw the establishment of customary property law. There was eleborate structures for the management and control of land use. The area of land under control at this time was not extensive. Farming was largely subsistence and cash crop farming was unknown. Population was still sparce and there was large unoccupied land. Allottment and alienation by way of gift was practiced. This may arise from good relationship or neighbourliness and bravery during wars.

The next stage of development of customary land tenure was a response to a combination of factors. There was increased population within the community and there emerged the practice of cash crop farming.

These led to an increased and greater demand of land use. More importantly, this period concided with the influx of Europeans; and this increased the volume of trading activities, which was mainly in cash crops. There was therefore a gradual change from subsistence economy to money and cash economy. Commercial activities flourished, partly as a result of the establishment and activities of modern government. Large urban centres were established, and the demand for land in these areas were greater because of the need for modern infrastructure. Land became a valuable exchange commodity; which people preferred to own individually. People preferred to have their own modern houses or property rather than family or communal ownership. The tendency in this era was shifting toward individualism; especially as land ownership became an object of socio-economic and political prestige. The new socio-economic and political changes was reflected on the customary property law. It developed extensively, created new horizon, and filled the gaps or loop-hole that existed previously.

The new economic status of land gave it a higher exchange value. The former attitudes to land as a gift of God to members of the community became untenable. For even members found it difficult to acquire land. Only the rich and influencial could have access to land. The difficulty also extended to government which found it increasingly expensive to obtain land to meet it's economic and political obligation. Huge amount of money was usually paid by government when it acquires land for development purposes. This was precisely the position in southern Nigeria. There was a boom for land owning classes and land speculators. They acquire land from communities families and individuals and later sell at higher prices. With this uneconomical drift, it was only a question of time for government to intervene and steady the tide of this unco-ordinated movements.

The Role of the Judiciary and Legislature

The judiciary and the legislature also had their own contribution to the development of customary land law. Within the Nigeria legal system, there has been a united system of courts which have been charged with the administration of customary law. Through this means they have been able to influence the shape and direction of the customary property law in Nigeria. The judicial process adopted a number of techniques in this regards. One of such techniques, according to Ajayi,[17] involves the historical enquiries of the position of the customary rule in the past. Once ascertained, the rule is applied to the present situation without question. By the use of this technique, the courts have been able to enforce some of the old rules that makes for the stability of the indigenous social structure. It has prevented the disintegration of the traditional law and way of life, under the impact of non-traditional aspects of society. Another technique is that the court have been inclined to regard customary law as being in a process of evolution. The courts have been disposed to take cognizance of changes in the rules of customs where they have occurred. This is made possible where evidence is before the courts that such changes have been accepted by the community whose life the custom regulates.[18] This technique has rendered customary law as adaptable as possible to the ever changing needs of the society. It emphasises the flexible nature of native law, as one incident of land tenure after another disappears as time changes.[19]

By far the most important contribution of the judicial process was through the implementation of the statutory validation provisions in Nigeria. For example, section 34(1) of the High Court Law of Northern Nigeria[20] provides that the High Court shall observe and enforce every customary law which is applicable and not repugnant to natural justice, equity and good conscience nor incompatible with any

law for the time being in force.[21] Section 14(3) of the Evidence Act,[22] 1945 also provided that the courts shall not enforce any customary law that is contrary to public policy. These provisions allow the courts to wither out rules of customary property law which the judge thinks infringes these provisions. The courts have assumed the mantle of "keeper of conscience of the native communities in regard to absolute enforcement of alleged native customs".[23] The justiciability of these provisions is a completely different enquiry. What seems rather unfortunate, is that these test "have made the legal morality of the courts a percurses to the social morality of the people whose conduct is subject to the customary legal regime".[24]

Through the judicial process, certain changes occured within the framework of the fundamental basis of the customary land tenure. Some notable positive changes includes the use of wills in English form as a means of creating family property;[25] the ability of the family head to act in a period of emergency to save family property;[26] while it is the head of the family or the community that is competent to take action for the protection of family or communal property, if he neglects, an ordinary member can do so;[27] allowing the use of election as a mode of determining the headship of a family;[28] imposition of strict accountability on family head for the revenue accruing from family property;[29] decreeing partition of family property whenever it is necessary;[30] and finally the change in the status of women with regards to property. Women are not only allowed allottment of family or communal land, but can also become family head.[31]

The judicial process have also contributed negative trends in customary property law. For example the decision of COKER v OGUNYE[32] which was to the effect that transactions involving customary transfer of land when documented, are not registrable instrument under section 2 of the Land Registration Act, 1924.

This is because it is not like the English documentary methods. Also the decision of ABEJE v OGUNDAIRO[33] where the Supreme Court held that family property that devolves to a single heir, does not pass to him absolutely to be able to alienate it by will. To some extent, the doctrine of judicial preedent had also contributed some negative effects. It gives customary law a mantle of cystallization, even when it is in a formative stage. It therefore restricts the flexible nature of customary law. Also, due to its continued binding effect, it leads to the perpetration of error once a mistake has been made.

Another statute that brought some changes to customary property law was the Communal Land Rights (Vesting in Trustees) law[34] which applies only in the old Western Region. The law was passed to regulate the management and disposition of communal land. The powers previously exercised by the traditional chiefs became vested in the trustees, appointed from the community. Although, quite naturally the trustees included the chiefs or their appointees.

2.2.2 The Nature of Customary Property Law

The basic principle of customary land tenure is that land is owned by the community, the village or the family, and every member has a fundamental right to the access and use of the land. This position has been reiterated by the often quoted report of Rayner, C.J. on land tenure in West Africa, cited with approval in AMODU TIJANI v SECRETARY, SOURTHERN NIGERIA,[35] by Viscount Haldane:

> It is important to bear in mind in order to understand the native land law ... that the notion of individual ownership is quite foreign to native ideas. 36 Land belongs to the community, village or the family, never to the individual. All members of the community, village or family have an equal right to the land.[37]

This is the concept of communal ownership. It is completely distinquishable from the English ideas of primitive communism or communalism in which rights of the individual are completely absolved by those of the community.[38]

Under customary jurisprudence, communal ownership stems from the fact that the community, village or family has a kind of social cohesion or social unity in their regards to the ownership of the land. Under this unity, each member has certain rights, claims, powers, privilages and immunity in and over the land.[39] For instance, a member has a right to a portion of the land, for his own use and sustenance. This right is guaranteed by the privilege of being a member of the community, village or family. A child born to the community, is automatically entitled to this right not only by reason of the inheritence from his father but by the fact of his membership thereof.[40] Acquisition and ownership of communal land by a member was by a grant from the chief or head of the community, although when land was abundant in supply, mere cultivation building or fencing would suffice. His right to the use of the land is in any manner beneficial to himself and his family. He has exclusive right to possession and his improvements against other member of the community. His right of use and control includes the right to alienate by way of pledge, gift, loan or lease, but he cannot effect an outright alienation to a stranger without the consent of the chief. The right of user or enjoyment of the land is perpetual and hereditary in nature. He can not be dispossessed of his portion, except with his consent[41] or where the land may be required for public purpose.[42] Some authorities have maintained that dispossession can be effected if a member misbehaves, like making bad medicine or committing adultery.[43] However, other have maintained that such dispossession occur under religious, political or constitutional rule, and not strictly under property law.[44]

2.2.3 Types of Landholding Under Customary Tenure

(i) Communal Landholding

The scope of communal landholding revolves around two ideas. Accourding to Elias:

> Land described as communal often embraces both those in which individual members of the group hold clearly recognised rights and those over which no claim of right is ever asserted whether by groups or by individuals. In the second place the term communal has been applied to lands like sacred groves and other fetish lands, market-sites, magico-religious grounds and houses, dumping grounds of the village, churches, mosque and land surrounding these - all of which are best described as public.[45]

It is this land described by Elias as public lands, that are really the communal land in the strict English sense of the word. Every body has access to use it in common and none has exclusive possession over it. Land which are held communally, but which the individual has acquired rights to, through allottment is vested exclusively in the individual. Although it is normally said that the absolute title remains with the community, the right of the member is no less absolute, as he assumes the community's position in his portion. To that extent, the interest of the community on that portion is displaced or postponed.[46]

The maximal interest in land which an individual member can have, can be described as a determinable title if compared with the communal absolute title. Such a determinable title, is a usfrunctuary or occupancy right, a qualification of the radical or final title vested in the community.[47] But such a determinable title can nevertheless be of an interest of such amplitude as to be scarely distinquishable from the allodial title.[48] It is not out of place for two of such recognised absolute rights to exist within the same property, for in any case, it has been quite recognised that the word ownership is used loosely in native jurisprudence. It can be taken to mean absolute ownership, and at other times it may mean a right of occupancy.[49]

(ii) Family Landholding

This is by far the most prominent of all types of holding, under the customary landholding system in Nigeria. The reasons are that in many cases, communities often divide their acquired land among the family that constitute the settlement, at the time of land acquisition. Even in highly centralised communities where land is controlled by the chief, land may be directly allotted to families, or first to ward heads and later to families for easier management. Also in decentralised societies comprising villages, the real landholding group are the families whose different head constitute the council of elders. More importantly however, is the fact that the allocation or allottment of land to an individual will in the final analysis become family property. This is because on death either through testacy or intestacy, the property mostly devolves as family property to most probably his children or relatives.

Under customary and native jurisprudence, the word "family" has more than one meaning. It could be the smallest social unit in the body polity which is variously composed of a man, his wife or wives and their children.[50] This approach has been applied in a number of cases[51] and family in this sense is a small holding unit that devolves from a man. There is however the "extended family" which is more or less a social institution. It has a stronger corporate character. According to Green "extended family" "is a group of closely related people, known by a common name and consisting usually of a man; his wives and children, his brothers and half brothers and their wives and children and probably other near relatives".[52] The corporate nature of extended family is still firmly embeded in Nigerian communities. It has to a large degree maintain its cohesiveness even in large commercial and urban cities.

With regards to the inheritence of property, "family" has a distinctive meaning. It means those members who are entitled to inherit the property as family property at a given time. According to Olawoye:

> In its strict analytical sense in the context of family property 'family' has a restricted meaning ... only those who are for the time being, are entitled to the inheritance are within the group. Thus, the answer to the question 'who are members of the family must concide with the answer to the question 'who are those entitled to claim as heirs of the founder of the family at the material time.[53]

It must be noted that blood relationship is the major consideration of being a member of a family. However, in some instances it may not strictly be the deciding factor. In some places as in Yorubaland, the process of assimmilation has made slaves and their descendants members of the family. The advent of British administration which frowns on the issue of slavery, coupled with the passage of time has made slaves and their descent mix freely with family members. Some of the female slaves are even married in the family. The result is that they are often allotted family land for building and cultivation as family members.[54]

It seems therefore clear that the connotation of the word family will depend on the customary law of the area. For instance in ADEYEYE v TAIWO,[55] the court rejected the claim of blood relations of the deceased as included in the inheritance of the deceased member's property. The claim was unsupported by custom. However, outside customary law, the founder may give the meaning of "family" for the purposes of his properties. This is usually done by the machinery of testamentary disposition, for example a will. Thus, although family property is created, family membership for the purposes of inheritance is not decided under customary law. The authority for this position is SOGBESAN v ADEBIYI,[56] where a deceased founder of the family devised his property to his heir and appointed his brother as the 'head of the family'. The question arose as to what is the meaning of the word family in this context, whether it

meant only his children as it ought to be, or included his brothers and sisters as well as his children. Lloyd, J. adopted the second interpretation because "it would be altogether contrary to the conception of native law and custom as well as good sense to appoint a person who himself has no interest in the family property to act as head of the family, a position which involves the management of that property".[57]

Family landholding is ownership of landed property by the family as a corporate entity. The legal power to control and manage the affairs of the land is vested on the family as a whole. The system is a joint ownership of its own distinctive characteristics. All members have rights and liabilities in the property, they are entitled to the enjoyment and use of the land either together or individually. But no one has a separate right of ownership over any portion of the land. The members have no alienable right to dispose the property by his or her own will, unless they act with the family consent, or the property has been partitioned.[58]

One of the recent decision on the nature of family landholding is the case of BAMGBOSE v SHOKO[59] In this case, the Appellants/Plaintiffs claimed inter alia, for a declaration of title. They trace their title to their father who bought the land in question from a member of the Defendants family. The Defendants contend that the land in dispute was their family land and that the vendor through whom the plaintiffs were claiming, was allotted the land but he did not have an absolute interest in it. The trial judge dismissed the claim, on the grounds that the land was not absolutely owned by plaintiffs' predecessors in title. The plaintiffs appealed to the Western Nigerian Court of Appeal, where the decision was reversed. The Defendants then appealed to the

Federal court of Appeal (then newly created), which restored the trial court's decision. The plaintiffs' now further appealed to the Supreme court which unanimously dismissed the appeal. Craig, J.S.C. (who read the lead judgement) gave an extensive explanation of the nature of family ownership, and the rights of an allottee of family land. According to the learned justice:

> In my view there is a world of difference between land which is inherited and one which is allotted. When family land is inherited the beneficiary takes absolutely ... and puts an end to the joint interest of the other members of the family in the land. This is not so in the case of allottment ... an allottment is no more than mere permission or licence from the family to make use of family land. Therefore, all that an allottee gets is the right to occupy and use the land allotted to him. The title to the land remains with the family. In this respect it must be stressed that no matter how long the allottee may have stayed on the land, or what improvement he has carried on it, the occupational right granted to him never ripen into full ownership: SHELLE v ASAGON (1957) 2 F.S.C. 65 at 67. Indeed so strong are the bonds of family ties under customary law that one extreme case, it was held that an allottee who had reclaimed a swampy portion of the family land does not entitle him to claim the title to the land. See BASSEY v COBLAM (1924) 5 N.L.R. 92. In the light of the above, it is not suprising that the learned trial judge came to the conclusion that the plaintiffs' vendor was an allottee of the family land and therefore had no right to pass absolute title to anyone. 60.

It is quite clear and established that ownership is joint and indivisible, and will at all times remain in the family. A member has no separate right to effect transfer of family property unless the family consents.

It may be necessary to draw a distinction between the right of members in a community land and members right in family land. Most writers are apt to treating them as the same, because both come under the general umbrella of corporate or communal ownership. This confusion has led to the application of certain distinctive rules, that do not apply universally. Under family ownership of property, the family at all times, as a corporate entity, maintains the ownership over all land or property. Members of the family are entitled to be allotted a portion of family land. They may reside

on or use the family property as the circumstances will permit. This fact of user or occupation does not in any way displaces the title of the family. Title can only be displaced if the family agrees to alienate, or there is partition of the property by the family or the court.[61] The contrary is the case under community ownership. Here, members occupying land have clearly recognised rights of a quantum hardly distinquishable from the community's title.[62]

It is conceded, that the holding of the member occupying either family or community land are inheritable in nature. But it may be necessary to draw a distinction between the legal basis of the inheritance. The right of the children of a deceased member to occupy family property previously in the possession of their father, may not in practice, be questioned, but this is not as a matter of legal right.[63] Such land or property remains within the ownership of the general family and to their immediate family. Although, a different consideration arises when the property is an improvement made on the land by their father. Such improvement passes to the immediate family of the deceased. Children of a deceased member who holds a portion of communal land, has a legal right to occupy and possess their father's holding. Such a property becomes family property as between the children. No one of them has a sole right over it, they must all act together in dealings concerning the property.

A member who has a portion of community land owns it. He has a right of alienation; he can sell, pledge, lease or mortgage his holding. His rights in the land are generally allodial in nature. The position is different with family holding. A member in possession of a portion of family land is able to use it substantially for his own benefit and effect improvement on it. His improvements which he owns absolutely may be a subject of alienation. But he cannot alienate the land without the family's consent. A member cannot make a gift of the land, nor can he sell the land as his own personal property. The portion of family land he occupies cannot

be attached in satisfaction of his personal debts. The position remains the same even if he has improved the land or he has been in possession of the allotted land for a long time.[64] It requires corporate decision to dispose corporate property; it is this fact that makes dealings in family property sometimes very difficult.[65] What is however certain, is that any improvement made on the land, like building or planting of economic trees or crops remains the property of the member, although the land may still be family land.[66]

(iii) Individual Landholding

In his report on land tenure in West Africa, Rayner, C.J. had stated that:

> ... the notion of individual ownership is quite foreign to native ideas. Land belong to the community, the village or family, never to the individual.
>
> This is a pure native custom along the whole lenght of this coast, and whereever we find as in Lagos, individual owners, this is again due to the introduction of English ideas. 67

The above views of Rayner, C.J. draws its basis from the anthropological conceptions about African societies. Some anthropologist have tagged the African societies as primitive and based on collectivism. The notion of individual ownership never existed in such societies.[68] Individual ownership they maintained is a product of Western capitalist societies[69] later transfered to Africa. Without over emphasising this point, it is important to note that this view has been rejected. According to a renowned anthropologist, Golden Weiser,[70] patent facts do not support this apriori conception, which he described as a concoction of the evolutionist.

There may be little doubt, that prior to the time Rayner made his report, the prevalent type of ownership was the communal and family holding. This would have certainly blurred his conception. However, an examination of the nature and quantum of individual rights in communal

land, showed that the concept of individual ownership is quite consistent with communal ownership. Communal ownership as we have previously discussed does not mean that individual rights are completely subsumed. Rather it means that individual members of a community, have certain claims, rights, and privileges over communal land. They are entitled to a portion of it which they can own.[71] It is therefore clear, that the abundance or prevalence of group titles is not necessarily incompatible with the existence of individual titles. Group titles itself with its solidary external semblance, is often, when viewed internally, only an umbrella under which individual rights and interest co-exist.[72] Furthermore, the very notion of family property, in one of its many instances, implies the acknowledgement and recognition of an original individual ownership or acquisition. In such an instant, the individual may be regarded as the founder who all members or branches of the family trace their ancestry.[73]

Contrary to the view that it was the introduction of English ideas that brought about individual ownership; judicial authorities have established that individual ownership did exist, for instance through gifts and absolute grants. In the case of ARE v IPAYE[74] the Supreme court upheld the contention of the Defendants that the grant made to their father by the plaintiffs' ancestor was made to him absolutely, and that he did own the land after the grant. Furthermore, in large communities with centralised authorities as the Oba, a grant of land to an individual member passes the ownership of that land to the member, including his wives, children and dependants. In GOLD v OSASEREN,[75] the Supreme Court approved Idigbe, C.J. (as he then was) observations that it was the Oba of Benin that can confer a legal title to land in Benin. And that once the Oba grants land to an individual, he becomes the owner of such land.[76]

The observations of Rayner as approved in AMODU TIJANI's case (Supra) has created a general presumption that all land in Nigerian communities are communally held. And that where individual holding exist, it must be strictly proved.[77] In UDEZE v CHIDEBE,[78] the presumption was described as a residuary and nagging vestige of our traditional concept of land ownership which has been dented and in fact obliterated in some places.[78] While it may be admitted that the denting of the presumption is of a recent development, it is contended that these are result of customary evidence which hitherto existed before now. The courts are only now making pronouncement as to their existence. It is not suprising therefore, that the general applicability of this presumption to all communities was rejected in OTOGBOLU v OKELUWA (Supra). More recently, the Supreme Court in CHIKWUEKE v NWANKWO[79] established that there are areas in Nigeria where the dominant holding was the individual holding. In this case, the land in dispute was surrounded by owners who held individually. The claim by plaintiffs that the land was owned collectively or communally was rejected and dismissed. But this decision was reversed on appeal to the court of Appeal on the grounds that ownership of land in Nigeria was communal. The Supreme Court unanimously reinstated the trial court's decision. According to Bello, J.S.C. (as he then was)

> The court of Appeal committed very serious error by applying the principles of incontrovertibility of communal land tenure to personal land tenure ... by over looking the overwhelming evidence that personal ownership of land was permitted by the relevant law and custom. The court appears to over look the decision of OTOGBOLU v OKELUWA ... to the effect that the general principles of communal ownership as pronounced in AMODU TIJANI v SECRETARY, SOUTHERN NIGERIA ... would not apply where it is established by evidence that the native law and custom of that particular area differs from the general principles. 80

However, the idea in Rayner, C.J.S. report as regard individual ownership may not be new in a technical legal sense under native jurisprudence. But it must be noted that this sense was hardly what the learned Chief Justice really meant. Under native jurisprudence, individual

effort and personal skill in the acquisition of property is actively encouraged. But the individual still remains a member of the community, village or family. He is still entitled to the collective security and protection which the communal system provides. The member himself is a property of the community, available at all times to render services as may be required from time to time. Consequently the land which he may acquire by his own labour or effort in the community in which he lives, being part of the land which the whole community must fight to preserve in the case of an invasion, must itself be considered as part of the communal lands or property.[81] This position is emphasised by the fact that in native custom, when a person is injured individually by members of another community or village, the aggression is not seen as against the individual alone. The aggression is against the community to which he belongs and receives protection. When an atonement is to be made, it is given to the community as a whole.[82]

2.2.4 Control and Management of Communal Property

The control and management of communal property is vested in the chief, oba or traditional ruler of the community. In societies without a centralised socio-political system, it may be vested in the council of elders. The chief assumes a physical and spiritual representation of the community as a whole, and plays a central role in relation to land matters. In fact due to his enormous powers concerning the land, he is sometimes loosely referred to as the owner or trustee of communal land.[83] While it is conceded that it is the chief that has power to grant lands to members to own, he is not the owner of the communal land.[84] As we have previously discussed, ownership is vested in the community or village as a whole.

To describe the chief as a trustee of communal land, may not strictly be objectionable, if it is done with a proper understanding of the context in which it was used. The chief is vested with certain management powers over the land. As a trustee of the land, he is to exercise his powers in a manner beneficial to the community in general. There is a fundamental difference between the chief position as a trustee, and a trustee under statutory law. Under the latter, the legal title is vested in the trustee, while the beneficial title is with another person. The chief has no such legal title over communal land or property. The title remains with the community or village. What is clearly discernable, is that the chief is the proper person to exercise the power of control and management in communal property, subject to the individual member's right in such property. Once the title of ownership is clearly separated from the exercise of rights and powers to which then give rise, the position of the chief is then perceived in its true perspective. The former is vested in the community or village and the latter belongs to the chief.[85]

The representative status of the chief or head of the community, makes him the proper person to take action to protect or recover communal property; to receive tributes, rents or incomes accruing from the land. For example, when compensation is to be paid to the community, by the government, it is given to the chief or head of the community to be disposed by him for the benefit of the community.[86] Since the income belongs to the community as a whole, the members are entitled to a detailed account, whenever they are not satisfied with the explanations of the chief. The rule of accountability is a firmly entrenched principle in customary property law, and commenting on it in ARCHIBONG v ARCHIBONG,[87] Robinson, J. said "his actions must be capable

of reasonable explanation at any time to the reasonable satisfaction ... of the members. He cannot treat house money as his own. If it is his own, he can throw it away or misuse it. He cannot do that with house money".[88] Furthermore, the chief in exercising his powers is not expected to act alone. He usually has his council of elders or chief who act as advisers to him. This is particularly true in matters concerning the allottment, allocation or alienation of land. In such situation, the requirement of consultation is not one of convenience, it is a requirement of law, not to be disregarded at any time.

The position of the chief is indeed a unique one; a uniqueness borne out of the fact that nothing can be done with regards to the land without his active participation. His role is no doubt one of social and political pre-eminence.

2.2.5 Islamic Property Law

The Islamic religion transcends many part of Nigeria; not only *in the North where the 19th century Jihad by Uthman Dan Fodio was* highly successful, but also in some areas in the South of Nigeria. Although, Islam may simply be viewed by many people as just another form of religion, it goes far more than that; "It is the total life of any person who decides to be governed by it. It has provided regulations governing all aspects of life, like law relating to the family, evidence, procedure, banking, property and criminal and civil wrongs"[89] Islamic property law, therefore forms one of the types of property holding in Nigeria. However, it is quite clear that under the scheme of classifications of law, Islamic law comes under customary laws applicable to Nigeria.[90] But as a customary law, it differs greatly being fully and completely documented. Its primary sources are the Holy Quoran and the Sunnah which are exhortations of the holy prophet Mohammed.

The treatment of Islamic property law as part of customary land law is not a mere coincidence. There is some similarities as to the conception and use of land within the moslem state and under traditional law. Land a gift of Allah, was regarded as a public property. The use and enjoyment is open to everybody as long as it does not cause prejudice to the general public. Islamic law prohibits exclusive claim to bare land and acquisition is by cultivation, building or fencing. Under Islamic property law, land can be divided mainly into three categories:

(i) Common land, generally regarded as "waff"

(ii) Occupied land, and

(iii) Unoccupied land.

Common land belong to the whole community and no one can claim any private or absolute title over it. It is usually used for public purposes. Unoccupied land are generally within the control of the Emir. He makes grants and allocation to any person for his use and enjoyment. Occupied lands are those under the occupation of persons in the community.

When land is occupied under Islamic property law, the plenitude of the rights of the occupier is just as it is under the indigenous customary tenure. The occupier has absolute ownership over that piece of land against all persons. He is free to deal with it in the way he likes as far as he does not cause injury to the members of the public. He can sell, loan or pledge the land without the consent of the Emir.[91] However, alienation to strangers must be with the permission of the Emir. Despite the occupiers rights over his portion, he can be dispossessed if the land is required for public purposes; for example building of a mosque. Although the occupier has a right of compensation.

The general powers of administration is vested in the Emir. As in customary land tenure, he holds the land in trust for the community. He makes grants to the people and cannot deny a person a portion. Although the Emir has enormous powers in relation to the land, it is well settled, that the Emir does not own the land. He is a trustee of the communal land for and on behalf of the people. The Emir has an emirate council, that assist in the management of the communal property.

