AN APPRAISAL OF ALIENATION OF RIGHT OF OCCUPANCY UNDER THE NIGERIAN LAW: ISSUES AND CHALLENGES

BY

Hassan BALA,
LL.M/LAW/10404/20011-12

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DECLARATION

I, BALA, Hassan hereby declare that the work in this dissertation titled "*An Appraisal of Alienation of Right of Occupancy under the Nigerian Law: Issues and Challenges"* was performed by me in the Department of Private Law under the supervision of Dr. A.M. Madaki and Dr. K.M. Danladi. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this work has been presented for another degree or diploma at any institution.

_____ _____

Hassan BALA, **DATE**

CERTIFICATION

This dissertation titled *An Appraisal of Alienation of Right of Occupancy under the Nigerian Law: Issues and Challenges* meets the regulations governing the award of the degree of Master of Laws (LL.M) of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

_____ _____

Dr. A.M. Madaki **Date**
Chairman, Supervisory Committee

_____ _____

Dr. K.M. Danladi **Date**
Member, Supervisory Committee

_____ _____

Dr. A.M. Madaki **Date**
HOD, Private Law

_____ _____

Prof. A. Z. Hassan **Date**
Dean, School of Postgraduate Studies

DEDICATION

This research work is dedicated to my beloved mother Safiya Aliyu and my late father for their moral and financial support.

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LIST OF ABBREVIATIONS

1. &---------- --and
2. ALL FWLR----------All Federation Weekly Law Report
3. Anor---------- Another
4. C of O---------- -------Certificate of Occupancy
5. CA---------- Court of Appeal
6. Cap----------Chapter
7. Ed.----------Edition/Edited
8. Eg----------Example
9. Etc---------- ----and so on
10. FSC---------- Federal Supreme Court
11. Ibid.---------- In the same source as previously cited
12. JCA---------- Justice Court of Appeal
13. JSC---------- ----Justice Supreme Court
14. L.F.N----------Laws of the Federation of Nigeria
15. LPELR----------Law Pavilion Electronic Law Report
16. LTD----------Limited
17. LUA---------- Land Use Act.
18. MJSC----------Monthly Judgment of the Supreme Court
19. No.----------Number
20. NRNLR---------- --Northern Region of Nigerian Law Report
21. NWLR---------- Nigerian Weekly Law Report
22. Op. Cit---------- Opere Citato (in the work already cited)
23. Ors----------Other
24. P. ----------Page
25. Paras---------- Paragraphs
26. PLC---------- Public Limited Company
27. Pp----------Pages
28. Pt.---------- Part
29. SCNJ---------- ---Supreme Court of Nigeria Judgment
30. SC----------Supreme Court
31. v.---------- versus
32. Vol. ----------Volume

33. WACA---------- West African Law Report

34. WNLR----------Western Nigeria Law Report

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ABSTRACT

One of the problems this research discovers is that of conflict of interpretation of the requirement of consent provision as provided under sections 21 and 22 of the Land Use Act. This problem leads to conflicting decisions by the Apex court, the development that always puts the lower courts in dilemma as to which of the decisions of the court to apply in cases relating to alienation of land. Another problem the research discovers is that of non-compliance in that the cumbersome nature of the consent requirement makes people to alienate land without complying with the requirement of the law. Therefore, the research appraised and analyzed consent requirement, the hardship meted out by its interpretation by the courts. It also looked at the issues and challenges of the research and finally proffered some solutions to same. The methodology adopted in this work is doctrinal which is library oriented. The research found that there is conflict of decisions by the courts on cases relating to alienation of land. It also found that consent requirement is too wide, thus making the powers of the governor to be discretionary and cannot be challenged even by the holder himself. It again found that people engage in land transaction without complying with the requirement of the law. Finally, it has been recommended that the apex court should judicially and judiciously look at their previous decisions on consent requirement in order to avoid conflict of interpretations. It also recommended that consent clause should completely be removed or time limit for governors to give consent be fixed and if it expires, consent should be deemed granted. Banks need to be very careful by ensuring that mortgagors obtained consent and from proper authority.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