2.3 Statutory Land Tenure

2.3.1 Meaning

Statutes are laws or enactments made by the legislative arm of a state for the purpose of goverance. This power is usually a part of the sovereign authority of a state. In relation to land, it implies the power to make laws which creates a new form of land tenure or regulate any pre-existing tenure. This power of sovereignty which is different from the "absolute proprietary interest" has been referred to as the "eminent domain" of the state exercised within its territory. According to Nwabueze:

> The regulation of the state of the manner in which private owners of land are to hold and dispose of their land results in some qualification being imposed upon private rights of ownership for various purposes ... Private ownership is therefore subject to the eminent domain of the state; in otherwords rights of private ownership can be enjoyed only subject to such qualification as the state may in the exercise of its sovereignty imposes upon them. 92

It is through this power, the state either regulates, modify or abrogate pre-existing land tenures. The nature of changes may affect the mode of acquisition or allocation, control of land use and property transactions or general administrative planning for the protection of land and its resources. Whenever any statute alters or changes any pre-existing tenure, such statute becomes the

reference point of any form of holding in land. Private rights may still exist, but their existence depends largely on the interest conferred by statute. The present statutory form of tenure in Nigeria, is as in the Land Use Act, enacted in 1978. This Act, apart from creating a uniform statutory land holding system in Nigeria, was instrumental to the radical changes of the erstwhile system of land tenure in Southern Nigeria.

2.3.2. Development of Statutory Land Tenure in Nigeria

(i) Southern Nigeria:

The British colonialist adopted different system of land administration between the Northern and Southern Nigeria. In Southern Nigeria, the interest of the British Crown actually started through the Treaty of Cession in 1861. By this Lagos was ceded to the British Crown by King Docemo and was made a colony. The establishment of the British administration in Lagos, saw the introduction of English law. This was done through the mechanism of reception statutes, the first of which was Ordinance No. 3 of 1863. When later in 1906, the Protectorate of Southern Nigeria was amalgamated with the colony of Lagos, the reception statute was retained. Through these applicable laws, English system of land tenure was made applicable to Southern Nigeria.[93]

It was purportedly thought that the Treaty of Cession was not one of sovereign rights alone, but also included the transfer of proprietary interest in the land in the colony. This resulted in the British government issuing crown grants to land, worded in such manner as to create interest in land known only under English law. These interest such as the fee simple or tail, were quite foreign to native law and custom, under which land in Lagos was held. The crown grants gave the impression that grantees were now to hold land free from native law and customs. This misconception brought about serious confusion and

consequently litigations, since it was well established that King Docemo did not own the land ceded to the British Crown; as such he could not give it away by any treaty as the principle of "nemo dat quod non habet" applied.[94] However the position received some clarification in the celebrated case of AMODU TIJANI v SECRETARY, SOUTHERN NIGERIA where it was held that by the Treaty of Cession, the proprietary right of the inhabitants where fully respected, that what was transfered was the radical or ultimate title, which itself is "bare" implying no more than a "comparative limited right of administrative control".[95] That the introduction of crown grants was a mere evidence of title; not intended to modify substantive rights, but rather a "definition of already existing rights and the preservation of records of that existence".[96]

The introduction of crown grants encouraged land allottees and holders to apply and convert their holding to crown grant. Many people who held land on allocation or allotment under native land tenure obtained crown grants because of some of its advantages. In the first place they could easily transfer their portions, as such if they got into financial difficulties they could either sell or mortgage their property. The system also made people believe that they were no longer bound by the customary incidents of native tenure, as such they refused to acknowledge their grantor's superior title or pay tribute as require by native law.[97] It became necessary to control this element of confusion by legislation, and in 1947 four Acts were passed. They are:

(i) Crown Grants Act No. 18

(ii) Arotas (Crown Grants) Act No. 19

(iii) Etepedo Lands Act No. 20, and

(iv) Glover Settlement Act No. 21

These Acts specifically declared that the crown grants were made subject to restrictions which already existed and recognised by native law and custom, as at the date of the grant. But it will altogether be wrong to assume that with the judicial and legislative positions above, the tenurial system of crown grant was killed. For even in land covered by the Acts above, for example under the Etepedo Land Act, section 5 provided for enfranchisement of the Crown grant. This has the effect of discharging the grant from all incidents and tenure under native law and custom.

There are also other considerable means or methods through which the British government was able to acquire absolute title over land in Southern Nigeria. One of such method was by private treaty or purchase from the customary owners of land. Much of the land in Ikoyi, Lagos was acquired by the Crown from the Onikoyi family who were the customary owners of the land in 1865. This was confirmed by the Supreme Court and later firmly established by the Ikoyi Lands Act.[97] Also Port-Harcourt town was acquired by purchase from the five chiefs and two Headmen who represented the Diobu people, the customary owners of the land.[98] The British government also succeeded into the position of the Royal Niger Company, with regards to land it acquired through private agreements in the course of its trading activities. Thus, save for some few stripe of lands comprising the station of the company, all rights and interest over land owned by the company became vested in the British Government.[99]

More lands were brought under the control of the British government through its power of compulsory acquisition. The first statute conferring general powers of compulsory acquisition in Lagos was the 1876 Public Land Ordinance. It was later re-enacted in 1903,

This statute is unique in the sense, that it gave the chiefs power of converting land held under native law and customs to the English tenurial system of fee simple. The Ordinance was replaced with the Public Lands Acquisition Act, 1977.[100] Conquest also brought certain land under the control of the British government. After the Benin punitive expedition in 1896, for example, the land in Benin became vested in the British by virtue of conquest. "For nearly twenty years afterwards the British Crown granted as absolute owners of the land, a number of leases in exercise of its sovereignty. But, when the Oba of Benin was re-instated in 1916, his customary rights of control over Benin land was restored to him."[101] However, for record purposes, the crown obtained from the Oba, a comfirmation of its occupation.[102]

These lands upon which the British government had interest were known as crown lands. They were under the control and management of the High Commissioner or Governor. For instance the 1906 Crown Land Management Proclaimation provides that:

> The High Commissioner shall have the management of all crown land in the protectorate; and may at any time and from time to time sell, lease, exchange or otherwise dispose of such land as he may think fit.

Thus, the crown may create absolute grants in fee simple terms to individuals, from its land, or may grant leases as the case may be. The creation of these forms of land holding from crown land, have direct bearing on English ideas of land ownership. Crown land was later named state lands after the adoption of the 1963 Republican Constitution, by the Adaptation of Laws Order, 1964. This was later regionalised with each region having its own state land law, in Southern Nigeria.

Much of the discussion of the land tenure existing in Southern Nigeria showed that apart from the introduction of English tenure system through the Crown control of land, the main system of tenure was the customary tenure. But one point to be emphasised, is that there was considerable attempts by communities, families and individuals to convert their customary holdings to English holding. They did this by either applying to have crown grant for their landholdings or to employ English conveyancing techniques to delimit their land rights when transfering their property. The net effect was that there was a dual system of land tenure existing side by side in Southern Nigeria. This was basically the position before the Land Use Act was promulgated in 1978.

(ii) Northern Nigeria

The interest of the British government in Northern Nigeria, started with conquest over the Fulani hegemony in the region. This was between 1902 - 1903. The crown had however claimed absolute title over land acquired by the Royal Niger Company by private treaties with the local rulers. It seems quite clear, that the company merely had an occupancy right, and not one of absolute title, since the company could not have obtained such rights from the local rulers who themselves do not have the power to confer such a title.[103] However, by virtue of the Crown Land Proclamation of 1902, the land held by the company and acquired by the government became known as "Crown land". This crown land became the absolute property of the crown, held in trust by the High Commissioner.[104] After the conquest of the Fulanis, the British government claimed to have succeeded into the rights of the Fulani rulers previously exercised over land in Northern Nigeria. Thus by virtue of the Public Land Proclamation, 1902, the government declared as "Public Lands" all other land

including those under the control of the conquered rulers.

By right of conquest, a real and absolute interest could have been acquired by the British government. But the exact nature of the British Crown's interest in "Public Land" did not assume such dimension. This appears consistent with the British policy to accord respect to the native rights already existing in the land; and thus reduce the Crown's title to a mere administrative control.[105] However the distinction between the "crown lands" and "public lands" at this time was necessary, since, the former is a private property of the crown, which it could sell, lease or transfer and any unauthorised interference on such land was deemed as trespass to government property. Even though this was the law, many portions of Crown lands were occupied without grants. It therefore appeared as if the crown's title over crown lands was a loose one.[106]

Between 1902 and 1908 the land question in Northern Nigeria received serious attention from Sir Percy Girouard who succeeded Lord Lugard as High Commissioner. This led to the establishment of the Northern Nigeria Land Committee in 1907. The recommendation of this committee formed the bedrock of the Land and Native Rights Proclamation, 1910. The summary of the effect of the law is as follows:

(1) That the whole of the land of the protectorate was under the control and dominion of the Government and that no title to the occupation, use and enjoyment of the land was valid without the assent of the Government.

(2) The Government control should in any case be exercised with due regards to lawful custom proved to exist.

(3) That any person entitled to the use and enjoyment of the land are subject to Government right, who should be entitled for "good cause" to revoke the title of the occupier.

(4) That the Government is entitled to acquire for public purposes any land and due compensation should be paid to previous occupiers.

(5) The law removed the distinction between crown and public lands.

The law received severe criticisms, since it was expropriatory in nature, and the issue of the requirement of consent to the indigenous occupier before his holding becomes valid was seen as unjust. According to Sir Geary, "to turn an occupier who under native law holds his land rent free in perpetuity into rent paying short term lessee on a precarious tenure is bluntly confiscation and both inexpedient and unjust."[107] Despite these criticism, it is pertinent to note that this law is the founder of the present day Land Use Act, 1978 applicable in all Nigeria. It introduced a new concept of obtaining right of occupancy as a type of landholding system.

The above 1910 Proclamation was replaced with the Land and Native Rights Ordinance, 1916. The criticisms of the old Proclamation was taken into consideration and some changes were effected; however, much of the old provisions were substantially re-enacted. The Ordinance declared all lands in the protectorate to be native lands. Natives in occupation were no longer required to have the assent of the High Commissioner to have a valid title. However, the control and management of all lands became vested in the Government to administer with due regards to native law and custom. The law provides 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 Government and shall be held and administered for the use and common benefit of the natives and no title to the occupation and use of such lands shall be valid without the consent of the Governor. 108

This Ordinance remained principally in existence in Northern Nigeria, even until after independence. Save for some administrative changes, it was substantially re-enacted as the Land Tenure Law, 1962. It is therefore quite clear that the Right of Occupancy System was already in existence in the Northern part of Nigeria, before the promulgation of the Land Use Act, in 1978.

2.3.3. The Land Use Act, 1978

The intention of this Act was quite clear from the preamble and the first section. The preambles states that it is in public interest that the right of all Nigerians to land for their enjoyment and sustenance be assured, protected and preserved. And by virtue of section 1, subject to the provisions of the Act, all land comprise in the territory of each state in the Federation, were vested in the Governor of the state, and the land shall be held in trust and administered for the use and common benefit of all Nigerians. The main objectives of the Act are:

(i) that land should be made available to all levels of government for developmental purposes.

(ii) that land should be available also to the private sector, in order to reduce the cost of private investment.

(iii) that land should be available to all Nigerians, at little or no charges or rents.

(iv) to check the activities of land speculators; and unnecessary land accummulation.

(v) to streamline all forms of landholding in Nigeria.

(vi) to bring under the same administration all rights and interest over land.

In the implementation of all these objectives public interest shall prevail over private or individual interest.

By section 2 of the Land Use Act, the control and management of all land in designated urban areas of a state is vested on the Governors. The power to designate an area "urban area" is also vested in the Governor.[109] The control and management of "Other Lands" is vested in the Local Government Council having jurisdiction over the area in which the land is situated. However, land in any state, which the Federal Government or any of its agencies had title to, shall continue to remain under the control and management of the Federal Government or such agency.[110]

2.3.4. Types of Landholding Under the Act

The Land Use Act, 1978 established the right of occupancy, as a system of landholding applicable throughout the whole country. Prior to the Act, the system was applicable only in the Northern Nigeria through the Land Tenure Law, 1962. Section 2 of the Land Tenure Law defines a right of occupancy as a "title to the use and occupation of land". Although the Land Use Act did not define a "right of occupancy" per se, it is quite clear that it is the right of a person (individual, community or corporation) to lawfully use and occupy land. A right of occupancy could either be statutory or customary. A statutory right of occupancy is granted by the Governor of a state in respect of any land to any person. For transitional purposes, certain rights over land in urban area were deemed as statutory right of occupancy over such land granted by the Governor.[111]

A customary right of occupancy is granted by the Local Government having jurisdiction in the area where the land is situated. It is usually granted in areas other than urban areas for residential, agricultural and other purposes.[112] Transitionally, land previously occupied for residential or agricultural purposes shall continue to

be so vested on such occupiers as if a customary right of occupancy is granted to them by the local government.[113]

2.3.5. The Nature of a Holder of a "Right of Occupancy" Interest

A lot of controversy exist as to the actual nature of the quantum of an occupier or holder's interest in a right of occupancy system. This is especially true when the system is compared with other known concept of land rights. The position becomes more difficult to explain, when one considers the wide powers of control and management vested in the Governors or Local Government, by the Act. According to Kolawole, J.C.A. in L.S.D.P.C. v FOREIGN FINANCE CORPORATION.[114]

> The Land Use Act has armed the Government with far reaching powers to not only expropriate land from people, but to control landed properties through considerable executive and administrative powers.
>
> ... We have reached a position in the evolution of land tenure system where the present statute has imposed so many restrictions in the use of interest in land that it may be difficult to state precisely the interest that an occupier has in land which he occupies. 115

Obaseki, J.S.C. re-emphasised the position in SAVANNAH BANK v AJILLO[116] when he said "in terms of known interest in land, the quantum of a statutory right of occupancy remains unclear".

In bid to classify the nature of a holders interest in the right of occupancy system, Nigerian courts have liken the system to a lease. In the celebrated case of MAJIYAGBE v ATTORNEY GENERAL[117] the court stated that the right of occupancy system and a lease where analogous institutions. More recently this same view was adapted by the Supreme court in SAVANNAH BANK v AJILLO

According to Obaseki, J.S.C.:

> To the extent that it can only be granted for a specific term (see section 8 of the Act) it has semblance of a lease. Also to the extent that a holder has the sole right to and absolute possession of all improvements on the land during the term of the statutory right of occupancy, a holder does not enjoy more than a lessee at common law. When therefore section 34(2) of the Act converted the interest held by an owner to a statutory right of occupancy the Act reduces him to the position of a tenant subject to the control of the state . ... As a tenant he is bound by the implied and express terms of the tenancy"[118]

It is a complete misunderstanding to liken the right of occupancy system as a lease. The major essentials of a lease are:

(i) that the lessee has exclusive possession;

(ii) that there is certainty of duration;

(iii) payment of rent, and

(iv) the form of its creation.

The legal right to exclusive possession, gives the lessee the right to exclude everybody including the landlord. He can sue any person for trespass. The lessor can only enter the land upon agreement with the lessee. Under a statutory right of occupancy, a holder shall have exclusive right to the land against all persons other than the Governor.[119] There is no right to exclude the Governor, in fact section 11 provides that the Governor or any public officer duly authorised by him shall have power to enter upon and inspect the land or any improvement. The holder shall permit and give free access to the Governor or any such officer.

The major point of similarity between a lease and a statutory right of occupancy, is that they are granted for a certain duration. However, this only applies to a statutory right of occupancy granted by the Governor under section 5. A deemed statutory right of occupancy need not be for a fixed period.[120] Unless such a holder applies for a certificate of occupancy under section 34(9) and the certificate contains such a limitation.

The payment of rents under the two systems, bear different meanings. In a lease, the payment of rents is usually for the economic value of the land or property. This is the rack rent. But this is not so under the right of occupancy system. The rent payable is usually minimal, the ground rent of the land. More importantly, payment of rent is an agreement between the lessee and lessor. Any unilateral increment by the lessor can therefore not be binding on the parties.[121] The Land Use Act, has given the Governor wide powers with regards to fixing and revising of rent. This is at the discretion of the Governor subject to the provisions of the Act.[122]

It can therefore be seen that there is little or no similarities between the right of occupancy system and a lease. In fact, it is quite clear that when the system was being proposed, it was clearly intended to create a new form of interest in land. The Northern Nigerian Land Committee, 1907 expressed this opinion when they said "we ... avoided as far as possible the use of such expression as freehold, copyhold, or leasehold tenure, tenancy at will, or fiefholder etc.; all which belongs to a system of land tenure which ... has a peculiar and wholly different history".[123] The above position was given credence by the privy council in the celebrated case of PREMCHAND v LAND OFFICER[124] where it was held that the intention of the legislature was to create a wholly different interest in land. While rejecting any form of similarity with a lease, their lordship drew attention to the delibrate avoidance in the constitutive acts, terms and concept common to leases, and the use of new ones. For example "compensation" for unexhaustable improvement" instead of the principle of removability of tenant's fixtures.

In order to fully understand and appreciate the nature of a holder's interest in the right of occupancy system, one must make recourse to the Act; it is the Act which created the system. The incidents and nature of the interest, and control over the interest are products of the Act. Apart from previous holders of land, a person's interest in land becomes real if a right of occupancy has been granted him by the authorities. A grant of statutory right of occupancy entitles holder to a right of exclusive possession over the land. Section 14 of the Land Use Act provides inter alia:

> Subject to provisions of this Decree ... and subject to the terms and conditions of any contract made under section 8 (this is between the Governor and the holder), the occupier shall have exclusive rights to the land the subject of the statutory right of occupancy against all persons other than the Governor.

The provision makes it quite clear that the holder's right is subject to some powers given under the Act. The grant of a statutory right of occupancy is made with the understanding that the interest of the occupier is subject to, and exists hand in hand with the power and rights of the Governor. The rights and powers of the Governor are those recognised by the Act itself. They may also be contained in special contracts between the Governor and the holder. For the rights and powers of the Governor to be effective over the interest of the holder, it must be exercised in accordance with the provisions of the law.

The holder or occupier also has a right of user of the land as he wishes. However, his user must conform with the terms and conditions of the grant, and that of the Act. Where the grant was for a specific purpose, the form of user must conform to that purpose. For example, where land is granted for building, the holder has a right to put up any form of building on the land. Such building must conform with the

terms and condition of the grant, if any, or any other law relating to building in that area or layout. While using the land, the holder is bound to effect improvements. Such improvements belongs to the holder absolutely. Section 15(a) provides that a holder shall have the sole right to and absolute possession of all improvement on the land, during his occupancy. The holder's absolute rights over his properties are as defined by the Act; he must therefore still conform with the provisions of the Act. For example section 15(b) further provided that a holder may transfer, mortgage or assign any of his improvement on the land subject to the prior consent of the Governor.

The plenitude of rights enjoyed over the land and improvements by the holder or occupier exist in conjunction with his duty to observe the provisions of the Act affecting his rights. His duties includes observance of the provisions of the Act, the terms and conditions of his grant, and the provisions of any special contract made with regards to the grant. The holder is therefore under a duty to observe the provisions of the certificate of occupancy and those which it is deemed to contain under section 10. More importantly, he is under duty to obey the powers of control and management conferred on the Governor by the Act, provided such powers are exercised in accordance with the provisions of the Act. The quantum of a holder's right can only be appreciated as provided under the Land Use Act.

The Governor of a state has been saddled with certain powers by the Land Use Act, over holders of a right of occupancy. One of his major powers and perhaps the most draconian, is the power to revoke any right of occupany, as provided under section 28 of the Act. Due to this power, the nature of a holder's interest has sometimes been described as not more than a mere licencee.[125] It is pertinent to note,

that revocation must be in accordance with the provisions of the Act.[126] The Act has provided the grounds upon which revocation can be made, and the manner through which it is carried out.[127] The Governor is under duty to obey these laws. He is not to work on his own whims and caprices. For example, the purpose for revocation must be as provided for by the law, otherwise the revocation will be invalid.[128] Furthermore, certain consequences follow the exercise of the power of revocation. The holder or occupier becomes entitled to compensation under section 29 of the Act. Compensation is payable for unexhaustable improvement on the land. Where the revocation is as a result of a breach of section 22 which restricts alienation without consent; or in breach of the terms and condition of the grant, section 29 does not provides for compensation. However, the Supreme Courts decision in GOVERNOR OF KADUNA STATE v DADA[129] was to the contrary. According to the court even in such situations, compensation shall still be payable for any unexhaustable improvement. This is surely a better approach, since the constitution of Nigeria guarantees right to adequate compensation in the case of compulsory acquisition of property.[130]

The above discussion has thrown an insight to the nature of the interest of a holder, in relation to the powers of the Governor. As far as person's interest subsist in the property or land, it can only be affected by the Governor's powers as provided and exercised under law. For instance, a Governor cannot make a grant of a statutory right of occupancy of a land already subject to such a right.[131] This can only be done after the earlier right has been revoked and compensation paid.[132] The revocation must be in accordance with the provisions of the law, and for purposes or

reasons stated under section 28; otherwise the subsequent grant will be invalid. In OGUNLEYE v ONI[133] the Governor of Oyo state had granted a statutory right of occupancy and issued a certificate of occupancy on a land. The land was however subject to a deemed right of occupancy, and there was no revocation before this later grant. Belgore, J.S.C. observed:

> Unless the land is acquired compulsorily in accordance with the provision of the Act e.g. for overriding public interest or for public purpose by the local government or state government whereby compensation must be paid, nobody shall be deprived of his land. The state has no right to disposess a person of his property lawfully acquired without reason, and that reason shall be in public interest with adequate provisions made in the enabling statutes to pay compensation that is just. The respondent never received any revocation notice, and no gazette or letter divested him of his right ... The purported right of occupancy issued by the Governor of Oyo state in 1983 is void and all the appellant has in hand is a piece of paper having no value. 134

It is therefore quite clear that the right of occupancy system has its own perculier characteristics which completely distinquishes it from other forms of land rights.

Chapter Two Notes and References

1. ELEKO v OFFICER ADMINISTRATOR, GOVERNMENT OF NIGERIA (1931) AC 662 at 673

2. (1981) N.S.C.C. (VOL. 12) 275 at 295 - 296

3. Yakubu, "A Dilemma of Land Law in Nigeria" op. cit. p. 37

4. Agbede, "Legal Pluralism; The Symbiosis of Imported Customary and Religious Law - Problems and Prospects" Fundamentals of Nigerian Law. Op. cit, p. 3

5. James, Op. cit., p.3

6. OTOGBOLU v OKELUWA, Supra., at 284 - 285

7. Section 2, High Court Law of Northern Nigeria

8. Yakubu, "Principles of Property law" Op. cit., p.64

9. IDUNDUN v OKUMAGBA (1976) NMLR 200

10. (1971) NMLR 127

11. OWONIYI v OMOTOSHO (1962) W.N.L.R. 1 at 3

12. Conquest also became a mode of establishing title to land. See MORA v NWALUSI (1962) 1 ALL N.L.R. 681

13. FADIRE v ABIRI (1959) WRNLR 186

14. Dual Mandate (1929) p. 280

15. Bentsi - Enchill "Traditional Legal System in Africa" Op. cit p.89

16. Yakubu, Land Law in Nigeria, Op. cit., p. 7

17. "The Judicial Development of Customary Law in Nigeria" Paper Delivered in the Conference on the Integration of Customary and Modern Legal System in Africa, Ibadan, 24th - 29th August, 1964.

18. Ibid.

19. BALOGUN v OSHODI (1929) 10 N.L.R. 36 at 53 - 54

20. Cap. 49, 1963. All other states have their applicable law, by virtue of their former region. Section 20 High Court law, Eastern Nigeria, Cap. 61; section 12, High court law, Western Nigeria, cap 44, section 13, High court law, Mid-Western Nigeria and section 27, High court Act, Lagos Cap. 80

21. The provision of the Western Nigeria law, provided in substitution "any written law".

22. Cap. 62. Each state in Nigeria has its own Evidence Law, which is a direct replica of the federal Act.

23. ASHOGBON v ODUNTAN (1935) 12 N.L.R. 7 at 10

24. Ajayi, "The Judicial Development of Customary Law in Nigeria" Op. cit.

25. GEORGE v FAJORE (1939) 15 N.L.R. 1

26. ARALOWON v AROMIRE (1939) 15 N.L.R. 9

27. BASSEY v COBLAM (1924) 5 N.L.R. 90

28. INYANGVITA (1929) 9 N.L.R. 84

29. ARCHIBONG v ARCHIBONG (1947) 18 N.L.R. 117

30. LOPEZ v LOPEZ (1924) 5 N.L.R. 50

31. FOLAMI v COLE (1970) 2 N.W.L.R. (part 133) 445

32. (1939) 15 N.L.R. 57

33. (1970) N.S.C.C. VOL. For criticisms of this decision and the reasoning, see Olawoye "Meaning of Family Property" (1970) N C L 300.

34. Cap. 24, 1959

35. (1921) 2 A.C. 399

36. The veracity of this contention will be subject to critical analysis later in this chapter.

37. Ibid., p. 404

38. Sonius, Introduction to some Aspect of Customary land law in Africa as compared with some Indonesia Aspects (Leyden, 1963) p. 16

39. Yakubu, "Principles of property law" op. cit. pp. 69 - 70

40. Nwabueze, op. cit., p. 53

41. ONWUKA v THE ABIRIBA CLAN COUNCIL (1956) 1 ENLR 17

42. Like the building of a school for the community, a mosque or a church or market place. In AKINTOLA v SOLANO (1986) 1 N.S.C.C. Vol. 17 504, evidence was used to establish that the plaintiff predecessors-in-title surrendered his grant at the request of the chief, for a subsequent grant to a society known as "Oshogbo Improvement Society".