The results of population pressure, urbanization and socio-economic growth have great social and economic impact on land issues in Nigeria.[1] This therefore makes people to move from rural to urban areas and therefore, congested urban areas are in need for expansion but land is too scarce.[2] Hence, to acquire land became even impossible because of the cost of compensation.[3] These difficulties faced by both the people and governments make it necessary for the government to do something about land distribution in Nigeria.[4] Consequently, the Rent Control Panel was appointed in 1976 and saddled with the responsibility to study the system of land distribution and speculation. They therefore recommended among other things, that the federal military government should take over all land in the country.[5] This and many panels and committees[6] necessitated the enactment of the Land Use Act which provides the framework of national policy in Nigeria and enables the government to control the use of which the land can be put in all parts of the country.[7]

To make the above policy of nationalizing land effective, the land use Act provides for "right of Occupancy"[8] which gives the holder a mere right of possession and not ownership.[9] Hence, two types of occupancies are provided for namely: Statutory Right

[1] Taiwo, A. *The Nigerian Land Law*. Ababa Press Ltd. Ibadan (2011) 201
[2] Yakubu, M. G. *Notes on Land Use Act* ABU Press ltd. Zaria, (1986) P. 9.
[3] Ibid.
[4] Oluyede, P. A. O., *Nigerian Conveyancing Practice, Drafting and Precedents.* Heinemann Educational Books Nigeria Plc, Ibadan, (1994) p. 324.
[5] Yakubu op cit. p. 10.
[6] The Constitution Drafting Committee (CDC) which was set up to prepare the 1979 constitution etc strongly recommended for nationalization of all underdeveloped lands in Nigeria to allow the landless land for shelter and sustenance.
[7] Omotola J. A. *Essays on Land Use Act, 1978,* University Press (1984), p. vi.
[8] Taiwo, A. op. cit. p. 208.
[9] Ibid 210 -211

of Occupancy (SRO) and Customary Rights of Occupancy (CRO).[10] However, the Act stipulates that those rights granted to holders can only be alienated when governor's consent is first had and obtained.[11] And failure to secure that consent may render any transaction or alienation null and void.[12]

Therefore the above provisions of the land use Act[13] make land transactions very difficult, thereby making grants very complicated. These problems can among others be attributed to inadequacy of the law regulating land transaction (Land Use Act), on one hand and the conflict of interpretation of the requirement of Governor's consent on the other. Thus, the research aims at appraising and analyzing alienation of right of occupancy, consent requirements and the problems it created. It also looks at the issues and challenges of the area and proffers some solutions.

1.2 Aim and Objectives of the Research

The aim of this research is to appraise alienation of the right of occupancy under the Nigerian law. The objectives of the research are:

a. To analyze Governor's consent under the Land Use Act,
b. To examine problems and controversies created by the consent requirement as well as the hardship meted out by the interpretation of sections 21 and 22 of the Land Use Act.
c. To also bring out some issues and challenges and finally offers some solutions to the problems associated with the area of the research.

1.3 Scope of the Research

[10] Ibid
[11] See generally s. 22 of the Land Use Act cap L5 LFN 2004.
[12] S. 26 ibid
[13] SS. 22 and 26 Ibid

This research work is restricted to Alienation of Right of Occupancy in Nigeria. Hence, more emphasis is placed on right of occupancy, alienation of right of occupancy and the requirement of governor's consent as provided under Sections 21 and 22 of the Land Use Act. More so, the work touches some aspects of alienation under customary law, other laws and some other legislation As such, local cases on alienation of land in Nigeria, some of the provisions of the Land Use Act and other legislations on alienation of land are referred to.

1.4 Statement of the Problem

One of the problems the research discovers is that of consent requirement, to which the Act stipulates that it must be first had and obtained from the governor of a state.[14] This is because even though there have been interesting developments from the courts since the ruling in ***Savannah Bank Ltd. v. Ajilo***[15] concerning governor's consent, yet some decisions appear to be directly opposite of Ajilo's case.[16] This creates problems of conflict of interpretation of the provisions of governor's consent as well as controversial decisions by the courts. This is because, the Supreme Court has recently gone back to its earlier decision in Ajilo and held that any alienation without the consent Government of the Governor or Local Government as the case may be is null and void

[14] Section 22 of the Land Use Act, cap L5,Laws of Federation of Nigeria, 2004. See also Akujobi, O. R. *'' Governor's Consent under S. 22 of the Land Use Act: the position since Savannah Bank v. Ajilo".* Land Use Act Twenty Five Years After. Journal of Department of Private and Property Law, Faculty of Law, University of Lagos, Nigeria (2003) p. 223.