43. See Elias, op. cit., pp. 94 - 96, and also Coker, op. cit, pp.103-109

44. Yakubu, Land Law in Nigeria, op. cit., pp. 61 - 62

45. Elias, op. cit., p. 73

46. OTOGBOLU v OKELUWA (Supra) at p. 296

47. Ollennu, Customary land law in Ghana (London, 1962) p. 10

48. Bentsi - Enchill "Traditional Legal Systems in Africa" op. cit., p. 75

49. ENIMIL v TUAKYI (1952) 13 WACA 10; NSIREM v NWAKERENDU (1955) 15 WACA 71

50. Elias, Nigeria Land law and custom (London, 1951) p.91

51. See COKER v COKER (1943) 17 N.L.R. 55; also ADESEYE v TAIWO (1956) 1 F.S.C. 48. It should be noted that this restricted application is only a presumption, and local variation if proved will alter the meaning: UKA v NKAME (1963) F.S.C (Unreported). See also James, op. cit., p. 47

52. Green, Land Tenure in an Ibo Vallage (London, 1941) pp. 2-3

53. Olawoye, Title to land in Nigeria, op. cit., p. 27

54. ALAKA v ALAKA (1904) 1 N.L.R. 55; DABIRI v GBAJUMO (1961) 1 ALL N.L.R. 225

55. (1956) 1 F.S.C. 48

56. (1941) 16 N.L.R. 26

57. Ibid. at p. 27. Note that a perennial problem often arise when a stranger is made to manage family property sometimes as a trustee, and at the same time a family head exist: AKIN-OLUGBADE v WILLIAMS (1966) LD/482/65 (Unreported) where Ikpeazu, J. said "It is my decision therefore that the creation of trust in this case ... is ineffective as the customary tenure does not recognise this alien idea which is in conflict with the incidents of family property". This is contrasted with GIWA v OTUN (1932) 11 N.L.R. 160 where the execution of a trust deed removed the application of customary law, and the beneficiaries were treated as joint tenants.

58. OGUNDAIRO v AMINATU (1967) L.L.R. 9; OGUNMEFUN v OGUNMEFUN (1931) 10 N.L.R. 82 citing with approval MILLER BROTHERS v AYENI (1925) 5 N.L.R. 40

59. (1988) 1 N.S.C.C. Vol. 19 899

60. Ibid., at 904 - 905

61. AJOBI v OLOKO (1959) L.L. R 105

62. Bentsi - Enchill, op. cit

63. TAYLOR v WILLIAMS (1935) 12 N.L.R. 67 at 70

64. BAMGBOSE v SHOKO (Supra)

65. Strangers/Purchasers will always find it difficult in getting or knowing all the principal members of the family where consultation and consent is required.

66. SATENG v DARKWA (1940) WACA, 52; also SALAKO v OSHINLAMI (1961) W.N.L.R. 189

67. Quoted with approval in AMODU TIJANI v SECRETARY, SOUTHERN NIGERIA (Supra)

68. Rivers, "Property" in The Making of Man. An outline of Anthropology. ed. Calverton. (Newyork, 1931)

69. Golden weiser, Anthropology : An Introduction to Primitive Culture (New York, 1946) p. 146

70. Ibid., at pp. 147, 148 and 149.

71. Yakubu, "Business Development under the Nigeria Land Tenure System" Op. cit., p. 54

72. Bentsi - Enchill, Op. cit., p. 75

73. Nwabueze, Op. cit., pp. 32-33; Olawoye, op. cit, pp. 20-21; Bentsi-Enchill, Ghana Land Law. op. cit., p.81

74. (1990) 2 N.W.L.R. (Part 132) 298

75. (1970) 1 ALL N.L.R. 125

76. Ibid., at 134. This statement has been approved by the Supreme Court in ARASE v ARASE (1981) N.S.C.C. (Vol.12) 101 Some writers have refused to acknowledge such rights of members as absolute ownership: Nwabueze, op. cit., p. 34

77. See EZE v IGILIEGBE (1952) 14 WACA 61. Also OVIE v ONORIOKIRHE (1957) W.R.N.L.R. 169, where Onyeama, Ag. J., (as he then was) said that plaintiff would have to establish by "credible evidence that under local custom land could be owned by individuals; that is to say that the general principles of communal land ownership ... does not apply in his locality".

78. (1990) 1 N.W.L.R. (Part 125) 141 at 159

79. (1985) 2 N.S.C.C. (Vol. 16) 856

80. Ibid., at 860

81. Ollennu, Op. cit., p. 29

82. NWAGWU v OKONKWO (1987) 2 N.S.C.C. (Vol. 18) 953

83. AMODU TIJANI v SECRETARY, SOUTHERN NIGERIA (Supra) at 404

84. OMAGBEMI v NUMA (1923) 5 N.L.R. 17

85. Nwabueze Op. cit., p. 151

86. Section 29(3) of Land Use Act, 1978.

87. (1947) 18 N.L.R. 117

88. Ibid., at 123

89. Yakubu, "Principles of Property law". Op. cit., p. 68

90. Section 2 High Court law Northern Nigeria, 1963.

91. Yakubu, Land Law in Nigeria. op. cit., p. 8-9

92. Op. cit., p. 194

93. The reception statutes have no application in Nigeria again. They have been specifically repealed.

94. Elias, op. cit., p.9

95. (1921) A.C. 399 at 410

96. Ibid. at 404

97. James, op. cit., p.136, see also Olawoye, op. cit., p. 153

97a. Cap. 82, Laws of Nigeria, 1958.

98. WOBO v ATTORNEY GENERAL (1952) 14 WACA 132

99. See Niger Lands Transfer Ordinance, 1916

100. Before 1978, the applicable statute was the Public Land Acquisition (Miscellaneous Provisions) Decree, 1976. This Land Use Act, 1978 has however, repealed the application of this law in Nigeria.

101. Elias, op. cit., p. 28

102. Nwabueze, op. cit., p. 212

103. Elias, op cit., pp. 18 - 20; Yakubu, Notes On The Land Use Act, 1978. (Zaria, 1986) p. 3

104. Section 3, Niger Lands Transfer Ordinance, 1916

105. Nwabueze, op. cit., p. 235

106. Yakubu, op. cit., p. 4

107. Cited in Yakubu "A Dilemma of Land Law in Nigeria" op. cit p.34

108. Section 4.

109. Section 3 of the Land Use Act, 1978.

110. Section 49 of the Land Use Act, 1978.

111. Sections 34(2) and (5) of the Act.

112. Section 6 of the Act.

113. Sections 36(2) and (3) of the Act.

114. (1987) 1 N.W.L.R. (Part 50) 413 at 460

115. Under lining mine.

116. (1989) 1 N.W.L.R. (Part 97) 303 at 328

117. (1957) N.R.N.L.R. 158

118. (1989) 1 N.W.L.R. (Part 97) 303 at 328

119. Section 14 of the Act.

120. Section 8 of the Act.

121. UDIH v IZEDONIWEN (1990) 2 N.W.L.R. (Part 132) 357

122. Sections 16 and 17 of the Act.

123. Cited in James, Nigerian Land Use Act: Policy and Principles. (University of Ife, 1982) p. 94.

124. (1966) E.A. 941

125. Yakubu, Notes On The Land Use Act, 1978, Op. cit. p

126. MAJIYAGBE v ATTORNEY GENERAL (Supra)

127. Section 28 of the Act.

128. L.S.D.P.C. v FOREIGN FINANCE (Supra) AKANDE v OMODEHIN (1966) N.N.L.R. 78

129. (1986) 2 N.S.C.C. (Vol. 17)

130. Section 40, 1979 Constitution of Nigeria.

131. DANTUBU v ADENE (1987) N.W.L.R. (Part 65) AKANDE v OMODEHIN (Supra)

132. AKANDE v OMODEHIN (Supra)

133. (1990) 2 N.W.L.R. (Part 135) 745

134. Ibid. at 773

CHAPTER THREE

3.0 MODES OF BUSINESS TRANSACTIONS IN PROPERTY

3.1 Introduction

This chapter examines some modes of alienation of property. This is the means by which property is transfered by the owners or holders. To keep in line with this present enquiry, the modes of alienation are those which have a direct relationship with, and are regarded as business transactions. By their very nature, these transactions are stimulants of business development. Such modes of alienation or business transaction in property are categorised into interest or transactions which confers rights to the land, and transactions which by their nature confers right enforceable against the land of another person. Examples of such transactions are sale, leases or tenencies, mortgages and pledges.

Modes of alienation or business transactions in land applicable in Nigeria are under both statutory and customary laws. Some of the statutory transactions were previously made applicable to Nigeria through received English statutes. Prior to 1987, save for the former Western Nigeria, received pre-1900 English statutes were laws in Nigeria. For example the Conveyancing Act, 1881, a property legislation was in force in Northern, Eastern and some part of Lagos states of Nigeria. The Nigerian Law Reform Commission reviewed these statutes and recommended for the repeal of these laws and the enactment of some as Nigerian statutes. Many states have taken this initiative. For instance, Kaduna state has enacted the Law of Property Edict, 1987. This edict replaces the Conveyancing Act previously applicable in the state.

It is important to note that the enactment of the Land Use Act, 1978 did not affect property transactions by way of alienation. In fact various sections in the Act effectively recognised the modes of

alienation. More particularly however, section 48 of the Land Use Act provides in part:

> All existing laws relating to the transfer of title to or any interest in land shall have effect subject to such modifications as will bring those laws into comformity with this Decree or its general intendment.

The draft statute of the Law Reform Commission, to replace the English Conveyancing Acts was made to be in line with the Land Use Act, 1978.

Customary land transactions are no doubt covered by section 48 above. It is important to note that since customary law by its nature is flexible, the introduction of English law in Nigeria, and its operation side by side with customary law, has influenced the trends and facets of the latter. This is quite justificable, as law generally grows by borrowing and lending. Our colonial contact has exposed us to the English laws and way of life. There is nothing to be ashamed of or apologetic about the assimilation of some positive aspects of English law by our customary law.[1] Another influence on our traditional customary law is the application of fairness in the form of equity. Equity here does not mean the English doctrines of equity. Equity should be looked as a broad principle denoting fairness which may be made applicable to law as at when necessary. It has been established that equity existed in our traditional adjudicatory system,[2] and modern courts have had to do equity whenever it is necessary, in native law and custom.[3] These facts nonetheless, customary land transactions have still been able to have its own perculiar incidents, essentials and formal requirement which in each case must be followed to confer validity on any such transactions.

The modes of alienation for business transactions in landed property will now be examined. The nature of each will be noted. The incidents and essentials of each transaction within the framework of each particular law whether statutory or customary will be highlighted.

3.2 Modes of Alienation

3.2.1. S a l e

This is the transfer of the totality of all interest a person has in a property, to another person for valuable consideration which is generally money. It is usually a contractual agreement between two different parties, and it generally involves the compliance of the pre-condition of contractual agreement. Thus:

(i) the parties must be competent contracting parties, that is being able to deal with the landed properties, either as owner and the buyer, or persons having their authority. If this is not so any purported transfer will be ineffective.

(ii) there must be mutual consent regarding the subject matter of the sale; that is, there is an assertained area of land with determined boundaries, or a determinable property which the seller has agreed to sell and the buyer has agreed to buy.

(iii) there must be settlement as to the price to be paid for the property; the time for the payment and the delivery of the property.[4]

This means that in all issues concerning the transfer, the parties must be in ad idem.[5] Sale of landed property may be conducted either through statutory law and procedure or customary law or as in most times a combination of both.

The position of sale of land under native law and customs shows some difference in attitudes from place to place. In most communities, sale of land may not have been known as it is today. Even in places where it was known, it is rarely practiced; and practically frowned at by the people. In fact there are communities like the Jukun in Northern Nigeria where sale of land was forbidden.[6] These attitudes of the people towards sale of land was due firstly, to the conception of land in the communities. Land was conceived as a gift from God or Allah. It is to be used by the people for their enjoyment and sustenance. It was also seen as a sacred trust to be protected and handed down to posterity. The people have attached sentiments on the land, which was previously occupied by their fathers; and will be handed down to generation unborn. While this is an important factor, it is hardly the sole determinant.

The prevailing socio-economic setting at early times hardly calls for the transfer of land by sale. Land was plentiful in supply. It belonged to families and communities and their members had free access to the use and possession of it.[7] The availability of land prevented it from having any exchange value. Even then, land had limited uses. It was used in a purely subsistence economy. It is not suprising therefore, that there was no real economic reason to sell land, neither was there a market for it.

The rarity of sale of land in early times could hardly justify the claim or conclusion that sale of land was forbidden under customary law in Nigeria. And that sale of land was introduced to Nigeria communities as a result of our contact with English ideas.[8] From our earlier discussions, it is a discernable fact that the nature of socio-economic activities did not strongly call for the sale of land.[9] Land was plentiful in supply and there was no market for land as it

is today.[10] Certain investigations in areas where prohibition of sale of land did exist, have revealed that the prohibition was not as a result of a customary rule, but rather an executive order from the traditional ruler, Chief or Emir.[11] Customary law which is the "mirror of the culture of the people"[12] and which control their transactions, seems to have shown easier flexibility in the popularity and adoption of sale, than would have been applicable if sale was indeed entirely forbidden under customs.

It appears to be even more incorrect to contend that sale started with the introduction of English ideas. The popularity of this form of dealing in land was the result of a necessary reactions of society to the realities of contemporary circumstances.[13] A combination of several factors facilitated the creation of these circumstances in our social, political and economical setting. Some of the factors includes, for example; the individualisation of communal lands. This removed the control of alienation of these lands from the tedious procedures involved in corporate ownership. Increased volume of trading activities in the coast and across the sahara resulted in the growth of money and cash crop economy. The culminating effect is that many towns became large markets or commercial centres. People started moving to these areas in order to establish businesses or seek employment. This process of urbanisation led to an increased or higher demand for land. The increased demand was partly necessiated by emphasis on cash crop. People needed large tract of land to establish plantations of crops like cocoa, rubber and groundnut. There was also the need to erect modern buildings to cater for the needs of the teeming populace. The above situation was further complicated by natural factors such as erosion and infertility of land. The increased demand led to the scarcity of land, and consequently,

the exchange value of land was altered.[14] Land became a viable marketable commodity. It thus became lucrative to sell land which now is an object of economic wealth.

3.2.1.(a) Formalities

The owner of landed property may choose to undertake the transfer of his property, by adopting statutory procedures, or applying his customary law. In the administration of statutory law on sale, the courts have drawn a distinction between legal and equitable transfer of property. A legal sale strictly requires the execution of a deed of conveyance after the parties have concluded their agreement. But sometimes the parties may conclude their transactions in what may be described in English law as an imperfect transfer. The purchaser may pay the purchase price and take possession of the property. In this situation he only acquires an equitable interest. No such distinction exist under customary law.[15]

The procedure of conducting sale of land under statutory law, requires that the actual sale be preceded by an agreement or a contract. Such a contract is required to be in writing otherwise, the rights will become unenforceable.[16] The formality of writing does not necessarily mean that there should be a formal written document, a memorandum about the transaction will certainly be enough. However, to meet the statutory requirement, the memorandum or note must contain:

(i) an agreement for a sale,

(ii) a description of the parties,

(iii) a description of the property,

(iv) a statement of the price

(v) every material term agreed by the parties.

The omission of any of these requirement is fatal, although, it has

been established in NORTH v LOOMES[17] that an omitted material term in favour of the suing party can be waived. The memorandum also need not be in a special form. In HAMILTON v MENSAH,[18] it was held that a receipt with all the necessary term is sufficient to meet the requirement. Furthermore, two or more document can be joined together to satisfy the requirement of statute. The supreme court in ALI SAFE v NORTHERN STATE MARKETING BOARD[19] held that several documents proved to be connected, can be joined together. It also allowed oral evidence to so connect the related documents.

A contract is not enough to transfer the interest of the vendor to the vendee even though money has been paid and received. The execution of a formal deed of conveyance is required to effectively transfer the interest of the vendor in the property. On execution, the vendor becomes divested of his interest, and it becomes vested in the purchaser. The courts have through their equitable jurisdiction ameliorated the rigidity of the law, by allowing the enforcement of a contract, that is neither executed nor in writing. This can be done, when it is established that there is sufficient acts of part performance, that is done in pursuance of the alleged agreement by either of the parties. Such acts should unequivocally be referrable to the alleged agreement. A clear example is when a vendee pays the purchase price and take possession of the property or effect some improvements therein.[20]

Under customary law, sale of land is effected by the payment of the agreed sum of money or price and the handing over of the land to the purchaser in the presence of witnesses. Traditionally, this may be coupled with some ceremonies, during the handing over of the land. The precise nature of these ceremonies differs from custom to custom. In Urhoboland and some other communities in Delta state, the

purchasers are required to bring kola-nuts and spirit (Hot drinks) on the day of the actual handing over. The breaking of kola-nuts and pouring of libation are made on the land. These are concurrently followed by prayers to both sides, and sharing of the kola and some of the drinks. In some other communities as in the Ibo areas, the ceremonies may involve some form of rituals and sacrifies to their gods who may have frowned on sale, as a form of appeasement. Another explanation is that, the ceremonies enables the past owners to join their present generation in the transfer of the land. In modern times, rituals and sacrifies may have become archiac, but the idea of bringing hot drinks and kola-nuts or paying the money equivalent is still actively done.

When the formal handing over is completed, the whole interest of the vendors become vested in the purchasers.[21] Any other subsequent transfer of the property is ineffective, since the principle of "nemo dat quod non habet" applies. Such subsequent transfers are worthless.[22] The above position has been restated in many cases. Idigbe, J.S.C. in ERINOSHO v OWOKONIRAN,[23] observed that:

> In order to transfer an absolute title under native law and custom, it is necessary that such a sale should be concluded in the presence of witnesses who saw the actual 'handing over of the property'.... In order to transfer the legal title under English law a deed of conveyance in respect of same should be executed .... if the sale under English law was imperfect then, on evidence that Oladiran bought the land and went into possession, she acquires merely an equitable interest in the land. 24.

The very interest case of FOLARIN v DUROJAIYE[25] treated exhaustively the formalities of sale under Nigerian law. For better appreciation, the facts of this case may be recounted briefly. The plaintiff/appellant bought land from one R. Adeoye. Adeoye had herself bought the land in question from G who then had a power of Attorney from the land owning family. But the Attorney G, neither

put Adeoye in possession, nor gave her a deed of conveyance, nor were there any witnesses to evidence the actual handing over of the land to Adeoye. However, the conveyance given to the plaintiff by R. Adeoye, was witnessed by G (the Attorney) and this was done before the power was revoked by the family. The Defendant/Respondent later bought the same land from the family and was put in possession by the family; a deed of conveyance was also executed in his favour. The plaintiff now sued for a declaration of title to a certificate of occupancy, damages for trespass and an injunction. The trial court gave judgement in favour of the plaintiff, on the grounds that Adeoye had an equitable title that was conveyed to the plaintiff/appellant. The Defendants' appeal to the Court of Appeal was successful, whereupon plaintiff further appealed to the Supreme Court. The issue for determination in the Supreme Court was "whether R. Adeoye had any interest in the land in dispute (whether customary or English legal or equitable title) which she could transfer to the plaintiff". The Supreme Court unanimously affirmed the decision of the court of Appeal, while answering the issue for determination in the negative.

Oputa J.S.C. quite vividly stated the position of the law, according to him:

> .... there are two clear distinct ways in which land in Nigeria can be properly and rightly sold, validly acquired and legally transferred - either under customary law or our received English law ... It is very important to plead clearly, carefully and fully the nature of the sale transaction so as to indicate the applicable law, ... The reason is simple. To transfer an absolute title under customary law, it ought be pleaded and proved that the sale was concluded in the presence of witnesses ... as well as the fact that they witnessed the actual delivery or handing over of the land to the purchaser.

Applying the position of the law to the present case, the learned Justice continued;

> Now the sale of the land in dispute to R. Adeoye, to qualify as a valid sale transfering title under English law, there needed to be a Deed of Conveyance in English form. None was pleaded nor was proved, as none was infact executed. Now again, for the self same sale to transfer title to R. Adeoye under customary law, the transaction needed to be concluded in the presence of witnesses who witnessed the actual handing over of the property ... in this case there is no evidence that R. Adeoye was either let into possession or that the land in dispute was handed over... The end result is that under either law, customary or English R. Adeoye had no legal estate in the land ... payment of money can under English law only confer an equitable interest in and over the land in dispute, if and only if she was let into possession. But R. Adeoye never entered into possession. She therefore had no equitable interest. She could therefore transfer neither legal nor equitable interest to the Plaintiff/Appellant. 26

It is important to note that entering into possession, in order to be effective, must be continous.[27] This condition has been criticised as unnecessary, carrying with it an element of uncertainty and insecurity of title.[28] But it seems that the rational is based on the fact that the purchaser should show some sign of being in possession so that his inaction may not be an instrument for fraud, and allow his right to be defeated by a bonafide purchaser for value without notice.[29]

The handing over of the land in the presence of witnessess, is a symbolic delivery of the land bought to the purchaser.[30] Witnesses are very important for

evidencial purposes as regards the terms and agreement of the parties.[31] The testimonies of witnesses handed over from generation to generation appears to be one of the major modes of proving customary transactions in court. Although writing has now been predominantly used by parties to customary transactions, this does not necessarily do away with the prove by witnesses testimonies. In OKONKWO v OKOLO[32] the argument that the testimonies of witnesses with regards to transaction that happened long before them, was hearsay; was rejected. According to the Supreme Court such argument, if accepted will "result in the exclusion of all evidence of transaction in respect of land under customary law as soon as parties and witnesses are dead".[33] According to the Court, it is naive to think that oral transactions no longer exist because of the prevalence of writing. "Transactions made under customary law orally and without writing still exist and are valid. It is sufficient for the plaintiff to adduce credible evidence of such transactions".[33]

It is essential to note, that the fact that a customary transaction of land was reduced to writing, does not on its own operate to transfer the land under customary law, if the formal requirement and incidents of customary law has not been fulfilled.[34] The idea of writing, does not necessarily do away with the necessity of witnesses or the handing over ceremonies. Writing, however, has its own good advantages. Its permanence help witnesses to be truthful. According to Allott:

> A written document plays a multiple function in native customary law. It goes to enforceability, since frequently customary stamping is not required if writing is used. It goes to prove, since a document signed by witnesses is accepted as strong - if not conclusive ... it also binds those described as partial witnesses (witnesses who themselves have interest in the res) expressly and impliedly where the use of the document is held to abrogate the necessity of their evidence. 35

3.2.2. M o r t g a g e s

A mortgage is a security transaction. It is created as a form of protection to creditors, conferring on them certain rights against a property. According to Lord Lindley, a mortgage:

> is a conveyance or other disposition in land designed to secure the payment of money or discharge of some other obligation with a provision for redemption, that is, upon payment of the loan or the performance of some other obligation the conveyance shall become void or the interest shall be reconveyed.36

Thus, a mortgage is a form of conditional assurance that is resorted to when a debt has been incurred, as a form of security for the repayment of the debt or the liquidation of the credit effected. The lender or person in whose favour the security is created is called the mortgagee, while the land owner, who borrows is called the mortgagor.. Mortgages as trans-actions affecting landed property, became applicable in Nigeria with the introduction of English law through the reception statutes.

The development of the English mortgage up to its present form received a lot of influence from the equitable jurisdiction since the 15th century. In its early inception, because of the mortgagor's weak position, the transaction was only favourable to the mortgagee. The mortgagee was usually in possession reaping all accruing benefits of the land. Failure of the mortgagor to repay the debt at the appointed date for repayment makes him lose his property forever. In most cases, the mortgaged property is worth far more than the actual loan to the mortgagor. By the 17th century, Equity made substantial changes not only in the form of a mortgage, but also in the nature and content of the transaction. It imposes strict accountability on the mortgagee in possession, which makes it quite unprofitable to do so. It also compels a reconveyance of the property even after the date of redemption has passed. No longer, therefore did the mortgagee stand to gain by obtaining a property which might be worth more than the debt. Equity will certainly compel the mortgagee to treat the property no more than a security for the money actually owed to him. The right of the mortgagor over the property, including the right to have the property after the date of payment has passed is known as the equity of redemption. It is a valuable interest in the property vested in the mortgagor. The measure of its value was the difference between the amount of the debt and the value of the mortgaged property.[37]

3.2.2.(a) Formalities for the Creation of a Mortgage

Like most received English transactions now adopted by Nigerian statutes, there are two types of mortgages; the legal and equitable mortgages. Legal mortgages are those whose creation conforms with the letters of the law. Equitable mortgages arises from an imperfect legal mortgage or the mortgage of an interest recognised only in equity. As a preliminary point, a mortgage being a transaction affecting land, must be in writing. The contract must be evidence by a note or memorandum containing all material terms.[38] All previous discussing concerning this issue, are equally applicable here.

With the implementation of the recommendation of the Law Reform Commission on the received English Statutes, the Conveyancing Act, 1881; no longer applies in Nigeria. A new law of property was recommended for all states, thereby making the creation of a mortgage in Nigeria uniform, save for some part of Lagos State. Section 108(1) of the Kaduna State law of Property Edict, 1987 provides:

> A mortgage of a right of occupancy shall only be capable of being effected at law either by,
> (a) a sub-lease for a term of years subject to a provision for lesser on redemption, and
> (b) a charge by deed expressed to be by way of legal mortgage.

Where the title of the mortgagor is a term of years or a sublease, the same method above will be applicable. According to section 109(1) of the Edict, in this situation, the term of years vested in the mortgagee,

by the mortgage term, shall be at least one day less the original term of years owned by the mortgagor.[39] The method of creating a mortgage by an assignment of a term of years is no longer applicable in Nigeria, with the repeal of the Conveyancing Act, 1881. When a mortgage is created by charge expressed to be by way of legal mortgage, it has the same protection, powers and remedies as any other mortgage.[40]

It is important to stress that in some areas in Lagos State, within the jurisdiction of the Registration of Titles Act,[41] a different procedure applies. By Virtue of Section 18 of the Act, a charge shall not be complete unless it is made and registered under the prescribed form; Form 5. This provision is mandatory to confer validity on the mortgages effected in such areas, otherwise such a mortgage becomes void.[42]

Equitable mortgages can be created in any of the following ways:

(i) Persons whose interest in a property are only equitable in nature, can create a mortgage of such an interest. A beneficiary in a trust can mortgage his interest in the property. Another example is the equity of redemption which is the interest of the mortgagor in a property already subject to an existing mortgage. This is an equitable interest in property, which itself can be mortgaged. This mortgage will operate as a subsequent mortgage in the property.[43]

(ii) Where there is an agreement to create a legal mortgage which has not been perfected an equitable mortgage is created. This agreement to mortgage can be enforced by a decree of specific performance at the instance of any of the parties.

(iii) An equitable mortage may be created by the deposit of title deeds without more at the reception of credit.[44]

For this purpose the doctrine of part performance in other to ameliorate the requirement of a written document, is stretched beyond its normal limits. The deposit of deeds and reception of credit, is regarded as an act of part performance by both parties.[45] Some times the deposit may be accompanied by a memorandum under seal, where the mortgagor covenant to execute a legal mortgage when-ever he is called to do so. In this situation, the transaction is not merely an equitable charge. It creates an interest in the property in favour of the mortgagee.[46] The mortgagee's position is as secured as if it was a legal mortgage; and since the agreement is made under seal, he can exercise all powers provided by statute.

3.2.2.(b) The Nature of a Mortgage

There are certain characteristics which makes a transaction a mortgage. If these are not present, one may safely say that what the parties intended was not a mortgage. In the first place, a mortgage

as a contract, is purely a security transaction. It must therefore contain clauses for both the repayment of the debt and the redemption of the property. It is only if, according to the intention of the parties, the property was held as a security for money, and to be recovered by the mortgagor when the money is paid was the transaction be considered a mortgage.[47] The transaction must be such that apart from the property or security, the mortgagee should be able to recover his money. This distinquishes a mortgage from a conditional sale. In a conditional sale, there is also a redemption clause, but money cannot be recovered. Once the time stipulated in the conditional sale agreement has passed and the seller fails to redeem, the property passes to the buyer. It becomes a sale. In a mortgage therefore, the remedies must be mutual and reciprocal. The mortgagor is able to recover his property as the mortgagee is able to recover his loan, otherwise it is not a mortgage.[48]

The mortgagor's right to redeem his property should not be clogged or in any manner rendered illusory. If this is done, the transaction becomes inconsistent with a mortgage transaction. According to Lord Mac-Naghten in NOAKES v RICE[49] "Redemption is of the very nature and essence of a mortgage". There are however, certain circumstances when the court will allow the postponement of the right to redeem. This will be treated later in this chapter.

Lastly, an important characteristic of a mortgage is that the mortgagor remains in possession of the property, unless the mortgagee is taking steps to recover the loan. When a legal mortgage is created the legal title to the property is vested on the mortgagee. He is therefore entitled in law, to take possession of the property, since possession follows the legal estate. "The mortgagee may go into possession before the ink is dry on the mortgage".[50] But if the mortgagee immediately takes possession, it will defeat the transaction as a purely security arrangement. More importantly, the strict duty of accountability required from the mortgagee in possession will most certainly prevent or discourage him from doing so. The mortgagee's liability to account extends to what he ought reasonably to have made from the property, but for his own fault.[51] The mortgagee usually takes possession when it is absolutely necessary to do so, in order to recover his money or loan. In any case most mortgage institutions are large financial concerns who will most certainly not want to get involved in the management of property.

3.2.2.(c) Rights of the Parties

The mortgagor has a single right, this is the right to recover his property. Since the property is used as a security for the loan of money, once the obligation of repayment is effected, the mortgagor is entitled to redeem his property. This right to redeem,

is in two folds; there is the legal right to redeem at the specified date in the agreement, and there is the equitable right to redeem.[52] The equitable right to redeem arises after the expiration of the legal date, in this situation, equity intervenes to allow the redemption of the property. The equitable right to redeem is part of the sum total of the mortgagor's equity of redemption, which is an interest in the property. It is important to note that the mortgagor's right to redeem should not in any way be clogged or denied. Any term in the agreement which prevents the mortgagor from recovering his property will be treated as void. Lord Lindley once maintained, that the doctrine 'once a mortgage always a mortgage' means that:

> No contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or in otherwords, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property or paying off what is due on his security. Any bargain which has the effect is invalid and inconsistent with the transaction being a mortgage. 53.

There are however, certain circumstances when the right to redeem can be postponed. For instance, where parties to the mortgage are of equal bargaining power or where the terms are mutual and reciprocal, the courts will hardly interfer with the terms and condition of the contract. What appears important is that no party has an unfair advantage in the process of the agreement. An example of parties of equal bargaining power are two trading companies. One can most certainly draw a distinction between the Directors of a trading company in search of financial assistance and an impercunious

land owner in the toil of a money lender.[54] Postponement may take the form of lenghty date of redemption, or imposing excessive premium on the loan in case of a short term repayment. In determining whether the postponement of the date of redemption is a clog on the right to redeem, the courts have refused to look solely at the length of time. What appears important, is that, from the circumstances of the whole transaction, the terms or provisions of the mortgage are not unfair, unconscionable or morally reprehensible;[55] even if the length of time was unreasonable. Courts have refused to import the notion of reasonableness in transaction whose terms and conditions are mutual, entered freely by parties acting at arms length, and capable of protecting their own interest.[55] In each case therefore, whether the nature of postponement is unfair, unconscionable or morally reprehensible; is a question not of form but substance. "It can only be answered in each case only by looking at all the circumstances and not by reliance on some abstract principles, or upon the dicta which has fallen obiter from judges in other different cases."[56] Each case is therefore, treated on its own merit.

The mortgagee also have only one right in the transaction. This is the right to recover the loan and interest if any. In a bid to enforce his right, the mortgagee has a number of methods. Some of these

methods of enforcing his right or what are sometimes called remedies may be ordinarily provided for by the parties in the agreement. In any case if the mortgage is made under seal, the remedies become implied by statutes into the agreement. In the first place the mortgagee can take an action in a court of law to recover the mortgage loan and interest thereon. Secondly, the mortgagee may take possession of the property and manage it, in order to recover his money. This is only done when it becomes necessary to protect the loan or interest that may be payable. If the mortgagee takes this step, he must exercise utmost business prudence. This is necessary because, he may be held strictly accountable to the mortgagor, not only for income he received, but also for that which he ought to have received.[57] It is important to note that if the mortgagee remains in possession for more than 16 years[58] without acknowledging the mortgagors right or receiving any money from him, the mortgagor loses his right to redeem the property over which the mortgagee now has possession.[59] Alternatively to taking possession, the mortgagee may appoint a Receiver to manage the property, receive income from which payment will be made to satisfy the debt.[60] A Receiver has the same responsibility of prudence as a mortgagee in possession.

There are two more methods to enforce the mortgagee's right. These are the power to foreclose the mortgagor's equity of redemption and the power of sale. Both powers have the tendency of destroying the mortgage. The

consequences of the power of foreclosure is to destroy the mortgagor's right over the mortgaged property and vest it in the mortgagee. This power can only be exercised through the courts on application. The courts are usually slow in granting an order of foreclosure. It may infact order sale instead of foreclosure on the application of any interested party in the mortgaged property.[61] Even when the court accept to grant foreclosure, it first orders a Decree Nisi. This gives the mortgagor six months to redeem the property by paying the debt. On failure to pay the debt before the expiration of six months, the order is made absolute. The property then become vested in the mortgagee. This may not strictly be the finality, for instance, if the mortgagee proceeds to sue on any personal covenant in the mortgage, the foreclosure may re-open.

The mortgagee may choose alternatively to exercise his power of sale of the mortgaged property. This power may become necessary to enable the mortgagee recover his capital and interest due on the loan. This power is provided by section 123 of both the Law of Property Edict, Kaduna State and Property and Conveyancing Law, applicable in former Western Nigeria. It is implied into any mortgage agreement made under seal. Whenever a sale is effectively conducted, the mortgagee takes what is due to himself, and pays the remainder to the mortgagor. In conducting the sale, the mortgagee is neither an agent or trustee for the mortgagor. The sale need not, strictly, be favourable

to the mortgagor. The power of sale is for the mortgagee's own benefit, so as to realise his security. In exercising this power, if he acts "bona fide for the purpose without corruption or collusion with the purchaser, or such reckless impropriety as to be tantamount to fraud, the court will not interfer even though the sale be very disadvantageous, unless, indeed the price is so low as of itself to be evidence of fraud".[62] Thus, the mortgagee is to exercise reasonable care to obtain the best price for the property.[63] He must not allow his personal interest conflict with the interest of the mortgagor. But he is not necessarily debarred from selling the property to where he has an interest, for example, a company, provided he proves that he took all reasonable precautions to obtain the best price reasonably obtainable at the time of sale.[64] This will be evident, if the mortgagee obtains expert advice and conduct the sale in a public auction. In any case, such sale are usually conducted under the Auctioneers Act.[65]

The Equitable mortgagee may have these alternative methods of recovering his loan by agreement. Where the mortgage is made under seal, the power of sale and appointment of a receiver becomes implied into the agreement by statute.[66] Ordinarily the remedy of an equitable mortgagee is to apply to court for an order of foreclosure. He cannot take possession, which normally follows the legal estate. He may be able to

apply to court for an order of sale if foreclosure is not available; so as to be able to recover his capital and interest due.

It is important to note that the institution of mortgage, has turned out to be one of the most potent form of business transactions involving real property. It potency lies in the fact of the various advantages associated with the transaction. In the first place, it allows the development of real properties; stimulates landowner's business by making capital available to them; mobility of liquid capital into the economy, which may otherwise have remained unused; and above all, serving as an investment for creditors with little risk, as they are adequately secured.

3.2.3 Pledges

A pledge is a security transaction practiced under native law and custom. It is a kind of indigenous mortgage by which the owner occupier of land, in order to secure an advance of money or money's worth, gives possession and use of the land to the pledge creditor until the debt is fully discharged.[67] This type of land transaction was practiced to enable land owners raise money to satisfy their various needs. This may be the cost of bride prices, funeral rites or other ceremonies. It may be to raise tributes[68] or in modern times to raise money to train their children. There are two types of pledges; firstly,

the pledge may be for a fixed period. The pledgee, that is the creditor is expected to use the land for that period of time. The profit from the land is in lieu of the repayment of the loan. At the expiration of the period of time, the pledgee hands over the possession of the land. The second type of pledge transaction is where the pledgee goes into the land. to use and obtain profit until the debt is liquidated. The profit is in lieu of interest; and separate from the principal debt. The most prominent form of pledge in Nigeria, is the second type, where profit from the land is independent of the principal debt.[69]

Historically, it has been said that the institution of pledge was not known to West Africa, particularly Nigeria, until the advent of the British administration.[70] That the pledging of land, arose out of British ideas of real property introduced through English law. This contention arose out of the misconceived anthropological views about African Societies.[71] It is based on the erroneous assumption that the idea of alienation was foreign to West Africa, and only brought about by contact with Europeans. Other anthropological investigations have rejected this view on alienation, as indeed different forms of alienation did exist under customary property law, before the advent of the British in West Africa. With regards to pledge transactions, there are many authoritative views to support the fact that pledging of land has always been practiced as part of customary transactions in former times.

As an idea, it is quite possible in early times for a person to pledge himself as a security for a debt. More closely related is the fact that a man may pledge himself in return for the use of another person's land.[72] This may be due to infertility of his own land or the unsuitability of his land for a particular type of crop. Meek, while discussing the above views on pledge in Nigeria, maintains that:

> This view is hardly tenable since the practice of pledging of land and tree appears to be deeply rooted in the customary law of numerous Nigerian communities. Land could be pledged for payment in kind as well as in native forms of currency such as cowries and manillas which had been in use long before the establishment of British Suzerainty. It is even possible for a man to pledge his own person in return for the use of a piece of land, working for many days a week on the farm of his master and the remainder on his own. 73

Similarly in NNAJIFOR v UKONO[74] the trial and Supreme courts believed and accepted the evidence of a witness, to the effect that the institution of pledge was practiced by the ancient people, and that part of the land in dispute was indeed pledged.

It must be noted that the English institutions nearest to a pledge transaction, that is the Mortum Vaduim (dead pledge) or Vivum Vadium (living pledge), had long ceased to be part of English law before any effective contact was made with the West coast. Moreover the early contacts between the British and Africans in the West coast did not centre on land transactions. Both were involved in trading activities

that later extended to slaves. What may however be conceded is that like most customary law transactions the pledge has been influenced to some extent by some notions in English law. This was a likely result of interactions. A necessary reaction of the flexible nature of customary law to contemporary circumstances. An example of such influence or reaction is the charging of interest in some pledge transaction.

(9) The Nature of a Pledge

One of the fundamental nature of a pledge transaction is that while the title to the land is with the pledgor, possession and use passes to the pledgee. "It is an essential element in a pledge transaction that possession of the property should be given to the pledgee at the time when the transaction takes place between the parties".[75] Taking possession implies that the pledgee is to use and exploit the property, until the pledgor redeems. Traditionally, since no interest is charged on the loan, it is intended that the entry into possession and exploitation of the land by the pledgee is intended to serve as an interest.[76] It is important to note that customary law distinquishes between pledging of a bare land and pledging of improvement such as economic trees or crops thereon. When a land is pledged, unless the economic trees are included in the pledge, they are exempted. This is particularly so since the owner of the trees may be different from the person who own the land.[77]

Another important nature of a pledge is that it is perpetually redeemable. The pledgor has a right of redemption, no matter how long the land has been pledged.[78] For, in native customary jurisprudence, once a pledge always a pledge.[79] Thus, as long as it is possible to identify the original purpose behind the transaction - the land was pledged, the parties or successors to the parties of the pledge, there is a right to redeem no matter the lenght of time or years the transaction has taken place.[80] The pledgee cannot improve the land to prevent the pledgor from recovering the land at any time.[81] Nor should there be any stipulation in the agreement that is of a nature to prevent the right to redeem by the pledgor.[82] The position of the law was restated in the case of OKOIKO v ESADALUE,[83] where the Supreme Court observed as follows:

> One other important point is that the pledgor's right of redemption cannot be clogged in any way by the pledgee. Such for instance as by demanding any amount in excess of the sum for which the land was originally pledged, or by planting the pledged land heavily with economic trees, or by using other subterfuge to delay or postponed the pledgor or his successors right to redeem, nor is lapse of time to bar the exercise of right of redemption. For customary pledges of land are perpetually redeemable. 84

It is quite clear, that the pledge transaction is aimed at providing credit to the pledgor, and possession and use the pledgor's property to the pledgee. The pledgee therefore has no legal right to insist on the repayment of his money. If the

pledges is short of cash, he may repledge the land to a third party. This may be with the consent of the pledgor. However, such transaction, as the subsequent repledging of the property should not be for an amount greater than the original debt.[85]

(b) Some Problems Associated with the Pledge Transactions

One of the present problems of the pledge transaction, is that within the framework of modern economic development, the transaction has resulted in an unfair economic advantage to the pledgee. When a land is pledged, it is usually for a little financial assistance to the pledgor. The profits from the exploitation of the land which is in lieu of interest, is normally as a result of the pledgee's invididual effort. This is apart from situations when specific trees are pledged. The change in the socio-economic condition resulted in the growth of cash crops and the stimulation of trading activities. There were thus large plantations of economic tree and erection of modern buildings on land. These improvements which are usually high revenue yielding properties, themselves became objects of pledges. The enjoyment of the profit from these properties puts the pledgee in a more advantageous position than was originally conceived. Where a cocoa farm or a concrete rent bearing house is pledged, it often happens that the profit from the plantation or the house exceeds by far the amount of the loan together with any interest that might have been charged upon it.

The position above shows that the pledgee will continue to enjoy the high profits from the pledgor's efforts and still require the pledgor to pay the actual money loaned. The customary rule is that the pledgee is entitled to the exploitation and profit without accounting for them. But as previously stated, this is a profit which far exceeds both capital and interest of the loan to the pledgor. The pledgor is then placed in an economically unfair position. This situation could not have been within the contemplation of the customary rule as to the non-liability to account by the pledgee. For customary law abhors ill gotten wealth and unfair dealings. The law has a duty to ensure that if the pledgee is not to account for his exploitations, the profit should at least be used to liquidate the debt. Conversely too, the pledgee may be asked to render accounts for anything in excess of what might be considered a reasonable return by way of interest on his capital.[86]

The courts have however taken note of this development, but they have proceeded to settle it through application of equitable principles. In the case of KUAHEN v AVOSE[87] certain palm trees were pledged to raise an amount to pay tributes owed by the pledgor. In this suit for the redemption of the property, it was held that the amount of the produce realised shall be taken into account and some portion of it set aside each year against the original debt until it is liquidated. According to the court, it would be unjust and inequitable and opposed to natural justice that the pledgee should be allowed to

enjoy profits from the trees, giving and rendering no account of the value of the produce; which in this case amounted more each year than the amount for which it was pledged. In DAPAAH v POKU[88] the West African Court of Appeal, took a similar stand. In this case a cocoa farm yielding an income of 60 pounds per annum was pledged for a loan of 60 pounds. The pledge was to continue for 13 years. The court allowed redemption 4 years later. According to the court, taking the transaction as a whole, it would be hard and unconscionable to allow the pledgee to receive any more profit by way of interest than he had already received. In AMOO v ADIGUN[89] a building was the subject of a pledge. It was rented out by the pledgee as a shop. The court was of the view that the occupation of the property was to give the pledgee an equivalent credit, as such the pledgee is to account for the excess rent.

It is not easily discernable whether the courts in passing these decisions were applying native law and custom or this was another aspect of judges shapping of customary law. Elias maintained that the accountability rule or

principle was part of native custom; according to him, under the indigenous system, the pledge creditor obtains possession for as long as it is considered necessary to give him an equivalent credit.[90] This position was rejected by Meek, whose investigations revealed that the most prominent form of pledge in Nigeria, is the possession and use of the property, and this is not taken into account against the principal debt. He therefore maintains that the decision in KUAHEN v AVOSE was plainly contrary to native law and custom with regard to pledge transactions.[91] James supports the latter view, and says that Elias was not correct when he stated that the rule was part of the indigenous system.[92]

It may be noted, that there is nothing inane about this accountability principle of pledges being a product of native law and custom. This is particularly true because one of the chief characteristics of customs is its flexibility and adaptability. However, the application of this principles by this above case, bear a close similarity and might have been influenced by a similar principle under the English law of mortgages;[93] which in its inception was a product of Equity. Many of our judges have been trained in these areas of the law, and it is not uncommon to find such related application. In any case, what appears important for our purposes is that the recognition of this principles had enhanced the pledge, as a viable commercial transaction involving landed property; otherwise, it would have been very unattractive to land owners.

It is from the above position on pledge transactions that one may examine the indefensible decision of the Supreme Court in OKOIKO v ESEDALUE (supra). In this case the plaintiffs sued the Defendants to recover land which was pledged by their grand father for 3 piece of cloth now valued at N15. The defendants and their ancestors had planted economic trees on the land which was bare at the time of pledge. The trial court allowed the redemption of the land, and defendants appeal to the Supreme Court was dismissed. The court applied the accountability principle, and while relying on the decisions of KUAHEN v AVOSE and AMOO v ADIGUN (Supra), the court continued:

> The court will in all proper cases take into consideration the nature and character of the use of which the pledgee had put the land while in possession, so that any unjustifiable benefits thereby derived by the pledgee may be brought into final account when the pledge is being redeemed. No longer, it would seems can the pledgee in possession take all the benefits of his commercial exploitation of the land and still gets back his original capital; much less can he claim against the pledgor any benefit arising from his having planted the land with economic crops like cocoa or rubber.[94]

With due respect, this is a complete misapplication of the principles applicable to pledge transactions. In pledges the profits from the exploitation of the land was suppose to serve as an interest of the loan,[95] and the pledgee is never accountable for it. These are usually the result of the pledgee's individual efforts on the land. Customary law respects such personal initiative and effort exerted on bare land.

A man may as a result of abandonment lose his right to the use of a land, but he never loses his rights over the tree he had planted on it.[96] More importantly, the reliance on the decisions of KUAHEN v AVOSE and AMOO v ADIGUN as to the accountability principle was a misdirection. In both cases what was pledged were improvements of the pledgor on the land. It was the exploitation of the profits from these improvements that the pledgee was made liable to account in the payment of the capital and interest. This was not made applicable to bare land pledged by the pledgor.

Another problematic area of a pledge is the ownership of improvement effected by the pledgee, at the time of redemption. The pledge transaction may be intended to last for a short period, but some times, and this is always the case, it last for a long time. During this long period, the pledgee may have carried out some form of economic exploitation of the land. He may have planted the land with economic trees and cash crops. No doubt, these are the pledgee's property, made as a result of his personal effort on the land; but the pledgor also has a right to redeem the land at any time. The question now is what happens to the pledgee's improvement at the time of redemption of the land by pledgor. The Supreme Court in OKOIKO v ESEDALUE stated some principles of law which requires a more careful examination. It was held that the pledgee cannot claim against the pledgor any benefit arising

from his having planted the land with economic trees or improving the pledged premises. The court further observed:

> We think that planting the land with economic crop like rubber must be regarded as necessarily incidental to the use of the land since there is no evidence that it was forbidden under the terms of the original pledge; but it is also clear, never-the-less, that the pledgee has no right to any compensation or credit for the plantation, which accrued to the pledged land on the principles of 'quic quid plantatur solo solo cedit'. 97

Once again, the application of certain principles by the Supreme Court in OKOIKO's case leave much to be desired. There was no bases for the application of the 'quic quid plantatur solo solo cedit'. The principle means that whatever is affixed to the land belongs to the land. The court had found in OKOIKO's case, that the use of the land which gave rise to the improvement was reasonably incidental to the transaction. The question now was how then could such improvement pass to the pledgor on the principle of 'quic quid plantatur solo solo cedit'. As earlier observed, customary law protects the effort of individual on the land, and will not support any form of ill gotten wealth. In the case of KOFI v KOFI[98] the pledgee had a cocoa farm in some part of the pledged land, the West African Court of Appeal observed as to the protection of such rights of the pledgee to the improvement. It is important to note that the improvement being the result of the personal effort of the pledgee, makes them his personal property.

The right of the pledgee to his improvement cannot prevent the pledgor from redeeming his land. The right of the pledgor to redeem his land does not also vest on him the improvement of the pledgee. If the pledgor insist on having the improvements, he must be prepared to pay compensation to the pledgee for the improvements. But the pledgor is not obliged to do so, since he has a right to recover his land. It becomes necessary that a balance be struck. Thus, if the land has improvements belonging to the pledgee, it becomes imperative that the pledgee be given reasonable notice, depending on the circumstance of each case, before the pledgor redeems the land. This is necessary in order to enable the pledgee to harvest his crops or remove his improvements. At best he may destroy the improvements, since his rights to them cannot deprive the pledgor of his land.[99] This position seem consistent with other customary principles. For instance, in family property, where a member builds on family land and later sells the building to a stranger without the family's consent; the stranger as purchaser is not entitled to occupy the land at the expence of the family. All the purchaser has is to remove the materials of the building after demolition.[100]

In fact, the decision of the trial court in OKOIKO's case (supra), was consistent with the above customary law principles. It was held that the pledgor

can redeem his land and that the pledgee must be given an opportunity to harvest their crops on the land and remove their properties, structures, farm implements and other articles from the pledged land. Rather erroneously the Supreme Court described the orders as "an act of grace rather than legal rights".[101] The position of the law was expressed by Yakubu as follows:

> The right to redeem must be exercised reasonably. The pledgor in some cases cannot redeem on certain occasion or certain time. The pledgor cannot redeem the pledge in the middle of the rainy season when the pledgee has already planted his crop for the year, the pledgor in this case has to wait until the crops are harvested ... The principle of quic quid plantatur solo solo cedit does not apply. 102.

There is no customary property rule applicable to pledge transaction which justifies the application of the quic quid plantatur solo cedit principle. In fact some authorities are prepared to go even further than the above. According to Meek, where no permission is given to the pledgee to effect such improvement on the land, the pledgee is still entitled to remove the improvement at the time of redemption.[103] Rowling maintains, that where permission is given to the pledgee to effect such improvement, for example, like planting cocoa trees on the land, the land may become irredeemable. Both parties will therefore, be sharing the income from the land.[104] This is however subject to situations where the pledgor is willing to pay compensation.

Ollennu further maintains that in certain circumstances customary law can compel the pledgor to compensate the pledgee, for example, if the pledgor redeems too soon after the improvement has been effected.[105]

Finally, one may observe that the idea of pledging of land may not be an attractive option in a modern economic environment. Here, the main actors are huge financial concerns who may not be interested in the management of landed properties. But pledging is still a useful and indeed a necessary institution especially in the rural areas of Nigeria. In these areas, the system of pledging, as a business transaction, is better understood and is still actively practiced. It provides the people with credit in times of needs and relieves congestion of land, by making land available for those who requires it most. No doubt it is a step towards the commercialisation of land.[106]

3.2.4 L e a s e s

A lease is an agreement between two parties, whereby one party, usually called the landlord or lessor, confers or grants the right to the exclusive use and possession of certain lands or landed properties to the other party called the tenant or lessee. The intention in a lease agreement is confering upon the tenant an interest in land as opposed to a mere

personal privilege.[107] The commercial nature of the transaction is based on the fact that the grant of land from the lessor to the lessee is usually in consideration of the payment of money called rents. The tenant pays rents in consideration of the interest in property conferred on him for a definite period. In an economically conducive atmosphere, the leasing of landed properties is usually a viable option. The landed property will usually attract a rack rent. This is the full value of the property, and in a long lease, it may be paid in a lump sum. However payment may also be periodical depending on the lease or tenancy agreement.

a. The Nature of a Lease

There are certain essential elements that constitute a lease. In the first place, the tenant or lessee must be given a legal right to exclusive possession of the land. This is the right to exclude all persons from the land, including the lessor. Unless the lessor has express or implied authority in the lease to enter the property, he cannot do so without the lessee's permission. In determining the nature of exclusive possession, the degree of control exercised over the premises by the lessee is important.[108] It must however be noted that exclusive possession is no longer a preserve of a lease,[109] but it is by all means essential.