[15] (1989)1 NWLR (pt. 97) p. 305. Where the Supreme Court held that any transaction entered into without Governor's consent is null and void notwithstanding the fact the defendant wanted to benefit from his wrongful conduct.

[16] E.g. the case of Adedeji v. National Bank (1989)1 NWLR p. 212. Which was decide in the same year with that of Ajilo's.

Thus, in ***Nigeria Industrial Development Bank Ltd v. Olalomi Industrial Ltd***[17]. There was a mortgaged transaction without Governor's consent and the mortgagor wanted to invalidate the transaction on ground of lack of governor's consent. The court in refusing the mortgagor's application held inter alia that *"... It is my view that it will be in the interest of justice to do so rather than allow the mortgagor to eat his cake and still have it back, the court shall resist at all cost the attempt at using it as an engine of fraud or cheating or dishonesty''.*

Again, in ***Alh. Ayotunde Seriki v. Sefi'u Olukorede***[18]. It was held that one cannot have a right of action when he or she comes to a court of justice in an unclean manner. It goes to say that equity will not allow a person to benefit or profit from his own crime, fraud, immorality or illegality as in the case of failure to obtain the Governor's consent to alienate his or her right[19].

However, the decision in ***Awojugbagbe Light Industry v. Chinukwe***[20] represents a means to moderate the excesses of the wisdom in Ajilo. One of the main issues in that case was whether the land use Act forbids some forms of agreement to alienate. The Supreme Court held that the holder of a statutory right of occupancy is certainly not prohibited by S. 22(1) of the Land Use Act 1978 with a written agreement in form of negotiation which may end with a written agreement for presentation to the government for his consent or approval. This is because, the Act does not prohibit a written agreement evidencing an intention to transfer or alienate land. Thus, to hold that a contravention or non-compliance of S. 22 of the Act occurs at a time when the holder of

[17] (2002) 5 NWLR (pt. 761) 532 at 548
[18] (1999) 3 NWLR pt. (595) p. 469 at 480-481.
[19] See Taiwo, A. *The Nigerian Land Law* op. cit. 230
[20] (1995)4 NWLR (pt. 390) 379 S.C

Statutory Right executes or seals a deed of mortgage is tantamount to defeating the spirit and intendment of S. 22 of the Act.

Another decision that creates controversy is ***Okuneye v. F.B.N. Plc***[21] where the bone of contention was whether governor's consent is necessary for equitable mortgage. The court held that a mere deposit of title deeds of property to secure a loan is not an alienation of the holder's statutory right of occupancy by the definition under S. 22 of the Act, and therefore, governor's consent is not required. This decision appears to have been reached per incurriam as no reference was made to S. 51 of the Act where mortgage is comprehensively defined to include a second and subsequent mortgage and equitable mortgage as well. So the Act unequivocally stipulates that any alienation made without governor's consent is null and void notwithstanding the fact that the alienation is by assignment, mortgage, transfer of possession, sublease or otherwise.[22]

Finally, in ***Chief Belonwo Ugochukwu v. Cooperative and Commerce Bank Nigeria Ltd***[23]. The Supreme Court frowned at conducts similar to that in Ajilo's case[24] where it held that a mortgagor who was to seek and obtain consent shall not be allowed to turn round and assert that the mortgaged deed was null and void for lack of governor's consent and that he shall not be allowed to benefit from his own wrong.

Surprisingly, in recent case of ***Union Bank of (Nig.) Plc & Anor v. Ayodire & Sons (Nig) Ltd***[25], the Supreme Court went back to its earlier decision in Ajilo and held that a mortgagor can still turn round to benefit from his wrongful conduct. This unfortunate

[21] (1996)6 NWLR (pt. 457) 749 CA
[22] See generally s. 22 of the Land Use Act Cap L5, LFN 2004.
[23] (1996) 6 NWLR (pt. 456) 524, see also *Nigerian Industrial Development Bank Ltd v. Olalomi Industrial Ltd* (2002) 5 NWLR (pt. 761) p 532
[24] It frowned at the conduct of some mortgagors who refused to obtain consent but later come back and seek to invalidate the transaction, even though the law says that they are the ones to obtain consent not the mortgagors
[25] (2007) 12 NWLR (pt. 1052) 567

development put the Court of Appeal in a dilemma as to which of the Supreme Court's decision to apply in the case of ***Pharmatic Industrial Project Ltd v. Trade Bank (Nig) Plc 84 others***[26]that came before the Court of Appeal barely two years after the Supreme Court's decision in ***Union Bank v. Ayodire***[27]

Another problem of this research is that of non-compliance. This is because the cumbersome nature of consent requirement makes many people to alienate land without governor's consent. Thus, the aims and objectives of the Land Use Act (which vests all lands on the governor and gives him power to give consent for any alienation) have been defeated.

The above, among other problems leads to the questions as to whether the theory and practice of governor's consent has helped to realize the objective of the Act and as to whether the land is available to those who are willing, ready and able to use it. Hence, the research centres on analysis of those problems and proffers some solutions to same.

1.5 Justification of the Research

This research is necessitated as a result of the problems of alienation of land in Nigeria. Thus, it would be of great assistance to legal practitioners, most especially those specialized in property and conveyancing law, law lecturers, judges and justices of various courts of record, law students, banks and their customers who participate in mortgage transactions and any other person who has interest in land transactions. Consequently, people that engage in land transactions would be enlightened and finally comply with the requirement of the law.

[26] (2009) 12 NWLR (pt. 1159) p. 577
[27](Supra)

1.6 Literature Review

The area of this research is statutory oriented and it came into effect when the Land Use Act came into operation.[28] Therefore, most of the literatures about this area can only be traced from 1978 to date. One of the authors that contributed much on this area is Omotolar J. A.[29]. He highlighted the necessity that facilitated the enactment of the Land Use Act, the impact of Sections. 22 and 26 of the Act i.e. issues of governor's consent and effect of non-compliance with the requirement of consent. Yet he does not take necessary steps to stipulate the impact of the interpretative misconceptions of the Act by the courts. This is what this research sets out to achieve

James, in his book[30] critically analyzed consent requirement. He discussed problems of sale or assignment and mortgage transactions, particularly the hardships that both the mortgagors and mortgagees face. However, he made little attempt to discuss the emerging issues with consent requirement. This is a gap that this research fills.

Taiwo,[31] is another recent author that contributed hugely on the aspect of alienation of land in Nigeria. He succeeded in analyzing issues of Right of Occupancy, impact of Right of Occupancy and requirement for governor's consent. He also made effort to highlight many recent cases on the area.[32] However, no attempt was made by the author to analyze the inadequacies of the Act, more particularly Sections 22 and 26.[33]

[28] i.e. in 1978 when the National Assembly passed it and came into operation on…..
[29] *Essays on Land Use Act*, 1978, Lagos University press (1984), p. vi.
[30] *Nigerian Land Use Act: Policy and Principles,* University of Ife Press, Ile- Ife, Nigeria. (1987). 176-189.
[31] Taiwo, A.*Nigerian Land Law*, Ababa press Ltd. Ibadan, Nigeria, 2011.
[32]E.g. Mr. Mojisola Edebiri v. Prince Omotayo Daniel & another (2009) 8 NWLR (pt. 1142) 15 at 27, Edohoeket v. Iyan (2010) 7 NWLR (pt. 1192) 43
[33]i.e. the controversial sections that require for Governor's Consent in case of any alienation as well as the effect of non-compliance of the provision of consent requirement.

Yakubu M.G.[34] viewed that any transfer of Right of Occupancy by assignment, lease, sale, mortgage, sublease, bequest or otherwise made without the consent of the governor first had and obtained is invalid. However, this assertion was probably made prior to the Supreme Court decision in the case of ***Okuneye v. F.B.N Plc***.[35]Hence, the author did not talk about the problems of interpretation of the provisions dealing with alienation of right of occupancy[36].

Again, Olong A.D.M[37] maintained that consent requirement to alienation of land in Nigeria has its philosophical basis in the concept of ownership. Hence, its potentials are so great that in recent times it has become the focus of government policy. He again opined that since alienation is one of the incidents of ownerships, one can therefore alienate his interest in land without consent of anybody.[38] But with the advent of the Land Use Act, title to land became vested in the Governor who serves as a trustee to all Nigerians.[39] However, the author did not take time to dwell on the subject matter[40] let alone hammer on the conflicting decisions of the courts in trying to interpret Sections 21 and 22 of the Land Use Act respectively.