Another essential element of a lease is that there must be certainty of terms as to duration. For the lease to be valid therefore, the duration shall be certain or capable of being rendered certain. There must be a specified date for commercement and expiration of the lease thereof. A lease to take effect on the completion of a building the subject matter of the lease was held void for uncertainty of its commencement.[110] Also a lease for the duration of a war or cessation of hostilities is not a valid lease.[111] While the duration of a lease may be uncertain but its terms are certain, for example a lease for 99 years until the death of A has a certain term, and it is valid, even if the time of A's death may be uncertain.

The third essential element of a lease is the form of its creation. As a transaction affecting land, it is required to be in writing. This is with the exception of a lease of less than three years.[112] A lease is legally required to be by deed. Although a lease will still be created if evidenced in writing and containing all the necessary terms. It will then qualify as an agreement for a lease. Alternatively, it should be such that an oral transaction or agreement is backed by sufficient act of part performance, referable to the oral lease agreement. In this situation, the court of equity shall decree specific performance for the agreement.[113] This is known as

the doctrine of WALSH v LONSDALE.[114] Thus if a tenant enters into possession under an oral agreement for a lease of more than three years, he acquires a position to call for the execution of a deed in his favour. He is practically in the same position as if he had a deed of lease in so far as his rights and liabilities in relation to the landlord are concerned.[115]

b. Types of Leases

(i) A lease can be granted for a fixed period, no matter how long or short, provided the duration is fixed. This is called a fixed lease.

(ii) A lease may be periodic; that is it can be weekly, monthly, quarterly or yearly. This may be created as at the time of the agreement or by law from the subsequent acts of the parties. For example, if after a fixed lease has expired and the lessee continues to occupy the land with the landlord's consent and rent is paid and received on the basis of a periodic limitation, then, a periodic lease is created by law.[116]

(iii) A lease at will is created when a person occupies land as a tenant (and not merely as servant or agent) with the consent of the owner, on terms and understanding that either party may determine the lease at anytime.[117] Examples are when a tenant whose lease has expired holds the property with the landlord's permission without paying rents, and where the tenant takes possession infinitely, rent

free, for example pending the completion of a purchase contract.[118]

(iv) A lease at sufferance arises when a tenant who originally entered under a valid lease, holds over after his tenancy or lease has come to an end without renewal of the former lease or entering a new lease; and without the landlord's assent or dissent.[119] This can only arise by operation of law, although it becomes a lease at will if the landlord consent.

(v) A lease of reversion is created whenever a lessor of a subsisting term of years in a property grants another term to run concurrently with the first subsisting term. The subsequent term operates and take effect as a lease of the reversionary interest of the lessor. The lessee of the reversion then steps into the position of lessor of the first subsisting lease. He becomes entitled to the benefit as well as the obligations which runs with the reversion. The lessee of the reversion can collect the future rents from the tenant of the subsisting lease and can sue forfeiture in the event of a breach of any of the tenant's obligation.[120]

C. Rights and Duties of the Parties

A lease agreement is essentially a contract between the lessor and the lessee. It is governed by the ordinary rules of contract concerning the rights, duties and obligations of each of the parties. This is subject however to some statutory rules of law governing the agreement. The parties are free to enter into agreement or create rights that may bound each one of them. But in most cases the agreement may only provide for the barest essentials. This is usually the parties, premises, period and rents; thereby remaining silent on other rights and duties that may affect the parties. In other cases, there may be no agreement for a lease in the strict sense. In these situations there are certain rights and duties implied into the agreement by law. This will apply to any such lease unless there is an express agreement to the contrary.

The implied duties of the lessor are:

(i) Covenant to give quiet enjoyment or enjoyable possession. The covenant gives the tenant or lessee right to be put into possession and to protect the possession. Any interference of the possession by the lessor or persons claiming through him will be actionable against the lessor. In BASHUA v ODUNSI[121] the plaintiff was a tenant of one of the defendants. The defendants had purportedly claimed to have determined the tenancy. On this basis, they

instructed a carpenter to disturb the possession of the plaintiff/tenant. It was held that the defendant/lessor was liable in damages for the acts of the carpenter. The covenants does not cover acts of third parties or unlawful acts of the lessor's agent.[122] Other examples of acts which affects the quiet enjoyment includes, lessor's persistent treats to drive awaw tenants or by inflicting physical discomfort, for example by cutting electricity and water supply.

(ii) Covenant not to derogate from the grant. The grantor or lessor having given a thing with one hand, is not to take away the means of enjoying it with the other.[123] The lessor will be restrained from using the adjoining land in a manner that will unduly prejudice the use of which he had first granted the land. In ALDIN v CLARK[124] a lessor's new building on an adjoining land which interrupted the free flow of air to the lessee's premises was held to be a derogation of the grant. Furthermore, in ONADE v THOMAS[125] the plaintiff had a grant of land with a right of passage conveyed to him. The grantor subsequently made another grant with an exclusive right of passage. It was held that the latter grant was a derogation of the plaintiff's earlier grant. If the leased premises was to be used for a specific purpose, for example the storage of petrol or explosives; the lessor cannot use the adjoining land in a manner that will

endanger the first grant. If the land was leased to dry timber, the adjoining land could not be used in a manner that prevents the sun light.

(iii) In certain cases, there is an implied covenant for fitness of purpose. Ordinarily, there is no undertaking as to the fitness of the property for any particular purpose. However, if the lessor knows what specific purpose, the property was to be used for; then in letting it out, he impliedly covenant that the premises will be fit for such a purpose. When the property is for residential purposes or it is a furnished apartment, then it is implied that the property can be safely used for human habitation. In COLLINS v HOPKINS,[126] it was held that a property that was recently vacated by a tuberculous.patient was not fit for human habitation. The same position applies to a house infested with bugs.[127] Whenever a property is not so fit for its particular purpose, the tenant can repudiate the contract and recover any damages which he has suffered; this is because this implied covenant is also a condition.[128]

(iv) There is an implied covenant to observe the statutory Restriction on the recovery of possession. When the lessor wishes to recover possession of his property either because the lease has come to an end by effluxion of time or a breach of a covenant by the lessee, or for any reason whatsoever, he has to do so in accordance with the procedure laid down by law.

The controling act is the Recovery of Premises Act.[129] Section 7 of the Act provides that the lessor should first give a notice to quit the property to the lessee. The lenght of the notice will depend on the type of tenancy; or period of the lease. On the expiration of the notice, the lease becomes determined. The Lessor is then required to serve a 7 days notice of his intention to recover possession. It is important to note, that the giving and proper services of the notice is a condition precedent to the taking of proceedings to recover possession. In LASAKI v DABIAN[130] the notice to quit by the lessor was just a day short; there was also no service of the 7 days notice as required by law. It was held that the statutory requirements being prerequisite to the commencement of proceedings; the lessor could not recover his property, until they are strictly complied with.

Similar statutory restrictions exist when the lessor wants to exercise his right of forfeiture. Section 161 of the Property and Conveyancing Law, 1959[131] provides:

> a right of forfeiture in a lease for a breach of any covenant or condition shall not be enforceable by an action unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the

breach or make reasonable compensation in money, to the satisfaction of the lessor.

In ISHOLA - WILLIAMS v HAMMOND PROJECTS[132] it was held by the Supreme Court that compliance with the provision of the section above, is a condition precedent to the success of an action for forfeiture. In this case, the defendant respondent company had leased land from the plaintiff for a term of 60 years. In this action, the plaintiff claim alleged breach of covenant, inter alia: to develop the demised land by constructing a building to the value of N750,000. The plaintiff had served a 23 days notice to the defendant to remedy the breach. It was held by the Supreme Court, affirming the court of Appeal decision, that the reasonable time as contemplated by section 14 of the Conveyancing Act, 1881, is one which would allow the lessee to act before an action is brought. A time that will give him the opportunity of considering whether its capable of remedying or ought to offer compensation for the breach alleged. That in this case considering the colossal cost of the building, and the number of years unexpired (55 years), the lenght of 23 days was unreasonably short, and cannot constitute a notice in the circumstances.

(v) There is an implied covenant to observe the Rent Control Laws wherever they are applicable. All states have statutes controlling the fixing and increasing of rents. Where they are applicable, the

lessor must comply with the provisions of the statute. Any increase which fails to comply with the provisions of the law, will be unlawful, null and void.[133] In some cases the lessor may even become liable to an offence for increasing rent arbitrarily.[134]

The lessee's implied duties are:

(i) Covenant to pay rent as consideration for the grant. Rent is the crux of every lease transaction. It is the payment of rent that gives the lease a colour of commercial transaction on the part of the lessor. The courts have therefore tried, even where uncertainty exist to make issues concerning payment of rent certain. It is undoubtedly true that payment of rent is a matter of agreement between the parties.[135] The courts have however held that where there is no agreement as to the rent or rent free lease, the lessor may recover from the lessee a reasonable sum as rent for the use and occupation of the property.[136] The payment of rent can be enforced by the lessor by an action in the court for rent due; by forfeiture of the lease, if the agreement so provides, or by distress. Distress, is a right by the lessor to enter upon the land and impound any chattel found thereon. Such property may serve as a security for the payment of the rent, until a right of sale arises. The right of sale arises after due notice has been given to the lessee.

The lessor cannot pursue his right for distress and action concurrently. It is better to distrain first and sue later for the balance.

(ii) Unless a contrary agreement is made by the parties, there is an implied obligation on the part of the lessee to pay the rates and taxes;[137] for example water rates and electricity bills. But the lessor continues to be liable to pay any rent or rate accruing and arising from his own superior grant.

(iii) There is an implied covenant not to commit waste. Under common law a lessee is not liable for waste; however statute has imposed the liability for waste the lessee commits on the property, unless it is otherwise provided by the agreement. The lessee must maintain the property in a condition in which he took it.[138] Waste is either voluntary consisting of positive acts of destruction or permissive, resulting from decay of the building.

(iv) Covenant not to assign or sublet without the consent of the lessor first had and obtained. However, if the tenant is a respectable and responsible person, he can sublet or assign without the consent of the lessor.[139] Some authorities are of the view that if the agreement of the parties are silent on it, than the tenant can assign or sublet. That this is not an implied obligation to the agreement.[140]

Finally, it is important to observe on the importance of a lease as a viable instrument for the stimulation of business transaction in landed property. In this regards the observations of Lawson are quite intuitive. According to him, leases:

> On the one hand, divides the present income from the land between the lessor and the lessee, the former taking a fixed rent and the latter the undefined residue of profit arising from the exploitation of the land. Thus, the interest of the lessor and the lessee are simultaneous in different senses, first in the ordinary way in which all estates are simultaneous, in that they have a present capital value although they may give successive rights to possession, but secondly, in giving them simultaneous rights to share in the income. This second, much more important aspect of the lease always makes it difficult to fit leases into the feudal system. They were indeed, and have always been a commercial intruder into the way of looking at property which was essentially uncommercial and which was primarily concerned with public duties owed by the holder of the land. 141

3.2.5 Certain Land Transactions Under Customary Law

There are certain transactions in landed property under customary law which are commercial in nature. These may be regarded as tenancies under customary law. Usually either the land or economic trees such as cocoa, palm tree or kola nuts are the subject of such transactions. One major characteristics of these transaction is that they are usually for a fixed or specific duration. This may be counted in farm seasons or by the years. Under customary law a grant for such limited duration are normally made for farming, fishing or exploitation of trees on the land.[142] Another characteristic is the consideration of the grant; and

it is this that gives it a commercial flavour. The consideration of the grant is an economic return from the possession and use of the land or property by the grantee. This may be called "rent" in the loose sense of the word; but they may be in form of money, share in produce and even sometimes services. These are quite distinguishable from tributes, paid usually to over lords. A tribute has no economic relation to the value of the land; it is intended to acknowledge the grantors political authority over the land. "A customary token for loyalty and fealty".[143]

(a) The owner of economic trees such as cocoa, kola nut trees, oil palm or other fruit bearing trees may transfer the exploitation of the trees to another person for a fixed period, after obtaining a loan or credit for the transaction. This is usually in form of a pledge; the credit or loan is given on the anticipated yields of the economic trees for that period. At the end of the period, the grantee or purchaser of yield must give up his rights over the trees. The rule is that possession must be handed over, and it is not relevant whether the grantee had reaped enough profit during the period to cover the money loaned. The grantor is not entitled to any excess of the yield or profit exceeds the sum advanced.[144] The transaction ends at the expiration of the duration and everybody reverts to his former position.

(b) A family or community having extra land may loan or borrow the land to another community experiencing shortages of land. The period for the loan is usually calculated in farming seasons. The purpose is for the customary loanee to relieve their temporary shortages of land, which may be due to the practice of land being left fallow. Other reasons that may lead to borrowing of land, includes over population, non-suitability of the borrowers land for growing specific crops and infertility of borrower's land.[145] Economic considerations are usually given for the grant, and this may be in form of money or share in the produce. The change in socio-economic development and the introduction of money economy, has made substantial value to be paid in money when loan of land is made.[146] At the end of the period, the land is supposed to be handed over to the grantors; although the grantee may seek to have the land for another specific period. A renewal may be granted depending on the needs of the grantor's family or community.

(c) The owner of land may grant it to another person on the understanding or agreement that the produce from the land or profit will be shared. This is sometimes referred to as share tenancies. This type of grants are usually for farm-lands; however, with the growth of cash crops it was also extended to it. The grantor will provide the land and the crops while the grantee, the labour. At the end of the season the produce is shared between the parties, alternatively, they may share the after sale profit of the produce. Share tenancies have also resulted from pledging of land. Rowling in one of his Reports[147]

maintains that if a land pledged is turned into a cocoa plantation for example, except where there is no permission to so plant the land or where the pledgor is willing to pay compensation on redemption of the land, the land may become irredeemable. In such situation, the pledge may either agree to share the profit with the pledgor or agree to pay a yearly rent; thereby converting the transaction to a tenancy.[148]

(d) The owner of land may obtain services in form of labour for his own farm land, by giving a portion of land to another person who will provide the services. The latter person may not have land to farm, but may obtain one by agreeing to work on the owner's farm land along-side his own. The eventual result of such services are the profits from the farm land in form of produce. This is called a service tenancy, it is also an aspect of share tenancy. Tenancies of this nature are abound in Yoruba land, Ibo land and some part of Nupe land.[149]

(e) The introduction of money economy has led to the predominance of a transaction which allows the exchange of money for the use and exploitation of land. This may be given to a single person for a specific period. But the parties may also agree that at the end of such period, the grantor will continue the grant unless he wants to use the land. The money is the rent for the use of the land, and the period may be computed with regards to farm seasons or crop seasons. It is certainly not month to month. In BASHUA v ODUNSI[150] Carey, J. observed that:

"I have never heard of a native customary tenancy by the month at a monthly rent". The reason for this state of fact is that customary law only recognises the grant of land for specific purposes. The grant or allocation of land is usually based on the use of it. For such short periods, the grants are usally agricultural. This will require the use of the land on the basis of farming seasons.

Finally. it may be observed that some authorities have maintained that the idea of lease applies to customarv law. In EJEANALONYE v OMABUIKE[151] the Supreme court held that customary law recognises the lease of land. The court drew a distinction between a "customary lease" and a "customary tenancy". That a customary tenant pays tribute and the "customary lessee" pays rent as consideration of his grant.[152] It is submitted that this distinction does not apply to customary law. What may be ascribe as customary tenancy is strictly not a tenancy in nature. It is a grant of land which is perpetual and heritable in practice. It goes on and on as long as the grantee does not challenge the grantor's title or guilty of any form of misbehaviour.[153] Strictly speaking the idea of lease is unknown to customary law, as a commercial transaction.[154] The cause of the above usage may not be unconnected with the growth and association of customary and English laws. There appears to be an uncontrolled use of English terminologies on land transactions under customary law having related traits.

Chapter Three Notes and References

1. Oputa, J.S.C. in FOLARIN v DUROJAIYE (1988)1 N.S.C.C (Vol. 19) 255 at 264

2. See Ollennu, J. in KWAME v FIO cited in Bentsi-Enchill, Ghana Land Law Op. cit, p. 357, note 17.

3. "I regard this court in its equitable jurisdiction as in some measure ... keeper of the conscience of native communities in regards to absolute enforcement of alleged native custom" per Graham-Paul, J. in ASHOGBON v ODUNTAN (1935) 12 N.L.R. 7 at 10. See also the decision of AWO v GAM (1913) 2 N.L.R. 100

4. Bentsi-Enchill, Op. cit., pp. 351 - 352

5. Nwabueze, Op cit., p. 340

6. Yakubu, PH.D Thesis Op. cit., p. 160

7. Yakubu, Land Law in Nigeria, op. cit., p. 45

8. Elias, Groundwork of Nigerian Law., op cit., p. 335 James, op cit., p. 177. Also Lewis v Bankole (1908) 1 N.L.R. 81 at 83.

9. Oluyede, Nigerian Law of Conveyancing, (Ibadan,1978)p.2

10. Bentsi-Enchill, op. cit., p. 45
Yakubu, op. cit., p. 45

11. Yakubu, PH.D. Thesis, op. cit., p. 165

12. Oyewunmi v. Ogunesan (1990) 3 N.W.L.R. 182 at 207 per Obaseki, J.S.C.

13. Coker, op. cit., p. 30

14. Yakubu, op. cit. p. 48

15. Ojomo v. Ajao (1983) S.C.N.L.R 156: One cardinal point in indigenous customary law is the inapplicability of abstract legal notions of legal estate and equitable estate as understood in English law, at 168.

16. Section 67 Property and Conveyancing Law, 1959, section 68 Law of Property Edict, 1987, Kaduna State. Section 5 Law Reforms (Contract) Act, 1961.

17. (1919) 1 Ch. 378

18. (1937) 3 W.A.C.A. 224

19. (1972) N.N.L.R. 1

20. Megarry and Wade, The Law of Real Property 5th ed. (London, 1984), pp. 571 - 599

21. Ogunbambi v. Abowab (1951) 13 W.A.C.A. 223

22. Kabiawu v. Lawal, (1965) 1 All N.L.R. 329

23. (1965) N.M.L.R. 479

24. Ibid, at 483

25. (1988) 1 N.S.C.C. (Vol. 19) 255

26. Ibid, at 265 - 266. See also Oputa, J.S.C.in Okonkwo v. Okolo (1988) 1 N.S.C.C. (Vol. 19 909 at 925, Nwosu v. Udeaja (1990) 1 N.W.L.R. (Part 125) 188 at 210.

27. Oransanmi v. Idowu (1959) 4 F.S.C. 40

28. Nwabueze, Op. cit., p. 345. See also the opinion of Onyeama, J. (as he then was) in Amao v. Adebona (1962) L.L.R. 125

29. Folarin v. Durojaiye (Supra), pp 262 - 263

30. Ibid., at 266

31. The importance of witnesses in'handling over of the land' was established by the Supreme Court in Taiwo v. Ogunsanya (1967) N.M.L.R. 375, where it was held that inability to produce witnesses that witnessed the 'handing over' shows that the party has failed to prove the sale under native law and custom. Apart from proof, witnesses also give solemnity and validity to the sale.

32. (1988) 1 N.S.C.C. (Vol. 19) 909

33. Ibid., at 923

34. It is essential to note that the use of writing in customary transaction does not on its own operate to transfer the land in customary law, if the essential and formal requirement of customary law, has not been fulfilled: Cole v. Folami (1956) 1 F.S.C. 66

35. Essays in African Law, (London, 1960), p. 343

36. Santiley v. Wilde (1899), 1 Ch. 474

37. Megarry and Wade, Op. cit., p 917

38. Section 67 Property and Conveyancing Law, 1959 Section 68 Law of Property Edict, 1987.

39. These sections are direct equivalent of sections 108, and 109 of the Property and Conveyancing law 1959, which had long been applicable in former W.N.

40. Section 110 Law of Property Edict, 1987

41. Cap. 121, laws of the Federation of Nigeria, 1958.

42. ONASHILE v IDOWU (1961) 1 All N.L.R. 313

43. OGUNRO v OGUNRO (1960) L.L.R. 20

44. BANK OF NEW SOUTH WALES v O'CONNORS (1889)14 App. Cases, 273; OLOFUTUNYI v BARCLAYS BANK D.C.O. (1965) N.M.L.R. 142

45. MEGARRY & WADE, OP. Cit., p. 928

46. BARCLAYS BANK v ASHIRU (1978) N.S.C.C. (Vol.11) 351

47. KRELINGER v NEW PATAGONIA MEAT & COLD STORAGE CO LTD (1914) A.C. 25 at 47

48. OLOWU v MILLER BROS (Of LIVERPOOL) LTD (1911)3 NLR 99

49. (1904) A.C. 24 at 30

50. FOUR-MAID LTD v DUDLEY MARSHALL (Properties)LTD (1957) Ch. 317, per Harman, J.

51. WELLINGTON v PAPAFIO (1952) 14 WACA 49

52. FEDERAL ADMINISTRATOR GENERAL v CARDOSO (1973) 1 All N.L.R. 169

53. SAMUEL v JARRAH TIMBER CORPORATION (1904)AC 323 at 329

54. Ibid.

55. KNIGHT BRIDGE ESTATE TRUST LTD v BYRNE (1940) A.C 613 MULTI SERVICE BOOKBINDING LTD v MARDEN (1979) Ch. 84

56. KRELINGER v NEW PATAGONIA MEAT CO (Supra) at 39

57. WELLINGTON v PAPAFIO (Supra)

58. Section 26 Limitation Decree, 1966. In Western Nigeria, the period is 12 years. Section 13 of Limitation Law, 1959, Cap. 64

59. FEDERAL ADMINISTRATOR GENERAL v CARDOSO (Supra)

60. Section 131 of Law of Property Edict, 1987 and Property and Conveyancing Law, 1959.

61. See Section 114(2) Property and Conveyancing Law 1959.

62. Coote's Treatise on the Law of Mortgages. 9th Ed. (Vol. 2) P. 93.

63. CUCKBRICK CO. LTD. v MUTUAL FINANCE LTD. (1971) Ch. 310.

64. Tse Kwong Lam v. Wong Chit Sen (1983)1 W.L.R. 1349

65. Each State has its own equivalent of the Federal Act, for example Auctioneer law Cap. 10, Laws of Northern Nigeria.

66. Sections 123 and 131 of Property and Conveyancing Law, 1959.

67. Adjei v. Dabanka (1930) WACA 63 at 66 - 67

68. See Kuahen v. Avose (1889) noted in Elias Nigerian Land Law Op cit., P. 155

69. Meek, Land Tenure and Land administration in Nigeria and Cameroons. (London, 1957) p. 201

70. West African Land Committee, 1048 (1916) p. 173. Also see Fowler, " Report on the lands of the Colony District (unpublished typescript), 1948, paragraph 33, cited in Meek, op. cit., p.202.

71. As previously discussed in chapter one.

72. James, op. cit., p. 224

73. Op. cit., p. 202

74. (1986) 2 N.S.C.C. (Vol. 17) 1067.

75. Per Mitchelin, J. in Adjei v. Dabanka (Supra) p. 66

76. Dapaah v. Poku (unreported WACA decision, 1950) Reported by Ollennu, Op cit., p. 173.

77. Meek, Op. cit., pp. 173 and 203

78. Nwagwu v. Okonkwo (1987) 2 N.S.C.C. (Vol. 18) 953 at 956.

79. Ikeanyi v. Adighogu (1957) 2 E.R.L.R. 38

80. Ohonbamu, "Current trends in Nigeria Law of Mortgages" (1964) N.L.J. 2

81. Nwabueze, OP. cit., p. 281

82. Dapaah v. Poku, (Supra).

83. (1974) N.S.C.C. (Vol. 9) 153.

84. Ibid. at 161

85. Meek, Op. cit., p. 204

86. Nwabueze, Op. cit., p. 278

87. Noted in Elias, Nigerian Land Law, Op. cit., p.155

88. Supra

89. (1957) 2 W.N.L.R. 55.

90. Nigerian Land Law, Op. cit., p. 154.

91. Op. cit., p. 203

92. Op. cit., p. 236

93. The strict accountability principle of the mortgagee in possession.

94. (1974) N.S.C.C. (Vol. 9) 153 at 161.

95. Dapaah v. Poku (Supra), Nwabueze, Op. cit. pp. 277 - 278.

96. Meek, Op. cit., pp. 172 - 173.

97. Ibid., at 161

98. (1933) 1 WACA 284

99. Nwabueze, Op. cit., p. 283

100. Omolowun v. Olokude (1958) W.R.N.L.R. 130 citing Odulami v. Soroyewun (unreported) with approval.

101. Op. Cit. at p. 161

102. Yakubu, Land Law in Nigeria, Op. cit., p. 37

103. Op. cit. p. 203.

104. Rowling, Report on Land Tenure in Ondo Province, (Lagos, 1952). Paragraph 36.

105. Op. cit., p. 100.

106. Meek, Land Law and Customs in the Colonies (London, 1946) p. 265

107. Hinde, McMorland and Sim, Land Law, Vol. I (Butterworths, 1978) p. 416.

108. Mobil Oil (Nigeria) Ltd. v. Johnson (1961) All N.L.R. 93

109. Heslop v Burns (1974) 1 W.L.R. 1241
Errington v. Errington (1952) 1 K.B. 290.

110. National Bank of Nigeria Ltd. v. Frassinet (1948) 9 N.L.R. 4; United Bank for Africa Ltd. v. Tejumola (1988) 2 N.W.L.R. (Part 79) 662.

111. Lace v. Chantler (1944) K.B. 368

112. Section 67 Property and Conveyancing Law, 1959.

113. Udolisa v. Nwanosike (1973) E.C.S.L.R. 652

114. (1882) 21 Ch.D. 9. The doctrine is based on this decision.

115. Savage v. Sarrough (1937) 13 N.L.R. 141

116. Clarke v. Smaridge (1845) 7 Q.B. 957

117. Hagee (London) Ltd. v. Erikson & Larson (1976) Q.B. 209.

118. Wheeler v. Mercer (1957) A.C. 416

119. Remon v. City of London Real Property Co. Ltd. (1921) I.K.B. 49.

120. Esi v. Itsekiri (1961) W.N.L.R. 51

121. (1940) 15 N.L.R. 107

122. Timeson v Fagbayi (1933) 11 N.L.R. 165

123. Birmingham Dudley & District Banking Co v Ross (1888) 38 Ch.D. 295 at 313

124. (1894) 2 Ch. 437

125. (1932) 11 N.L.R. 104

126. (1923) 1 K.B. 617

127. Smith v Marable (1843) 11 M & W. 5

128. Wilson v Finch-Hutton (1877) Ex.D. 336

129. Each state has its own law which is an adaptation of the procedure of the Federal Act. Some states like Lagos and Kaduna has incorporated the procedure into their Rent Controlled Statutes.

130. (1957) N.R.N.L.R. 15

131. This is the equivalent of section 14 of the erstwhile Conveyancing Act, 1881 which have been repealed in Nigeria. For instance in Kaduna state it is now under section 164 of Law of Property Edict, 1987.

132. (1988) 1 N.S.C.C. (Vol. 19) 342

133. Ajayi v Chairman L.E.D.B. (1967) L.L.R. 120

134. Iluno v Commissioner of Police (1971) N.N.L.R. 152.

135. Udih v Izedonwen (1990) 2 N.W.L.R. (Part 132) 357

136. Gibson v Kirk (1841) Q.B. 850

137. Onwuamaegbu, Nigerian Law of Landlord and Tenant (London, 1965) 173.

138. Taylor v Webb (1932) 2 K.B. 283

139. Olofutunyi v Barclays Bank D.C.O. (1965) N.M.L.R. 142

140. Megarry & Wade, Op. cit., p. 712; Oluyede, Op. cit., p. 218.

141. Lawson, Introduction to the Law of Property (Oxford, 1958) p. 118.

142. Nwabueze, Op. cit., p. 249

143. Are v Ipaye (1990) 2 N.W.L.R. (Part 132) 298 at 320.

144. Onwuamaegbu, Op. cit., p. 25

145. Yakubu, Land Law in Nigeria, Op. cit., p. 31

146. Ibid. at 32

147. Report on Land Tenure in Ondo Province, (Lagos, 1952) paragraph 36.

148. Meek, Land Tenure and Land Administration in Nigeria and Cameroons Op. cit., p. 203

149. Oluyede, Op. cit., p. 55

150. (1940) 15 N.L.R. 107

151. (1974) N.S.C.C. (Vol. 9) 108

152. Ibid. at 111

153. Lasisi v Tubi (1974) N.S.C.C. (Vol. 9) 613

154. Meek, Op. cit., p. 202

C H A P T E R F O U R

4.0 RULES OF ALIENATION AND ITS EFFECTS ON BUSINESS TRANSACTIONS

4.1 I n t r o d u c t i o n

The preceding chapter dealt with the modes of alienation of landed properties. Each modes, as we have seen, has its own perculiar formalities before it can be created. There are however, some rules which forms the fundamental basis of the transfer of any landed property. These rules are not just formalities, they form the foundation upon which the validity of any property transaction is based. These are rules of alienation of properties. They are basically under customary and statutory property laws. It is important to note that there may be some other rules that may also affect the transfer of property. These are contractual rules. They arise mainly as agreement between parties and are alterable within that level.

This chapter fundamentally deals with the effect the rules of alienation has on business transactions. Business transactions in property is to a large extent based on the concept of alienation. This is the ability of holders of land to transfer their property to stimulate capital growth. The value of landed property today, does not lie solely in the physical use that can be made of it. Land utility lies more in its quality as a marketable commodity. Land is endowed with an imperishable exchange value through which it is used to secure credits in form of developmental loans. Alienation

specifically serves this purpose of making land available for credit flow. It is from this angle that one can appreciate the role that the rules governing alienation play. Within the realm of economic and commercial activities, the rules create the needed framework of the use of landed property as a vehicle of business transactions. Whenever the rules are unrealistically rigid and cumbersome, there is bound to be a clog in the wheels of business transactions.

4.2 Rules of Customary Property Law

Under customary property law, the units of landholding was mainly the community and the family. There are well fashioned rules for the alienation of properties belonging to either the community or family.

4.2.1 Rules for Alienation of Communal Property

It is pertinent to note from the outset, that in Nigeria, there has been a drastic reduction of landed properties under the control of communities. This was due largely to the change in the socio-economic conditions in Nigeria which resulted largely in the individualisation of communal lands. Most tracts of communal lands are now owned by either families or individuals. This fact none-the-less, certain lands are still within the control of communities. This is especially true in the rural areas.

Under customary property law, the title of property owned by a group or unit such as the community or village is vested not in anyone member but in the whole group or unit.[1] It is on this basis that some writers have contended that the fundamental rule of the transfer of any communal property requires the consent of the community. According to Bentsi-Enshill, title of such communally owned properties can only be alienated by a decision taken by the whole group.[2] Chief Williams also maintains this position, although he concludes that the so called "consent of the community" to the disposition of communal property is becoming more and more artificial.[3] It is however contended that, although title is vested on the group, the decision to alienate is hardly a group decision involving the whole community.

The community or village as an entity has its representatives. This may be the traditional chief or ruler of the community such as the Oba, Obi, Emir or Ooni. Sometimes, it could also be in the form of a council, comprising the elders of the community. It is the representatives who exercise rights and act on behalf of the group. It may be asked what is the rational behind this rule of alienation. The answer cannot be far fetched, the chief or elders, represents the physical and spiritual embodiment of the corporate life of the community. They are regarded as the custodian of the community's culture and heritage. They act as a link between the people and their ancestors.

This fact therefore explains why the chief for example is saddled with the management of the community's affairs and activities, including their most cherished asset like land.

The alienation of communal property by the chief and his council is one of the safest transaction in communal property. Usually the purchaser does not find difficulty in identifying the traditional authority of the community. In almost all states in Nigeria, the names of traditional ruler and community chiefs are in the official gazettes. More importantly, the chief, within the community is the most visible personality. The most casual enquiry by any purchaser or his legal practitioner will definitely reveal the chief. The major advantage this rule confers on purchasers and intending alienees is the security of title it guarantees. The security is borne out of the fact that the decision of the chief and his council are hardly questioned. Their actions are made on behalf of the entire community whom they represent. Their actions and decisions concerning the community affairs are binding on all members. A purchaser therefore becomes assured that his title is valid and free from uncertainties. Invariably, this serves as a stimulus to land transfers involving communal property.

In some parts of Nigeria, transactions involving the alienation of communal property have been removed from the traditional chiefs of the community. This is

by virtue of the Communal Land Rights (vesting in Trustees) law[4] applicable in the former Western and Mid-Western States. This law made provisions for the appointment of a body of persons who will be trustees of the rights of the community. The trustees are empowered to enter into transactions to dispose communal rights in property. The names of the persons who are to act as trustees for a particular community are listed in the trust instrument and published in the official gazette.

The rational for this law in communities having their own traditional rulers could not be easily ascertained. If it was intended to reduce the powers of the community's chief in the disposition of communal property, then the law was a failure. To the contrary however, the law appears to have strenghtened their position. It gave them a kind of statutory power to deal with the properties. This is so because investigations in the old Bendel State[5] (now Edo and Delta states) showed that the body of the trustee included the traditional rulers of the communities. When this was not so, the trustees were persons nominated by the chief or ruler of the community. Thus, the law merely restated the position existing in the native law and custom of the people. The law was however a welcomed development in landed property transactions of communities without a single traditional chief. In this regard, the application of the law makes it easier to identify

persons legally entitled to have dealings in communal properties. This reduced the incidents of fraud and enhanced land transactions. It is suggested that a law of this kind be introduced in other communities in Nigeria having this perculiar problem.

Again, the rule of customary alienation requires the consultation of the family or member in occupation of communal land, before such land could be validly alienated. Commercially this rule can only be justified if the family or member is putting the land into useful purposes. This may be farming or building. Such distinction is necessary because a person can claim to be occupying a bush or a forest. In ADEWOYIN v ADEYEYE[6] the Ooni of Ife had granted a portion of communal land under the occupation of the plaintiff family. The family had hunting rights over the forest land. The transfer was done without consulting the family, which now brought this action to recover the land. It was held and affirmed by the Supreme Court, that the grant by the Ooni without consulting the family in occupation was voidable. According to the Supreme Court, it made no difference that the land in question was a bush or forest. The court further relied on the grounds of Natural Justice, that the family should at least be informed of the Ooni's intending action so that they can prepare to move out of the property.

When the land is specifically used by the member or family in occupation, there is a greater imperative for consultation and even consent. In this instance,

the member's interest are specifically affected. When allotment of communal land have been made to members or families, their interest becomes greater over and above that of other members of the community. The legal significance of this rule is that it affords the members or family in occupation of communal lands, protection of their rights. This is the right to a portion of communal land for the member's use and sustenance. Under native law and custom, this is a fundamental right. Any infringement of this right is protected by law. This may be against other members of the community or the community itself. A member is entitled to an injunction or claim for trespass if there is any threat or interference with his portion of communal land.[7] It will serve little purpose for the right to an allottment to be guaranteed when there is no protection for such rights.

Finally, a member has a right to alienate his portion of communal land. The plentitude of a member's right over communal land certainly makes him the owner of his portion. Although, it is often said that allodial title to communal land remains with the community, yet a member's interest over his portion is of such an amptitude that it is scarely distinquishable from the allodial title.[8] A member has a right to use and enjoy the land in perpetuity. To hold and pass same to his offspring. During the term of his occupancy he may alienate the land by pledge, loan and even sale.[9] To this extent therefore, the right of the

community in the land under occupation becomes displaced or postponed.[10] The member in occupation is no doubt the owner of the land. He has unrestricted right to transact business with his portion.

Despite the member's right over his portion, it is a fundamental rule under customary property law that all alienation to strangers in the community shall receive the consent of the chief or traditional authority of the community. Before the present application of this rule is examined, we shall look at the customary significance of the rule. Within a communal setting, the people share the unique bond of living together. This was not solely as a result of the protection from external attack it provides. There are also some form of social security and the need to guide the communal norms and ethics. It is therefore unacceptable for a single member to admit a stranger to live within the community without the consent of the community. This is more so when the most valued asset of the community is involved. The decision to allow a stranger to live in the community and share in the exploitation of land, shall be by the approval of the community. The chiefs in this regard places important roles since they are the custodians of communal values and protectors of the communal properties.

The above rule has been greatly affected by the change in socio-political and economic conditions. The

introduction of modern government has stimulated an increased mobility of people from community to community. Many communities have become large commercial and administrative centres. This had necessiated the influx of strangers who settle in these communities inter marry and even acquire properties. The general prevailing conditions created a move from collectivism to individualism. People preferred owning their own property, consequently, there was a change in the tenurial system which tended towards individual holding. Members in occupation of communal land sought to remove their holdings from customary restrictions. This was done for example by converting their holding to government grants or acquiring document which confers interest existing in English law. The rule which requires consent before member's alienate their landed properties to strangers became lax. The increased commercial and administrative activities in the communities, made people living in the communities acquire properties from members without even the chief knowledge, nor do members bother to seek the consent of the chief. But the same cannot be said of some rural communities where the people still lived closely together and the chief still had considerable control. Strangers living in their midst are easily identified.

4.2.2 *Rules for Alienation of Family Property*

The institution of family property is the largest form of land holding in Nigeria. It is an aspect of group ownership. Ownership of the property is vested on the family as a group or unit. Dealings in family properties must be or involve the family as a unit. No member has a right to deal with family properties as if it were his own property without the consent of the family.[11]

The issue of alienation of family property is of fundamental importance in the management of family property. This is because as a concept it is capable of depriving family members from their right to the use and enjoyment of their property. Alienation may destroy the rights of the family in the property. This may be as in the sale of the property. It may confer powers which can ultimately destroy their rights. This may be in the form of mortgaging the land. Finally alienation can temporarily suspend the right of the family over its property. Examples can be by pledging or creating leases or tenancies on the land.[12] It is not suprising therefore that members of the family have a real interest in decisions to alienate family properties. This interest is protected by the right of members to take part in the management of the family property. With regards to alienation, the right is exercised by consenting or being consulted in decisions to alienate family property.

Consulting or obtaining the consent of members in a small family, is not difficult. It is easy for all members to take part in the decision concerning the alienation of family property. But the same cannot be said of large families. Such families may have various branches and hundreds of members. In such situations, all members may not directly take part in decision affecting family property. Members of the various branches would act through the head of their constituent branches of the family. These heads are the principal members of the family. Direct participation lies on the Head and principal members of the family. They are to act together after consultation and concurrence. As a rule therefore, the Head of the family shall obtain the consent of all principal members of the family for the alienation of family property.[13]

The significance of this rule is shown from the fact that it serves as a protection to the interest of the different branches no matter how small. The principal members who represent the constituent branches of the family, are to protect the interest and present the views of the members of their branches. The principal members are supposed to consult with the members of their branches, and in a meeting with the Head they are to propagate the views of their branch. Thus while every member may not take direct part in the decision to alienate, they have representatives who are consulted, and consent before any valid alienation. In any case, it was not intended by the rule of customary

law that every member shall consent to the alienation of family property. Such a rule will not only be impracticable, but impossible to comply.[14] In the celebrated case of LEWIS v BANKOLE[15] it was held inter alia, that grand children have no right of consultation as long as their interest is represented by their fathers or mothers.

Despite the importance of the rule above, it has had suffocating effect on various transactions involving family property. In the first place, more often than not, the purchaser or alienee and his legal practitioner come from outside the place where the family resides. They may not know the number of branches the family has got, so as to determine the number of principal members whose consent is required. Normally, they are not in a position to verify the claim by the Head or other members of the family that all the necessary consent has been obtained.[16] The problem could have been avoided if there was a registry which had the names of the head and principal members. But this is very much lacking. The result is that the purchaser become very susceptible to fraud or misrepresentation from the members of the family especially the head, Even in situations where the members whose consent is required is known, the purchaser has to contend with the problem of tracing the principal members. Coker had maintained that it is a rare phenomenom for persons who are indispensible to the management of family affairs to

have a long protracted absence from the arena of family matters. Accordingly he said "all entitled to join in the conveyance and transfer of family property would be readily available and capable of ascertainment by a reasonable purchaser or his legal adviser."[17] With due respect, this may likely be the position in early times when members of the family still lived together in subsistence level. The change in socio-political and economic conditions in Nigeria has encouraged a high migration rate. The result is that many people have moved from place to place. Thus the purchaser or his legal practitioner has to be travelling from Port-Harcourt to Kano, Lagos to Sokoto, all in search of principal members. Indeed, these difficulties above concerning compliance of the family rule of alienation, have been described as being beyond the resources of a careful inquirer.[18]

Greater difficulties will arise where the family has various branches. In some cases, the branches may lay absolute claim over the entire family property or a portion of it, to the exclusion of other branches. The branches will then sell to different persons claiming absolute ownership. The transfer is done without consulting, much less obtaining the consent of the other family branches. In such situation, the purchasers only get law suits in exchange for their money.

In COKER v ANIMASHAWUN,[19] the dispute involved two purchasers of land belonging to the Eyisha family in Lagos. The family consist of two main branches. The Head of one of the branches without consulting the other purported to sell the property to the defendant. Twelve years later, the head of the other branch with the principal members also sold the same property to the plaintiff. The family Head of the branch involved in the first sale was consulted, but he refused to take part in the sale. In this case, as in many others it is the purchasers who had to expend their time and money in the eventual litigation. The case was fought to the Federal Supreme Court, where both titles were held defective. The first purchaser had a void title, the second, a voidable one.

It is this type of unfortunate situation that has led to the lack of security of tenure in the purchase of family property. For however careful a prospective purchaser or lessee of family land may be, he could never be certain as to his holding. Any principal member of the family could succeed in obtaining a rescission of the contract, on grounds that he has not been consulted. This could be after the purchasers or lessee had made considerable expenditure on the land.[20] A committee on Registration of Titles to Land, once state the problem as thus:

> A man who wishes to purchase or lease land cannot find out who are the right people to convey it to him, many men buy their land twice from rival claimants or from two sections of a family. Having acquired the land a man is reluctant to develop it, being unsure of his right to it. When he does take the plunge and builds an imposing house or plant permanent crops he finds that his lack of secured title prevents him from mortgaging it to raise credit for expansion of his business. 21

There is no where that security of tenure is needed more than in business transactions involving landed property. The above situation, therefore could hardly be said to be of any positive encouragement to business transactions in land.

If tracing and identification of the members whose consent are required is a difficult process, minor disagreement within the family is equally suffocating. The withholding of consent by a single principal member has the tendency of frustrating the mobility of landed property. Such refusal of consent may arise from disagreement ranging from the portion of land to be sold to the price of the property. The above situation is well illustrated by facts of ESAN v FARO,[22] where there was a properly convened family meeting attended by all the members. It was unanimously decided that the family should raise money by the sale of some of its properties. In a second meeting to finalise the transfer, disagreement arose. A minority of the members opposed the sale of a particular property. Although the other members of the family still went on with the sale, it was held voidable at the instance of the non-consenting members.

Situations such as these stated above, could hardly be suited for a healthy business development in landed property. One may quickly recount the observations of Park, concerning this aspect of family property. He maintains that, the alienation of family property is:

> a difficult, hazardous, and often expensive process - first to discover the person whose consent is required and then to obtain the consent of them all. Failure to get the agreement of one person may be disastrous, and the danger is enhanced by the fact that lapse of time without acquiescence is no bar to the assertion of a right under customary law. The result of this and other circumstances is that the urban area of Nigeria are conveyancers nightmare. 23

Equally more frustrating is the rule that no alienation can be effected except the head of the family consents to it. This means in effect that if all the members of the family or all branches are desirous of selling the property; the head can refuse his consent. No title can then be passed, not even a voidable title. The Federal Supreme Court in EKPENDU v ERIKA[24] held that a transfer by all the principal members of family property without the consent of the head of the family was void abinitio. More recently in AJAMOGUN v OSHUNRINDE[25] a purported alienation was made by family members who are the 'principal and accredited' representatives of the family. In an action to set aside the alienation it was held that the mere fact that the vendors are accredited representatives of the family as representing the various sections of the family, will not vest them the authority to supplant the Head of the family or undermine his authority. The disposition was

thus treated as void. It may be conceded, that in certain circumstances, the principal members can effect alienation. For example where the head had waived his rights,[26] or where the court could imply an agency from the conduct of the head.[27] But all these involve the active participation of the head; otherwise no alienation can be made. It is a known fact that the head of the family cannot be compelled to consent to the alienation of family property.[28] This creates a situation where the family would have no remedy if the head unreasonably refuses to consent to the alienation of family property.

The above position is very unsatisfactory. There seems to be no justification for the whole family to be held to ransome by the refusal of the head to consent to any alienation of property. The position will be different, if it was a fundamental feature of customary law that the head and principal members of the family shall be elected by members of the family. The family also, should be able to remove the head or the principal members, whenever they lack the confidence of the family members. Unpopular heads and principal members will then risk removal, if their decision runs contrary to the wishes of the entire members of the family. The rights of the family members above, should be capable of being enforced by the court. No doubt the adoption of the above procedures would promote responsibility of family leaders and enhance better management of family resources.

It is important to note that in our present economic development, property management has assumed a greater dimension. Furthermore, within the requirement of modern business transactions, it cannot be seriously contended that it is the elders of the family who are more informed about business and economic decisions. At our level of economic development old age cannot be synonymous with business acumen. It is therefore imperative that the family members should be free to elect members who are capable and competent in taking business decision. While it is conceded that the older members should be family head, for purposes of socio-cultural matters; principal members may not strictly be such because of age. The family members should then have the right of electing representatives who will contribute sound economic imputs while taking decisions with the family head. The process of electing family representatives is not strange in Nigeria. It is already practiced under some customs especially in Cross River state[29] and some part of Yoruba land.[30]

Another major obstacle of family rules of alienation on business transaction, is as it affects a member's right over his allottment. As previously highlighted, a member has a right to a portion of family land. This he can use for building and farming purposes. A member can continue to use the land for as long as he wants, provided the family's interest is not jeopadised. He has a right to effect improvement on the land, and such improvement becomes his personal property. However

as a rule, a member cannot effect any alienation of his occupied portion, except he obtains the consent of the head and principal members of the family. Any attempted alienation of such land by the member in occupation is void and of no effect.[31]

In BAMGBOSE v SHOKO[32] the plaintiff/appellant traced his title to a member of the land owning family. The member had been allotted the portion of family land and had been in occupation for a long time. The member had transfered the land to the plaintiff who sought a declaration of title as against the family. The action was dismissed in the High Court. The appeals to the court of appeal and the Supreme court were unanimously dismissed. According to the Supreme Court, no matter how long a member has been on the land, an allottment never vest ownership in the member. Consequently the purported transfer was held void under the principle of nemo dat quod non habet. Similarly in FALAJU v AMOSU,[33] Obaseki, J.S.C. observed as follows:

> It is well stated rule .... that a member of the family is incompetent to transfer family title in land to a purchaser without the consent of the head and principal members .... an ordinary member has no power without the consent of the head and principal members of the family to sell even as family property, such a sale is void. 34

Most unfortunately, the same rule is applicable to improvement made by a member. Any improvement is the absolute property of the member even if it is

on family land.[35] As his personal property, the member can effect alienation of it if he so wishes. But the member does not have a right to alienate his portion of family land on which the improvement stands, except with the consent of the family. In OMOLOWUN v OLOKUDE[36] a member had sold his house built on family land to the defendant. The family sued to recover the land. It was held that a purchaser of a member's improvement could not as against the family assert a right to use and occupy the house which was on family land. The purchaser could only acquire the right to demolish the house and remove the materials.

One may ask the question, of what importance is this rule in our march towards economic development. Indeed no purpose will be served to restrict a member from using his portion of family land to raise capital, or acquire income by alienation. The rule which requires members to obtain consent is certainly a drag on the effort of business minded members. In most cases when consent is refused, the decision is not based on sound economic or business judgement. They are usually based on irrelevant consideration arising from family feud and rivalry. The most unfortunate aspect is that the family itself, cannot use the land which a member occupies as his portion, without the consent of the member.[37] A stalemate then arises, neither the member or the family could use the land. The result is that marketable land lie unproductive because of rules based

on out-dated collectivism. It seems rather unfortunate that the rules which affects member's right in family property have remained stagnant. They have refused to show any flexibility to meet the needs of modern socio-economic developments.

The most severe hindrance on member's use of his interest in family land, is his inability to obtain credit or capital facilities. This is due largely to the fact that a member has no distinct alienable interest in family property. As such, when a member's allottment is used as security for any capital or loan, it cannot be subject to attachment by the creditor. Member's interest in family property became largely recognised as an insecured title. According to the Report on Registration of Titles to Land.[38]

> A creditor is confronted with the orduous task of making sure that the security offered for his loan is not a member's interest in family property, because if the debtor defaults the creditor may eventually discover that he cannot attach the security given for the loan, which is an interest in family property.

It is a known fact that financial and credit institutions such as Banks often find it difficult to invest in landed property. This is because investment in real property demands huge capital outlay, long maturity period and some risk. Real property investment could therefore, hardly compete with other commercial transaction with quick economic returns. It is not suprising that any real property investment that is likely to increase the already involved difficulty

must definitely be discarded. The position of member's interest in family land and the rules associated with it, unfortunately move towards this direction. Consequently, "creditors are extremely reluctant to advance money to build on what seems likely to be a family land as security".[39] The effect of the above position is choking. It exerts an unparalled negative effect on business transactions. A genuine businessman of a family is denied the advantage of using his portion of family property from acquiring credit. Land in this condition, loses its value as an "imperishable exchange commodity". It can therefore hardly be denied, that these rules are diametrically opposed to the marketability of landed property.

It is the above prevailing circumstances that has informed those who have been calling for a redefinition of member's right in the use of his portion of family land. The redefined right over family property, should be over and above the mere exclusive usufructuary right previously enjoyed by members. Such redefined rights should considerably enhance the individual member's initiative in business transactions. It should afford him the institutional basis of a wider contractual capacity. This would largely take the form of granting the member certain competence in dealing with his portion without prejudicing the ultimate corporate interest of the family.[40]

The redefinition of the member's right requires that the family acknowledges that the member has a distinct right to the use of his portion of family land. The recognition of a member's distinct right should give him a somewhat distinct interest over his portion of family land. The interest should be capable of being alienated, there by conferring greater freedom on the member in his dealings with third parties. No doubt such an interest will grant a member access to credit facilities while it also serve as a guarantee to financial institution to recoup their loans in case of default. Within the framework of modern agricultural and commercial development the need to have an interest that allows one access to loans and credit cannot be over emphasised.

The rules of alienation of family landed properties are no doubt unsuited for business transactions. As earlier noted, they are diametrically opposed to the marketability of land. The family rules of alienation are based on the concept of preservation of family ownership. This obstruct the development of land resources. It is also contrary to the principles of free market which is the cardinal focus of the Government economic policy. According to Simpson:

> If good development is to be assured, it must be possible for rights in land to be adjusted or transfered cheaply, quickly and with certainty, and according to the economist, freedom and easy of transfer are absolutely vital to promoting the best use of land. English history supports the economic theory, for it has been found that development is inhibited by practices which restricts the power of transfer. 41

Equally, Jegede maintains that any system of land holding which imposes severe and unnecessary restrictions on alienation of property constitute a serious obstacle to the country's economic development.[42]

4.2.3 Justification of Family Rules of Alienation

The rules of alienation of family property, have no doubt been subject to severe criticism; but they do not exist in vacuo. They exist by virtue of the social institution called "family". In ADEDUBU v MAKANJUOLA[43] Kingdom C.J. observed that "the native law and custom throughout West Africa in regards to the alienation of family land quite naturally has as its basis the interest of the family and not the interest of strangers who may wish to acquire family land".[44] It follows therefore that any decision on the viability of the rules of alienation can only be justified, after one has examined the social and economic relevance of the institution of family ownership in Nigeria.