Another good literature about this area is that of Taiwo L.[41] who analyzes some of the problems associated with the practical implications of section 22 of the land use Act,

[34] Yakubu, M. G. *Land Law in Nigeria*, Macmillan Publishers, Nigeria, (1985) p.20
[35] (1996) 6 NWLR (Pt. 457) 749 C. A. In that case, the Supreme Court held that Governor's Consent is not required in case of equitable mortgage
[36] i.e sections 21 and 22 of the Act
[37] Olong, A.D.M. *Land Law in Nigeria* (Second Edition) Malthouse Press Limited, Lagos (2011) 120
[38] He maintained this stand by stating the position of Southern Nigeria before the promulgation of the Land Use Act 1978, where the consent needed was that of the family head if the land was a family property or consent of the Land Lord if it was a lease hold land with assignment covenant
[39] O. Olong, A. D. M. Op.cit
[40] He finished everything in 3 pages
[41] ''*Practical Implications of the Land Use Act, 1978, on Mortgages''* In: Adigun, O. (ed) the Land Use Act Administration and Policy Implication, Lagos University Press (1991) p. 142.

however he made little or less contribution about the current problems with the sections.[42]

Madaki,[43] Succeeded in highlighting some of the cumbersome nature of the governor's consent. Yet, he did not take time to dwell on the emerging issues related therein. That is issues of recent Supreme Court's conflicting decision that creates problems to lower courts

Aboki, [44] makes some criticisms about the requirement of governor's consent on alienation of Right of Occupancy. However, he placed much emphasis on the decision in ***Savannah Bank Ltd. v. Ajilo***.[45]

Taiwo, in his article[46]took time to discuss problems with consent requirement for alienation of right of occupancy and how the courts interpreted the phrase *'consent first had and obtained'.* However, he has not contributed on the conflicts of interpretation of the consent requirement by our courts. And this lacuna is what this research has set out to achieve.

Another literature on this research is that of Owolabi,[47]who did an expository analysis on alienation of land in Nigeria. However, he emphases more on the general provisions of the Land Use Act and the methods of alienation prior to the commencement of the Act.

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[42]i.e. the problem of the difficulty created by the section and the need for amendment of the entire Act.

[43]Madaki, A.M."*The Land Use Act, Years After Its Enactment*: *A Critical Assessment''* In: Kanam, S. M. G. (ed.) Contemporary Issues in Nigeria: Legal Essays in Honor of Hon. Justice Usman Faruk Abdullahi, A Publication of Private Law Department, Faculty of Law, ABU, Zaria University Press (2006) p. 403

[44]Aboki, Y. *An Introduction to Statutory Land Law* (Unpublished Class Material) (2013) p. 14.

[45] Supra

[46] Taiwo, .E.A. *''Interpretation and Construction of The Phrase 'Consent First Had and Obtained' under Section 22 of The Land Use Act, 1978'',*vol. 4.University of Ibadan Journal of Private and Business Law, University of Ibadan Press, (2005) 79-86

[47] Owolabi, K. A. *''Land Use Act: Why Does Therapy Become Pathology?''* University of Ibadan Law Journal, vol. 1 No. 1, Ibadan University Press, (2011) 257-282.

Taiwo, E.A. in his article titled; ''*The Effects of Failure to Obtain Consent to Alienate Rights under the Land Use Act and the Emerging Equities''* [48]brought out and analyzed the hardships suffered by the mortgagees. But he has not emphasized on conflicting decisions of the court which we submit are the causes of any hardships that people might suffer in land transactions.

Olawoye,[49] discussed the right of a holder to alienate his right of occupancy and opined that such right is hinged on governor's consent. Though, he explained right of occupancy, alienation and governor's consent, he however did not discuss the major problems with consent. And these problems and controversies are what this research aims at achieving.

Omotola[50]examined the provisions of sections 21 and 22 that deal with the requirement of governor's consent on alienation of right of occupancy. He recommended that governors should adopt the provisions in section 22 (2) in all cases dealing with transfer of interest arising before the Act and permit the citizens to follow the old practice relating to their transfer while giving prompt consent where required in an automatic manner. He however did not discuss the conflict of interpretation of the provision of section 22 generally.

Babaji,[51] made enormous contributions about this area of research. He highlighted the problems created by the entire Land Use Act, namely it leads to underdevelopment of the economy, and the issue of the "Half Hectare Rule" etc. Unfortunately, he made no

[48] University of Ibadan Journal of Private and Business Law, Vol. 5 University of Ibadan Press. (2006) 171-185.