The institution of family ownership is the most prevalent form of land holding in Nigeria. In the begining of this century, Speed, C.J. observed in LEWIS v BANKOLE[45] that family land holding was a dying institution. According to him, the death started ever since Nigerians entered into commerce with European nations.[46] This view was due to a complete misunderstanding of the Nigerian social structure. It is based on the inaccurate assessment of the value implicit in

the family system of holding. It is not suprising therefore, that after a lapse of many years, Tew, J. said in his Report on Title to land in Lagos[47] that

> I do not believe that even in Lagos today family ownership can be said to be a dying institution .... I am convinced that the idea of family ownership is so deeply engrained in the minds of the native community of Lagos, and particularly of a large proportion of that community.

The reason for this state of affair is obvious. The nature of the Nigerian society is such that the kinship and lineage structure is very strong. The single most cohesive unit is the family. The bond over members is such that no matter what happens, the family remains the last constituency to the individual. The family system of ownership therefore serves as a kind of social security to the members, also a kind of insurance that members turn to at all times. The bond over individual members is so strong that when the change in socio-economic conditions made individual holding popular individualisation was merely, in most cases a transitional stage to the establishment of family ownership. The above situation of family hold on property is actively strengh-tened by the system of inheritance. When an individual dies intestate, his properties, in some customs becomes inherited by his family. In some other customs, it may devolve amongst his children as family property. Even in urban centres when the idea of English will is practiced, the position has remained largely the same. The machinery of English will has become an object for the perpetuation of family holding.[48]

The enactment of the Land Use Act, 1978, created an erroneous thought that the institution of family holding has been abolished.[49] But contrary to this view the Act has preserved the institution. Section 50 defines a customary right of occupancy to include "a right of a person or community lawfully using or occupying land in accordance with customary law". This definition it is submitted covers family land holding. Section 24 actually goes further to strenghten the above position. The section deals with the inheritance of an occupier's right upon his death. It provides that unless a non-customary law or other customary law applies; devolution *in the case of a customary right of occupancy shall be* regulated by the customary law where the land is situated. That of a statutory right of occupancy is regulated by the customary law of the deceased occupier at the time of his death. In all these system of customary law, inheritance by the children of the property or by the larger family are very prominent.

The net effect of the above is that family system of land holding is a permanent feature in both urban and rural communities in Nigeria. The system is indispensible to the social organisational structure of Nigeria societies. It is this fact, that was considered by the drafters of the National Housing Policy when the idea of group ownership was seen as a solution to Nigerian housing problems. Under the National Housing Policy, 1991 the idea of co-operative Housing and Group Unitisation of property was accepted. Families and other organisation

can therefore form housing co-operative-societies. In these circumstances the desirability to preserve the family institution cannot be over emphasized. One cannot therefore say that because the rules of alienation implicit in the family system are unsuited for business transactions and economic development, family system of ownership should be abolished. Any such attempt would almost destroy the social fabric of the Nigerian society. It could throw it into a far more greater social and economic problems than we could hope to solve. We are then faced with a dilemma of having undesirable rules of alienation within a desirable system of ownership. The solution to this dilemma, lies in a form of balancing act. The strategy is to pursue a flexible policy regarding the alienation of family land.

It has been argued that an unrestricted policy of alienation will make family members landless and deprive their progeny of land. But, it must be noted that the continued preservation of land rights by families could only be justified in modern times if such families are prepared to use the land to its utmost utility. This does not mean only physical use but making the land a marketable commodity to acquire the much needed development loans. A flexible policy on alienation should allow members of the family distinct interest in their portion of family land. Such distinct interest over family property should exist within the joint holding by the family. It should also guarantee members access to loans and credit to stimulate business development.

More importantly, for the purpose of business efficacy and security of transactions creditors and purchasers of family or member's interest should be reasonably assured of secured titles. The idea of making creditors and purchasers suffer for the actions of members of the family is unhealthy for business transactions and development. Families should recognise the power of their members to alienate occupied portions. The family should also honour agreements made by the members concerning the alienation. This will no doubt give a positive effect to transactions involving family property. For purposes of preserving family ownership, it is necessary to insist that creditors should give the members of the family priority, when attempts are made to recover their money and interest. This will ensure that opportunity is given to the family to recover their property, and when they cannot, the public be invited. The family should learn to settle within itself, and recover its losses from errant members. This will make family member's more vigilant of their rights rather than remaining idle, and mislead the purchaser into believing he has a valid title.[50]

4.3 Statutory Rules of Alienation

The most important statute affecting landed property in Nigeria, is the Land Use Act, 1978 (hereafter referred to as the Act). The Act created two major interest in land. These are the statutory right of

occupancy granted by the Governor of a state and the customary right of occupancy granted by a Local Government in respect of land not in urban area.[51]

The Act has guaranteed the transfer of interest in land subject however, to the consent of the granting authority. Section 22 of the Act, provides for the alienation of a statutory right of occupancy. The section provides in part:

> It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub lease or otherwise whatsoever without the consent of the Governor first had and obtained.

Section 21 provides a similar provision in respect of customary right of occupancy, granted by the Local Government. However, when the alienation of the customary right of occupancy, is to be carried out by an order of court, section 21(a) insist that it is the consent of the Governor that is required.

There are some other specific sections which deal with the fact that consent must be had before any valid alienation can be made. For example, section 15(b) provides that a holder may subject to the prior consent of the Governor alienate any improvement on the land which have been effected pursuant to the terms and conditions of the grant. By virtue of section 23 a sublessee can only further alienate after obtaining not only the consent of the Governor but also the consent of the holder of the statutory right of occupancy.

Furthermore, the transitional provisions of sections 34 and 36, also provides for restriction on alienation of rights of occupancy deemed granted on undeveloped lands and land being used for agricultural purposes. Sub-sections 5(a) and 6(a) of section 34 deals with the deemed right of occupancy on undeveloped land, section 34(7) therefore provides that no land which sub-sections 5(a) and 6(a) applies held by any person shall be sub-divided or transfered without the prior consent of the Governor in writing. Finally, section 36(5) absolutely prohibited the transfer or sub-division of agricultural lands.

The broad and unrestricted application of the consent provisions, appears to inform us of its enormous importance in the control and management of land under the Act. This is emphasised by section 26 which renders any transaction that purports to vest any interest over land, without the requisite consent null and void. In some other instances such transaction are illegal and renders parties to it liable to punishment.[52] It is for this importance, one would have expected the Governors to take adequate steps to facilitate the application for consent. On the contrary, applications for consent to alienate land are characterised with long delays. Delays which results from cumbersome administrative procedures, intricate official routines and laxity on the part of public officials charged to process the applications. Public officials see this as yet another avenue to take bribes and engage in other corrupt practices, otherwise

the applicant's file will not move. In most cases applications remain in the Governor's offices for months and even years unattended.

One may quickly recount the direct procedure involved in obtaining consent, for example in Lagos state which has the highest volume of property transaction in Nigeria. An application for consent is accompanied by a copy of the agreement, receipt of the payment of consent fee, tax clerance certificate of the holder and receipt of payment of tenement rates or development levy. The application is made to the state Ministry of Lands and Survey, which ensures that the relevant document have been attached to the application. The application then moves to the Attorney General's office for what is termed investigation and endorsement. The applicant's file is then sent to the Governor's office, from where it is sent back to the state Ministry of Finance. The Ministry of Finance is to ensure that the tax clerance certificate is genuine, up to date and that the correct assessment has been paid. If along the line, there is no problem with the application, the file is sent finally to the Governor's office for consent.[53] The movement of the application, no doubt shows that it involves a cumbersome procedure. Usually, in order to have best result, one will have to follow the file from table to table, otherwise the file may never come out or even get lost.

These antecedent problems has made the procedure for procuring consent for alienation a difficult and expensive

exercise. Consequently, obtaining consent has become a clog in the wheel of business and commercial transactions in landed property. The seriousness of this situation is appreciated with some specific examples. A land owner in serious need of capital to develop his business intends to use his property as a security for a loan. He would have to contend with the long delays associated with consent before the deal with the bank or financial house could come through. The danger becomes real when the capital is needed for urgent business purposes. Also a person who intends to lease a building on a land, and in desperate need of accommodation will have to wait until consent is granted for the agreement with the land holder. Otherwise, any transaction with the holder will be null and void. The effect of these difficulties on transaction can indeed be described as suffocating.

Another factor which have added to the above problem, is the centralisation of the power to grant consent in urban areas. Under the Act, the right to consent to alienation of a statutory right of occupancy is with the Governor. Where there are several urban areas, all applications are channelled to the office of the Governor. He alone can grant the consent, unless, he delegates this power in accordance with section 45(1) of the Act. The volumes of applications will definitely increase where the state has large commercial and business centres. With the enormous duties of the Governors in the management of the states, there is bound to be an intolerable delay in processing of applications and

eventual granting of consent to alienate. The already bad situation is compounded in some states which have removed local Government from the scheme of land administration. For example in Lagos state all areas are declared urban areas, bringing them directly under the Governor's control. Equally in Kaduna state, all areas 40 kilometres from each Local Government head-quarters has been declared urban area.[54] This simply has made almost all areas "urban area". The overall effect of this mode of land administration is that all future grants and alienation will only be valid when the Governor's consent is obtained. The Local Government are cut out completely from this aspect of land administration thereby over loading the Governor's desk with applications from almost all parts of the state.[55]

This unfortunate development in states like Lagos and Kaduna, will drag the already slow machinery for procuring consent. It will further frustrate transactions involving the transfer of landed property. Ordinarily, great concern had been expressed with the implementation of the consent clauses; Obaseki, J.S.C. in SAVANNAH BANK v AJILLO[56] observed as follows:

> I agreed with Chief Williams expression of anciety over the implementation of the consent clauses. It is bound to have a suffocating effect on the commercial life of the land and house owning class of society who use their properties to raise loans and advances from the banks. I have no doubt that it will take the whole working hours of the state Governor to sign consent papers (without going half way) if these clauses are to be implemented. 57

Karibi-Whyte, J.S.C. was equally emphatic, he maintains that the "requirement of consent in every transaction is a veritable clog in the progress of the commercial life of the nation and requires urgent review".[58] One would therefore imagine what the situation is in states which has cut out the Local Government from the scheme of things.

It is important to concede, that the proper implementation of the rule of consent before alienation would perhaps be one of the most potent of all provisions in the Act which can enhance security of title.[59] The records of all transactions concerning the property will be properly kept. This would have had an unparallel positive effect on business transactions. There is hardly any other aspect of business that security of title is needed more, than in property transactions. But the consent rule has produced the contrary. As with any law whose compliance is fraught with difficulties, observance has been honoured more in breaches than obedience. It is not suprising therefore that many holders of right of occupancy have tended to evade the provisions of the Act before alienating their properties. The difficulties, time and expences involved in procurement of consent to alienate have prevented and dissuaded holders from even applying for consent. The result is that the operation of the rule has become a source for the multiplicity of existing imperfect titles.[60]

It is hardly doubted that imperfect titles are unmarketable. Purchasers and lessees with such titles, often cannot use their holding as exchange commodity. To do so would only mean to perpetuate the illegality. They cannot use such title to raise capital needed to set up other businesses or to build their own houses. This is because Banks and other Building finance institutions will always insist on legal title to land as security for a loan. Invariably such holdings loose its investment value. Even where purchasers or lessees take a plunge to develop the land, their positions are hardly different. They are "likely to erect illegal structure to be in a regime of unserviceable squatterdom".[61] Consequently, the operation of the rule of consent could hardly be said to have created an environment conducive for business transactions in land.

If the present implementation of the consent rule is a clog to the wheels of business transaction; the rule of absolute prohibition of alienation in section 36 is completely nugatory to the development of business transactions in landed property. Section 36 of the Act deals with land not in urban area as occupied by any person immediately before the commencement of the Act. Sub-sections (2) and (3) of section 36, deemed granted customary right of occupancy on holders of land used for agricultural purposes and developed land respectively.

Section 36(5) then provides:

> No such land to which this section applies shall be sub-divided or laid out in plots and no such land shall be transfered to any person by the person in whom the land was vested.

The effect of the section, in the first place is to promote the under utilisation of land resources. A farmer who is unable to cultivate all portions of his land, is unduly prevented from leasing the land to another who can use it for that season. More importantly, the rule prevents the rural pupolace access to much needed capital to expand their business or set up small scale industries, or even increase their agricultural out put.[62] If the development of the rural area as proclaimed by government is to be meaningful, then the people should be granted access to investment funds. The prohibition of the power to alienate developed lands, by this sub-section could hardly fulfil this end.

The section may have been designed to protect the rural agricultural land from the activities of urban land racketeers. It is however, impossible to argue that absolute prohibition will serve this purpose more, rather than making alienation subject to consent. Nor could the application to developed land justifiable. If the sub-section was a delibrate policy, then it is in urgent need of amendment to make it more amenable to business transactions. When the Act is read as a whole, one would conclude that the sub-section suffers a corpious omission. It could hardly be reconciled with section 21 which makes alienation of a customary right of occupancy subject to

consent of the local government. In any case, judicial decisions have consistently held, quite rightly; that for purposes of control and management the distinction between a "deemed grant" and "actual grant" is insignificant. The general control of alienation under sections 21 and 22 applies to all rights of occupancy respectively.[63] The Supreme Court in SALAMI v OKE[64] held that there is nothing in the provisions of section 36 preventing a holder of a customary right of occupancy from granting tenancy and forfeiting the tenancy, provided the provisions of the Land Use Act are strictly complied with. Also in practice, credit lines have been given to rural farmers, using their land improvements as cocoa or cotton farms as securities. These are indeed healthier development as opposed to absolute prohibition.

Within the framework of certain landed property transactions, the operation of the consent rule is difficult to understand. That a holder should apply for consent before such transactions are valid could hardly be justified. A holder of a right of occupancy may in pursuance to the requirement of the certificate of occupancy, make substantial improvements on the land. This may be in form of buildings, for example blocks of flat or duplexes. The holders intention may be to lease out these properties which is infact, a useful economic activity. Section 15(b) however, restricts his power of alienation subject to governor's consent. It serves no economic purpose for a holder of such a property to go through the rigorious process of obtaining consent before

he could sublease his properties. It must be emphasised that a grant of right of occupancy for building purposes, presupposes that if a building is erected on the land, the holder either stays on it, or leases it out for economic returns.

The consent rule was intended to strenghten government control and management of land. It was also intended, no doubt, to give government the knowledge of the ownership structure and movement of land holdings in the country. It is arguable, that such leasing of building hardly affects the ownership structure, except it is a long lease. Even if it does affect it, just as an out right purchase will, as long it is between Nigerians, there is little virtue in restricting unduly a willing buyer and seller from doing business. If government interest is on the revenue side, there are surely better ways of collecting the money, rather than clogging the commercial activities of the people. Oluyede[65] has however maintained that sublease for a short term of 3 to 5 years whether written or oral are exempted from the consent requirement. He justifies this exemption on the fact that the policy objectives of the Act are not in any way jeopardised - by such transactions.[66] It must be pointed out that while this is a better approach to the operation of the consent requirement; the Act has not in any way or manner made this exemption. All alienations can only be lawful subject to the consent of the granting authorities.

Another transaction which does not justify the application of the consent rule is the mortgaging of improvements, such as building and economic trees by the holder. Under the present land tenure system, save for few instances, such as, obtaining loan to develop a land for farming purposes; land without valuable improvement, is hardly an adequate security for loans to be given by financial institutions. Ordinarily therefore, loans are only granted on land as security, after considerable effort has been made to improve the value of the land by developing it. This is so because, one of the aims of the Act was to remove the astronomical cost of bare land which previously existed. Thus, bare land in case of revocation and acquisition by government does not attract any compensation save for the ground rent, if any, is paid on the land by the holder.[67] This in itself is very minimal and seldomly paid, except in highly commercialised and administrative areas. Financial institutions will then be at loss to recoup their capital and interest, since compensation are only paid for inexhaustable improvements on the land.

When a holder has complied with the requirements of his grant as to development, he should be allowed free to raise capital by mortgaging his property, for further business development. Most times business exigencies would be such that the delay antecedent in acquiring consent will certainly be retrogressive to the business activities of the mortgagor/holder. While

it may be conceded that in exercising his powers to recover his loan, the mortgagee becomes saddled with certain powers that could alter the ownership structure. It must be emphasised that this argument does not hold much ground, since where proper consent is granted, government hardly take any step to regulate the powers of the mortgagee. The mortgagee for example is still required to sell to the highest bidder. In any case, the enforcement of the mortgagee's security has its entirely different mechanism for the protection of the parties.

More disheartening, is the fact that the consent provision does not confer any advantage to the parties, save for the validity it confers on the transactions. It does not enhance the mortgagee's position in recovering his security, for example in the event of revocation. When compensation is to be paid to the holder of a right of occupancy for his improvements, the law does not take into consideration the security of the mortgagee. This is so even if consent has been given for the mortgage.[68] This has infact remained one of the short comings of the Land Use Act as it affects third parties rights. Rather than maintaining the mortgage as a security transaction, it has exposed it as a high risk transaction at the expense of the creditor. There is a copious and unreasonable departure, from the provisions of the more comprehensive Land Tenure Law, 1962. Section 34 of this law specifically provides that a revocation does not

affect the rights of a mortgagee. That where the mortgagee has notice of a revocation concerning mortgaged property, he should give notice of his interest to the authority within 2 months for purposes of payment of compensation money. Under the Act, financial institutions have had to insert in their mortgage deeds a provision that entitles them to the compensation money as a form of protection, to offset the debt.[69]

Finally the provisions concerning the non-compliance with the rule of consent have become an object of fraudulent activities. Under section 26 any transaction or instrument, that does not comply with the rule of consent shall be null and void. The antecedent difficulties associated with obtaining consent has made many land owners transfer their property without consent. When it is time to perform their obligation, they now use the issue of lack of consent to frustrate an already binding transaction. In SAVANNAH BANK v AJILLO[70] the Respondent had mortgaged his landed property as security for credit facilities from the Appellant Bank. The respondent could not pay back the loan and the Bank now took steps to auction the property so as to recover their money. Consequently the respondent brought this action to restrain the Bank from auctioning the property, arguing that the mortgage transaction between the parties to secure the debt was null and void since the governor's consent was not obtained. The High Court accepted this argument, holding that "the failure to obtain the required consent of the Military Governor under section

22 of the Act, has rendered the deed of Mortgage Exhibit A null and void abinitio and the mortgage transaction illegal. Accordingly, the power of sale under the mortgage cannot be exercised".[71] This decision was upheld on appeal to both the Court of Appeal and the Supreme Court.

Some judicial decisions have however taken a different and more pragmatic approach to the issue of lack of consent. In OMO BARE v NEW NIGERIAN BANK LTD,[72] the Appellant had mortgaged his properties for an over-draft from the Respondent Bank. He executed a deed of charge in the Bank's favour. The appellant defaulted in the repayment of the loan, and the Bank took steps to recover their money by putting up the properties for sale. The appellant brought this action to declare the deed of mortgage invalid, and an injunction to restrain the sale of the properties. The action failed in both the High Court and Court of Appeal. On further appeal to the Supreme Court, the issue of lack of consent of the Governor was raised. The appellant now contended that the whole mortgage transaction was null and void. The Supreme Court unanimously dismissed the appeal. It was held that the appellant cannot be heard to say that the mortgage was invalid, when consent was the responsibility of the appellant to obtain.

The decision of the Court of Appeal in ADEDEJI v NATIONAL BANK OF NIGERIA LTD[73] throws greater insight in the position of the law in this area. The

case had similar facts with the two discussed above. The mortgagor's property was put on sale, and he contended that the mortgage was null and void under sections 22 and 26 of the Act. It was held that the appellant mortgagor cannot rely on his own wrongful act to allege that the deed of mortgage was null and void. The court reasoned that if the mortgage transaction affects public interest, the government has the statutory powers to deal with the situation.[74] According to the court:

> It cannot reasonably be supposed to have been intended by those who promulgated the Land Use Act that a holder who without obtaining consent of the Governor; mortgages his property for a handsome amount, and after collecting the money can say to the Bank "the mortgage is null and void, you cannot have my property" and get away with it. 75

Unlike OMO BARE v NEW NIGERIAN BANK LTD (Supra) the above case was decided after SAVANNAH BANK v AJILLO (Supra). The court of Appeal explained quite rightly, that in SAVANNAH BANK v AJILLO, the issue as to the competence or otherwise of the respondent to rely upon his own wrongful act to avoid the contract was not canvassed.[76] The issue before the Supreme Court in SAVANNAH BANK v AJILLO was "whether a person, who is deemed to be a holder of a right of occupancy pursuant to section 34 of the Act, requires consent of the Military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy". More recently, the Supreme Court held in ATTORNEY GENERAL v SODE[77] that in land transactions, the holder of the right of occupancy is the party to ask for consent, and it will be unconscionable for the party, whose duty it

is to ask for consent to turn around and contend that no consent was obtained in order to vitiate an otherwise valid and binding agreement between the parties.[78]

The above approach, may have been influenced by the policy consideration of protecting the commercial and business transactions in landed properties. The actions of the land owners who use their properties as securities, smack of fraud. To allow the fraud, because of the breach of the provisions of the Act would injure the commercial interest of the public. Infact, it is morally despicable for a person who has benefited from an agreement to turn around and say that the agreement was null and void. The courts have evolve a technique of construction which prevents a person from benefiting from his own wrong. The effect is that the literal meaning of an enactment is departed from where it would result in wrongful self benefit.[79] Such approach is preferred in order not to frustrate commercial and business transactions in landed properties. Business efficacy requires that parties should not be allowed to withdraw from otherwise binding transactions on their own, especially when property has passed.

4.3.1 Justification for the Consent Rule in Land Transactions in Nigeria

The positive stimulation of business transactions in landed properties, is an aspect of economic development. It is undoubted that the present implementation of the consent provision is unsuited for business transactions. Also the application of the consent rule

to certain transactions has been rejected by this writer, for it serves no useful purpose. But this is not intended to suggest that the unrestricted and unregulated mobility of land rights is best suited for economic development. The Anglo Saxon or common law notion that the Land owner should have an unrestricted right to the use and transfer of his property is no longer tenable. There is no where in the developing world where an individual has an unrestricted and absolute use of his property.[80] It is now realised that within a society, land and its resources are fixed in supply and can easily be made retrogressive by shortsighted management. In this regard the state must have to assume greater responsibility in the management of land and its resources. The public intervention in land matters through control management and planning constitute an essential feature in the affairs of a modern state.[81] The Act is a legislation in this direction, and the rule of consent before alienation is designed to strenghten government control, management and protection of land policies.[82]

There are obvious and overwhelming justification for the necessity of the rule of consent in land management in Nigeria. In agricultural development the rule of consent before alienation would help greatly in planning. One of the major task in agricultural development is for Nigeria to be self sufficient in food production. The need then arises for rich agricultural land to be protected from being alienated or transfered and

used for other purposes. It is a known fact that oil fired urbanisation has created an unprecedented demand for building plots in urban areas. These demand have expanded on agricultural land whose intrinsic value for building development whether industrial, commercial or residential far exceeds that realised by agricultural uses.[83] It is therefore necessary for government to control the alienation of agricultural lands.

It is also necessary to protect the peasant farmers who produce the buck of our food, from the activities of land accummulators and urban land racketeers. These people often disguise as large scale farmers, acquire the peasant farmer's land without actually using the land for agricultural production. The rule that consent of the local government or governor must be obtained before the alienation of such land is valid, will therefore check the activities of these "land monger". The holders of agricultural lands should be prevented from alienating the land for uses other than for agricultural purposes. Land granted for agricultural purposes must be protected, and should not be alienated for building or industrial purposes. The idea in Nigeria is to return food production to the position it was before the oil boom.

One of the major reasons for the introduction of the rule of consent before alienation, in the Act was to curb the activities of land speculators. Speculation is the purchase or acquisition of lands which one has no use for. To accummulate the land and hold same with the

hope that it would appreciate in value. An artificial scarcity is created by withholding from the market available land. The demand for this land increases, and consequently the value of the land also increases. At this point, the land is sold at an exhorbitant price than it would ordinarily be available. In a capitalist society, the land speculator is believed to have performed the valuable economic function in the adjustment of prices to changing values. He is also believed to have prevented the premature committment of resources.[84]

However, in a developing society like Nigeria, the evil of land speculation cannot be tolerated, if economic development and social justice is to be attained. Speculation has great exploitative tendencies. It divides the society to the landed and landless classes. It increases the price of land beyond affordable limits and ultimately increases the cost of development. If speculative activities are unchecked, it will retard the socio-economic development in Nigeria. Under the Act, all land in a state has been vested in the Governor. A grant of a portion is made by either the Governor, or the Local Government, if it is an area other than an urban area. This will eliminate the possibility of land scarcity. Individual holdings of undeveloped land in any state has been pegged in the Act. The consent rule would check any form of land accummulation by the acquisition of land through alienation. The prices of land transfered can also be subject to scrutiny when the transaction is submitted for consent. The result is that the tendencies

of land speculation are reduced or eliminated.

With these reasons for the consent rule, any criticism as to its application can only be justified, if it will not run contrary to the underlying socio-economic bases. For instance, it has been contended that the application of the consent rule to developed land will hamper economic development in Nigeria. This view was expressed in a paper[85] presented by the Faculty of Law, University of Lagos. The paper was highly critical of the decision of SAVANNAH BANK v AJILLO where it was held that the requirement of consent before alienation is an attribute of all right of occupancy; including deemed right of occupancy on developed lands, as contained in section 34(2) of the Act. According to the paper; "if the control placed on alienation is limited to cases of right of occupancy covered by sections 21, 22, 34(7) (that is to say right of occupancy actually granted and those deemed granted to undeveloped urban lands) its effect would not have hampered economic development."[86]

With due respect, this writer disagrees with the above view. In as much as it has been contended in this work, that the application of consent rule to certain transaction involving developed properties, makes no meaning; the unclassified exclusion of developed land from the operation of the consent rule cannot be sub-scribed to. The reason for this disagreement becomes obvious when we take the Act as our reference point. Under the Act, the concept of "developed land" is too

wide and vague. By section 50(1) developed land means:

> Land where there exist any physical improvement in the nature of road development services, water electricity, drainage, building structure or such improvement that may enhance the value of the land for industrial agricultural or residential purposes.

The above meaning quite clearly shows that the concept of developed land is of various categories. As much as a land with an industrial complex or a modern housing estate is developed; so also is a land with a dugged well and drainage; or a fenced land with a make shift building. Land in the latter categories could hardly be differentiated from an undeveloped land, for purposes of control and management. It is therefore clear that to exclude these so called developed land from the operation of the consent rule would make a nonsense of the management of land resources. Holders will now see it as another hole of avoiding the law. The position would be different if the Act had given a definition which is more specific and certain. For instance, at this present meaning there is no reason why a developed land could not be an object of speculative transaction.

Another criticism of the consent rule in relation to business transactions in landed property, is as it affects the mortgage institution. In the realms of land transactions, the mortgage is practically the most potent in the march towards development. The major reason for its success is that the mortgagee who makes the capital available is reasonably assured of recovery

of his loan, and his profit as interest. It has therefore been argued that the consent rule affects the potency of the mortgagee's ability to enforce his security by the sale of the property so mortgaged. Consequently, the efficacy of a mortgage transaction in land property is reduced.[87] The argument is further predicated on the fact that the grant or refusal of consent is at the discretion of the Governor or local government. There are no appropriate or effective remedies to control the abuses of the respective authorities in exercising their discretion to approve alienations. The result is that the mortgagee is likely to be saddled with a security that cannot be transfered to recoup his loan and interest.

This criticism, appears to be based on a misconception of the operation of the consent rule. It is important to note that, under the Act, the obligation to obtain consent before alienation is imposed on holders and occupiers.[88] Persons who constitute holders and occupiers have been expressly defined by the Act, and it excludes the mortgagee. For instance, section 50(1) states that a "holder in relation to a right of occupancy is a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or validly passed on death of a holder but does not include ... a mortgagee, sublessee or sub-underlessee". Although, the mortgagee, sub lessee and sub under lessee,

have been excluded as holders, the Act has however made specific provisions restricting the power of alienation of a sub lessee and a sub under lessee.[89] It is therefore clear that the exclusion of a mortgagee, was a delibrate attempt to preserve the mortgage institution.[90] To protect it as a viable means of capital acquisition and business development in landed properties. It seems incorrect therefore to contend that the consent rule reduces the efficacy of a mortgage institution.

Although there are justifications for the consent rule to apply to land transactions in Nigeria, its application should follow some form of modalities. This will no doubt give it a more meaningful stance, when considered in relation to business transactions. Under the Act, and indeed under previous laws in Nigeria with similar background, the granting of consent is at the discretion of the appropriate authorities. But rather unfortunately, there are no set down regulations to guide the exercise of this discretion. It is true that the authorities are to exercise their discretion in good faith. However, in a complex society as Nigeria, the articulation of clear principles for the guidance of the appropriate authorities in exercising their discretion, will remove most of the fears associated with the current practices.[91] For example, Kenya's Land Control Act[92] provides listed considerations and principles upon which the grant or refusal of consent to alienate shall be based. When there are well laid

down principles and consideration, it becomes obvious when the authorities are acting in bad faith or on improper motives. This will go a long way to forestall any abuse of executive discretion.

Finally, the setting down of guiding principles will be meaningless, if the holder of the land, wishing to alienate is unable to check the abuse of discretion. The holder should therefore, be given access to effective remedies to control the appropriate authority's refusal based on irregular premises. Thus, the holder should have a right to apply to court to challenge the decision of any authority. The courts should be saddled with the power of mandamus, to compel the authorities to grant consent, if it is of the opinion that there has been an abuse of discretion. It makes no sense that a holder has a right to challenge the abuse of discretion, without the court having the power to compel the performance of the function. This will invariably change the prevailing position that no mandamus shall lie to enforce the grant of consent to alienate.[93]

Chapter Four Notes and References

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50. FOLAMI v COLE (Supra) at 456

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64. (1987) 4 N.W.L.R. (Part 63) 1 at 14

65. Modern Nigerian Land Law (Ibadan, 1989).

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67. Section 29 (4) (a)

68. MANYARA ESTATES LTD v N.D.C.A. (1960) E.A.R 177 (East African decision on a similar law).

69. See lecture by Chief B.O. Anyanwu, (Managind Director, Merchant Bank of Africa (Nig.) Limited) published in New Nigeria, March 11, 1991, p. 7

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C H A P T E R F I V E

5.0 SUMMARY AND CONCLUSION

5.1 I N T R O D U C T I O N

This chapter is basically intended to serve as a concluding run down of our attempts in analysing the problems of alienation in Nigeria land tenure system. We have been able to establish the important relationship between alienation of land rights and development, not only of land resources, but business transactions in general. In chapter one we showed the importance of land in both traditional and modern societies. But this importance can only be meaningful in our present stage of development, if land can lend itself to the utmost utility. Land and its resources are only significant in that they present certain opportunities for human utilisation.[1] But the economic potentialities of land today does not lie solely in the physical use of it. Land utility lies more in its quality as a marketable commodity. Land is therefore more of an investment, which has an imperishable exchange value.[2] This is realised when land is used to secure loans for the development of the owner's business activities. This can only be attained through the concept of alienation of land right and interest.

The concept of alienation depends solely on the rules associated therein, in any land tenure system. In chapter two, the nature of property law in Nigeria was treated to lay a foundation and show the conceptual basis for the rules of alienation in Nigeria. For example the rule of alienation under the customary law system was

basically designed in response to the corporate nature of ownership which is predominant under the system. It is important to note that whenever it is maintained that a particular land tenure is suited for landed property development, it simply means that such a tenure has created flexible rules that facilitates the use of land and its law like tangible commodity for the purposes of sale, mortgage, assignment, lease or other form of business transaction.

One may now highlight the summary of the major problems associated with the rules of alienation under the Nigerian tenure systems. For purposes of convenience both customary and statutory systems are treated together. This is even more imperative as they have similar problems. Afterwards it may then be appropriate to suggest some reforms in this area of the law.

5.2 PROBLEMS ASSOCIATED WITH RULES OF ALIENATION

The analysis and treatment of rules of alienation shows that they are geared towards restraint on alienation. Under the most prevalent form of landholding in customary property law, that is the family holding system, the rules have not been able to show flexibility to meet the demands of modern development requirements. As we have previously discussed in chapter four, for a valid alienation of family property, the head must obtain the consent of all the principal members of the family. Thus, if any principal member objects to any alienation, the whole transaction becomes frustrated. The same applies

to the head of the family, in fact, in the latter situation the transfer is void abinitio.[3] A similar tendency towards restraint on alienation is shown with regards to rules affecting member's right. A member in an allotted family land cannot effect any alienation unless he complies with the rule that the family must consent to it. The position remains the same no matter how long the member has occupied the land or how much he has improved it.[4] The effect of the above is such that if consent is refused, the member cannot use his lawful improvement to secure credit facility. This will no doubt considerably dampen the individual member's initiative in business transactions. It makes little sense that an individual member is assured the right to the improvement he has put on the land, without a right to transfer the improvement unhindered or use it to obtain lawful credit. Conversely too, neither the family can use or alienate the land unless the member agrees.

Under statutory property law, the unparrallel application of the consent rule to all types of transaction involving alienation is unjustifiable. It serves no purpose to subject a holder who has erected a building on his land to obtain consent before he could lease it. It is important to note that if government's interest is on the revenue side, then, there are surely better methods of collecting it. One very interesting question that we may ask, is, what happens when the governor refuses consent, and the owner does not have an immediate use of the building?. The owner of the

property is then denied economic returns of his effort, and the intending lessee is deprived useful accommodation. The same argument goes for transactions like mortgages. As we have previously highlighted in chapter four, save for few instances, undeveloped land hardly serve as adequate security for financial institutions to grant loans. It is the improvement on the land that could be accepted as security for any loan to be granted to any holder. A refusal of consent in this situation is equally a denial of the use of one's lawful property. Equally more unrealistic is the absolute prohibition on alienation as placed on land covered by section 36. The section applies to land not in urban area which are developed, and those also use for agricultural purposes. Under sub-section 5 there is absolute prohibition of any sub-division or transfer of the land to which the section applies. Surely, this section would have been neater and better if sub-division or transfer were made subject to consent.

Within the realms of customary and statutory rules for consent, it seems rather unfortunate that there are no guidelines for the exercise of the power to grant consent. Neither has there been any out-line of issues for consideration before any refusal or consent is made. It is quite arguable that under the family landholding system, the reference point will always be the family interest. But there is hardly any guarantee that refusal by the head of principal members will not be ill motivated from reasons arising from family feuds,

rivalry or jealousy. The end result is that valuable land for development remains trapped in the arena of family disagreements. It is quite clear that the Land Use Act, 1978 did not contain any guideline or condition upon which consent to alienate may be refused. Our analysis in chapter four shows a similar legislation in Kenya, with a well laid down conditions and procedure for the refusal of consent; anything outside such conditions is taken as irrelevant. What seems necessary in our systems of land tenure is that members of the family or holders of right of occupancy should be given adequate and effective remedy to check the power to grant consent by either the family head and the principal members, or the Governor of a State. It is a known fact that under the Land Use Act, 1978, the grant of consent is discretionary, and no one can question it in a court of law.[5]

No matter how undesirable the application of the rule of consent may be in the commercial alienation of landed property; this enquiry has been able to establish certain justification for its application. The rule which requires the consent of the family as represented by the head and principal members does not exist in va .uo. First, it exist to protect the right of the members of the family, and also the social institution of family landholding. The desirability to preserve this institution which is indispensible to the social organisational structure of Nigerian communities cannot be over emphasised. As we have previously seen in

chapter four, the requirement of consent before alienation of a right of occupancy will greatly help in the area of planning for agricultural development. The provision can be used to protect rich agricultural land whose intrinsic value for building purposes far exceed that of agricultural uses. Another important point is the check it would place on land speculators. Land speculation has great exploitative tendencies. It increases the price of undeveloped land and consequently its cost of development. Furthermore, the requirement of consent can serve as the most potent provision to enhance security of e. It will serve as proper records of all transfer and may even serve as another form of registration of titles.[6]

Despite these justification for the application of the consent rule, the procedures involved in procuring or obtaining consent in both customary and statutory land tenures leave much to be desired. The procedures are characterised by untold difficulties resulting in many instances in the loss of financial and material resources. It is these clumsy processes that sometimes makes the imposition of restrictions completely undesirable. Once again taking the family system as our reference point, intending alienees would have to ensure, for their own security, that all the necessary consent have been obtained. They will have to contend with the difficulty of tracing all relevant principal members from place to place. Even after tracing them, there is no guarantee that such a

principal member will consent to the transfer. In this instance, purchasers become susceptible to fraud. They could hardly verify if all concerned have been consulted or have consented to the alienation. The process of procurement has therefore created avenues for fraud and insecurity of tenure in the transfer of family land. These problems definitely makes transfer of family property conveyancies nighmare and consequently unattractive to creditors.

The application of and procurement of Governor's consent for alienation is in most cases characterised with excessive delays caused by administrative bottle-neck and red tapism. These delays which may even extend from months to years are completely unhealthy for business transactions. People would hardly complain about the scope of the consent provision if its procurement is easily obtainable without going through the present cumbersome bureaucratic processes. It is not suprising therefore that the law relating to consent before alienation under the Act is honour more in breach rather than observance. And some courts have in their own part been able to enforce agreement between parties, eventhough consent has not been applied for. The argument is of course, that parties cannot use the law to avoid obligations which has accrued as a result of their actions. Such agreements have been declared voidable only at the instance of the Governor. Thus, where there has been an unlawful alienation without obtaining consent. although section 26 of the Act. declare such transactions as void, some courts have

not held so, especially when such applications are at the instance of the party whose duty, it was to apply for consent.[7] Such courts has enforced such transactions as long as the Governor has not taken steps to refuse consent or exercise any of his powers in the Act. This is indeed a better approach.

Finally, from the view point of economic analysis, restriction on the power of transfer has been argued to be inconsistent with development. The Anglo-saxon jurisdiction is therefore, characterised by the unrestricted power of alienation of a land owner. In fact there has developed since the middle of the 19th century, in the common law jurisdiction rules against restraint on alienation. Restraint is viewed as patently against Freedom of Commerce which requires land to be readily marketable,[8] otherwise it will result to economic loss to all concerned.[9] According to Simpson:

> Land may be occupied by somebody who is unwilling or unable to make good use of it. If good development is to be assured, it must be possible for rights in land to be adjusted or transfered cheaply, quickly and with certainty, and according to economist, freedom and ease of transfer are absolutely vital to promoting the best use of land. English history supports this economic theory, for it has been found that development is inhibited by practices which restrict the power of transfer. 10

Although Nigeria was colonised by Britain, this policy of unrestricted alienation of property was not pursued. In any case it was contrary to the prevelent native law and custom. But a different development argument was adopted to justify restrictions. It was

realised that land resources are fixed in supply. That they may easily be destroyed by short sighted management without attaining any meaningful socio-economic development. The pressures put on land in the periods before the 1978 Land Use Act, are such that neither its continued productivity nor its equitable distribution should be taken for granted. It was quite obvious that government could neither remain indifferent to the land question which had grown to become an obstacle to national development. The response was government intervention with strict restriction of land mobility for purposes of control, management and planning. This was done without a proper appraisal as to areas it is most needed.

What however appears important to us is that times have started changing again. Government policies are now geared towards divesting itself of the ownership and regulatory powers over all facet of the Nigerian economy. It appears to be pursuing with all vigour the campaign for self-reliance of its citizenry, privatisation and commercialisation of its interest in all sectors. This is a direct application of the tenets of a free market economy which calls for deregulation of government controls. It therefore makes little or no sense that at a time like this, when government is devesting itself, of its requlatory powers, for it to continue to impose strict and clumsy restrictions in the commercial alienation of property.[11] While it is not

been suggested here that government should deregulate all facets of its control on land policies, the present blanket imposition of restriction on all transactions is far from satisfactory. One may however stress that whereever such restrictions are imposed, it should be based on sound policy judgement; clear articulate principles and guidelines.

5.3 SUGGESTIONS FOR REFORMS

Reforms on this area of the law should be aimed at making alienation of property as free as possible. This will reduce the incidents of uncertainties and difficulties presently associated with the rules of alienation. The object therefore, is to create a healthy environment upon which business and commercial transactions in property will trive.

Under the customary land tenure, major obstacles are encountered with the family system of landholding. Under this system, it is suggested that a law be enacted which reduces the persons saddled with the control, management and protection of family property to either two or at most three. The idea is to reduce the number of persons capable of dealing with family property. These persons who may be constituted as family council will quite naturally include the family head. The names and addresses of the persons should be registered with the land in the Land Registry. But where the land has not been registered, then with the local government council.

They will be listed as persons having authority in the management of the family's right of occupancy. Alternatively, the family may decide to create a power of Attorney on any of its members. The power shall entitle the attorneys power to alienate family property. Once again this power of Attorney will naturally be registered with the land exhibiting the names of the Attorney(s) therein. This practice is however not new, it is in fact being practiced by some families.[12] All dealings of the council or Attorney(s) shall be binding on the family. As this will also afford some form of security to purchasers and creditors.

In order to provide effective safe-guard to members of the family, the council or Attorneys must command the confidence of the family members. They should represent the general will of the members. It is therefore suggested that the council or Attorney shall be elected to such positions. The members should also have authority to remove these persons whenever they lack confidence in them. Furthermore the members of the family should be free at all times to apply to court to enforce these powers of safeguard. No doubt, this will go a long way in protecting the family from the fraudulent or reckless alienation of family property. It will also prevent the imposition of unpopular leadership in the control of family property.

The election of family representative is not entirely new in Nigeria. In fact it is already been practiced in some native law and customs, especially

in old Cross River State (now Akwa Ibom and Cross River States), and some parts of Yoruba land. In INYANG v ITA[13] the issue before the court was the right of two rival claimant to the headship of the Ewa Eking House. The plaintiff claims by right of being the oldest male member and the defendant by being elected thereto by popular votes at a family meeting. The plaintiff's contention that any kind of election of family head was contrary to custom was rejected by the court. It was held that while in former times the headship of the family belonged by right to the senior member, the changed circumstances and times have made it possible for the family saddled with an unpopular head to remove and appoint another in his place. According to Berkeley, J. the plaintiff is asking the court to put the clock back, to deprive the family of any choice in the matter of their head; to revert to a custom where safeguards and checks no longer applies. The Supreme Court in FOLAMI v COLE,[14] has further acknowledged the rights of members of the family to elect or remove any of their family head.

In other to fully implement the above suggestions, it is necessary that all family land and landed properties should be registered. This suggestion once again supports the call for compulsory registration of all interest and rights over land in Nigeria. No doubt this would involve huge resources but taking into consideration that land plays · important role in socio-economic development, nothing will be to much.

The logistics for the implementation of this suggestion requires in the first place availability of sufficient fund to cover the exercise. This will definitely include the training of the required manpower and the cadastral survey for the demarcation of land boundaries. The advantages of this system of registration in the sphere of development and planning is enormous. It will make it easier for identifying the family holder of the right of occupancy over a particular property; indicate the names and addresses of family representatives having authority to deal with the property. Furthermore, all dealings and interest affecting such properties should be registered with the land. All facts about the land or property will definitely become obvious after a careful perusal of the register. The possible sale or alienation of the property to different persons by the same family will then be avoided.

Another major reform under customary holding, is the redefinition of individual members right over land. There is no such problem under communal land holding. Even though it is said that the absolute title to land is in the community, the member's right is no less absolute. It is of such a degree that it is scarely distinguishable from the communal allodial title.[15] This is so because the interest of the community or that portion is displaced or postponed in favour of the member.[16] But this is hardly the position under family land holding. It is hereby suggested that the family member's right over his portion of family land should

be above the mere exclusive usufructuary previously enjoyed. Such redefined right and interest over land should considerably enhance the individual members initiative in business transactions. It should afford him the institutional basis of a wider contractual capacity. This will largely take the form of granting him certain competence in dealing with his holding without prejudicing the ultimate corporate interest of the family.[17]

This suggestion of redefinition is particularly important under the present dispensation provided by the Land Use Act. One of the ideas under the Act is to reduce to the barest minimum the value of undeveloped land. Under section 29(4) of the Land Use Act, compensation payable on such land is an amount equal to the rent, if any, is paid by the occupier. It therefore follows that family land acquires greater value when the individual members has improved on it. The member should now be capable of transfering his holding and its improvement without any hindrance. He should be allowed freely to use his improvement as security to obtain credit and development loans. The position that if a member alienates his improvement on family land, all that the alienee acquires is a right to remove or demolish the improvement[18] should be discarded. Such position are hardly suited for commercial alienation of property.

The whole idea of the redefinition of member right over family land, requires that the family acknowledges the members right or interest to the use of the portion allotted to him. His right to such a portion should be well defined in the register of family land; and his holding registrable. The recognition of a member's distinct right as indicated above, gives such a member a distinct interest in his portion. The interest having been acknowledged, will serve as the member's security in the use of his portion. Within the framework of modern agricultural and commercial development, the need to have an interest that will guarantee one access to loans and credit cannot be over emphasised. Although native law allows a member absolute right over his improvement, this is hardly enough; such improvement are subject to the overall interest of the family on the land. It may therefore be emphasised that the assurance of the right to improvement without interest in the land itself is not helpful in launching an ambitious economic enterprise. In any case, financial institutions, have always insisted on an interest in the land itself, as a condition precedent before a property is accepted for a loan or advance.[19]

It is important to note that the suggestion as to the redefinition of member's right is not intended to change the character of family property. If the

distinct interest of the member is such that it severs family control, then the character of the holding changes completely. But the essence is to strike a form of balancing act, between the preservation of family land holding, and the machinery of alienation. It must be emphasised that it is the family that has the right of occupancy over the land. As such the family head should be informed and consent to all dealings by the members of their portion. This is necessary so that the family council, for instance, would give its active support to the transaction. The requirement of the consent of the head is not intended to retard the power of alienation of the member. Rather it is to serve as a safeguard. Consent should freely be given unless for good reasons. A member who feels aggrieved by any refusal of consent to alienate, should be allowed to apply to court. And the courts when it is necessary shall compel the granting of consent to the member to alienate.

Finally, one may stress the point that the family must be protected against the reckless attitudes of some members in the transfer of their portion. The grant of access to credit through member's allottment should be monitored by the family council. The family council should ensure that member uses the loan to implement useful development. It is only the proper use of the loan facilities and the latter redemption of the land, could the land serve its utmost utility. Any improper

use may turn out to be retrogressive and consequently make the family landless. The family should strive to avoid this situation. When a member uses his portion and improvement to secure credit, for example through a mortgage transaction, and he is unable to repay back the loan, the family should be allowed to come in. As such, it is hereby suggested that creditors and financial institutions like Banks, should first give an opportunity to the family to redeem the property before engaging auctioneers. In this regards any member of the family should be allowed to redeem and pay back the loan. This will go a long way to protect and preserve family property, if it is in the process of being attached or sold by creditors.

Under statutory land holding system, it is quite clear that the problems which has plagued the consent provision in the Act are purely administrative. Suggestions for reforms in this area should be to make its implementation more expedient and expedious. It is in this light, that it is suggested that a full fledged department should be created in both the state ministry of land and in the local government councils. The department shall be saddled with the responsibility of processing applications for consent to alienate. The power of the governor to consent should be decentralised and delegated to appropriate officers of this department. This is definitely necessary because the governor's enormous duties will hardly

allow him time to attend to applications of consent. The attitude to work by the personnel of this department should also be checked if any meaningful changes are to be made. Bribery and corruption should be replaced with honesty, dedication to duty and hard work.

The granting of consent to alienate should be within a reasonable time. This should be 30 days from the date of application. Any unnecessary delay is completely unhealthy for business transactions. It is hereby suggested, that after the expiration of 30 days, a reminder should be served on the department as to the application. At the expiration of 14 days after the reminder, if no objection was raised as to the application, consent will be deemed to have been granted. This is certainly a better option rather than applying directly to the judicial process. An application to court at this stage will not only increase the expenses, but will also cause unnecessary delay.

It is equally imperative that the exercise of their discretion in granting or refusing consent, the personnel of the department should operate under well articulate guide lines. A useful example for our purposes is provided under the Kenya's Land Control Act, 1967. The Act states that:

> In deciding whether to grant a refuse consent, a land control board shall -
>
> (a) have regard to the effect which the grant or refusal of consent is likely to have on the economic development of the land concerned or on the maintenance or improvement or standard of good husbandry within the land controlled area.

(b) act on the principle that consent ought generally to be refused where -

(1) the person to whom the land is to be disposed of (a) is unlikely to farm the land well or develop it adequately; or (b) is unlikely to be able to use the land profitably for the intended purpose owing to its nature; or (c) already has sufficient agricultural land; or (iii) the terms and condition of the transaction (including the price to be paid) are markedly unfair or dis-advantageous to one of the parties ... or

(iv) in the case of division of land into two or more parcels, the division would likely reduce the productivity of the land

(c) refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not -

(1) a citizen of Kenya;

(ii) a private company or co-operative society all of whose members are citizens of Kenya.

A reform along these lines will not only aid the department, but will also afford the applicant, a better insight into his responsibilities in attempting to alienate landed properties.

In order to create effective remedies, if any refusal of consent is based on irrelevant considerations, an applicant should have a right to apply to court for review. The present position which makes the granting and refusal of consent an absolute discretion of the authorities and cannot be questioned by the court of law, should be discarded. The courts should have power to review the exercise of discretion, and when it is necessary order that consent should be given for any alienation when there is no reason not to do so.

As previously been argued in this thesis, the application of the consent provision should be excluded from certain transactions. For example, when a holder has made substantial improvement on a land, there is no need to restrict his power to lease or sub lease the property, or to use it as security to obtain loans. It is however, suggested that to confer legal validity to any such transaction, registration in the proper department should be compulsory. This is not only for record purposes, but also to reduce fraudulent transactions. It is not being suggested here that, application for consent should not apply to all developed land. This is because the definition of *developed land in the Land Use Act, 1978 is vague.* Under the definition a fenced land with a well and a make shift temporary structure would make a land qualify as developed. Developed land should be one with substantial improvement that will enhance the value of the land considerably. There is need for a review of this definition, because presently, one can hardly draw any distinction between certain developed land and undeveloped lands.

The application and procurement of consent to alienate, it is suggested should be restricted to undeveloped plots and agricultural land. Government should avoid accummulation or fragmentation of undeveloped land. Also in order to enhance food production, rich agricultural land should be protected

from being used for other purposes. If agricultural land is to be alienated it must be done with the consent of the appropriate officers, who must also ensure that the land will be used continously for agricultural development. From the above suggestion, it follows that the absolute prohibition on alienation as was provided under section 36(5) of the Land Use Act should be amended. This should reflect alienation with the consent of the appropriate authorities.

Finally, these suggestion for reforms concerning the alienation of landed property in Nigeria, calls into focus that government should take seriously matters pertaining land. It is hoped that if implemented, these suggestions will reduce the problems associated with business transactions in landed properties. Also, it will remove some of the anomalies present in the current practices, and definitely create an atmosphere for the stimulation of growth in this important aspect of our economy.

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