[49] *Olawoye, C. O. ''Statutory Shaping of Land Administration Up to the Land Use Act''.* In Olakanmi, J. (ed.) Land Law Readings and Cases,1st edition, Law Lords Publications Abuja Nigeria (2009) at pp. 25-31

[50]Omotola, J. A. '' *The Certificate of Occupancy,''* In Olakanmi, J. (ed.) Land Law Readings and Cases,1st edition, Law Lords Publications Abuja Nigeria (2009) 52 - 58

[51] Babaji H. Z. Alienation of Rights of Occupancy in A Developing Economy: A Critical Analysis of the Provisions of the Land Use Act.

attempt to analyze the problems created by S. 22, more particularly the issue of conflicting interpretation of the provisions of sections 21 and 22 of the Act.

The courts too have over the years demonstrated some level of judicial activism on this area. Hence, there are various judicial pronouncements on the concept of alienation of land in Nigeria, when to alienate, how to (the requirement of governor's consent),[52] etc.

Thus, in the *locus classicus* case of ***Savannah Bank Ltd. v. Ajilo***[53] the scope of the provision of S. 22 of the land use Act (which is one of the most central issues of this research) came up for determination. In that case, Chief F. R. A. Williams (SAN) contended that the provisions of S. 22 of the Act implies that, any alienation made without governor's consent was unlawful and consequently any transaction conducted therein was illegal going by the provision of S. 26 of the same Act. The court held that the alienation was unlawfully made and the mortgage transaction was illegal, notwithstanding the fault of the grantor (Ajilo) to secure governor's consent.

However, in ***Oil Feld Supply Centre Ltd. V. Joseph Lloyd Johnson***.[54] The same supreme court held that certain equities will not permit the company to benefit from their own illegality".[55] This goes with the equitable maxim that says "*he who comes to equity must come with clean hands*"

Again, in ***Okunneye v. F. B. N. Plc***[56] the court held that governor's consent is not required while creating an equitable mortgage. This decision also contradicts the

[52] As In Savannah Bank Ltd. v. Ajilo (1978) 2 NWLR (pt. 57) p. 421, Awojugbagbe Light Industry Ltd. v. Chinukwe (1995)4 NWLR (pt. 390) 379 S.C, Oil Field Supply Centre Ltd. v. Josph Lloyd Johnson (1986) SC, 30 etc.
[53] Supra
[54] Supra
[55] Per Kayode Eso JSC (as he then was) Supra.
[56] (1996)6 NWLR (pt. 457) 749 CA

provision of section 51 of the Land Use Act which defines mortgage to include equitable mortgage.

Recently, the Supreme Court in ***Union Bank of (Nig.) Plc & Anor v. Ayodire & Sons (Nig) Ltd***[57] went back to its previous decision in Ajilo, notwithstanding the distinction of the facts of the two cases and the effects of the decision on mortgagees who suffer for the wrongs they have not committed.

Therefore, the above cases even though they highlighted the significant contributions of the courts in the area of this research, yet, they ended up in confusing the practical application of governor's consent. For, some of the cases were decided in the opposite by one court.[58]

As such, the advertised motive of curbing land speculation and removal of the bottlenecks in land acquisition and tenure has been watered down by the event of difficulties brought about by the consent provision of Land Use Act. Thus, the writer embarks on this research to identify the causes and effects of these difficulties and itemize some recommendations that will help in solving the problems associated with alienation of land in Nigeria.

1.7 Methodology

The methodology adopted in this research is doctrinal i.e. library oriented research that comprises:

a. Primary authorities which includes Act of the National Assembly, Laws of the states and case laws.

[57] (2007) 12 NWLR (pt. 1052) 567
[58] They were decisions of the Supreme Court.

b. Secondary authorities, which comprises relevant information from leading authorities, textbooks on the subject matter of the research, journal articles, opinions of specialists and practitioners on aspect of law relating thereto.

1.8 Organizational Layout

Chapter one of this research deals with the General Introduction of the subject matter. It also highlights the Objectives of the research, Scope of the research, Statement of the Problem of the research, Justification of the research and Organizational Layout.

Chapter two is Analysis of the Nature and Scope of Right of Occupancy. It starts with an Introduction, Types of Right of Occupancy, Acquisition of Rights of Occupancy, Contents of Right of Occupancy, Duties and obligations of a Holder of a Certificate of Occupancy, Rights of a Holder of a Certificate of Occupancy Nature of Interest Created by Right of Occupancy, How to Obtain a Certificate of Occupancy and Effects of Grant of Right of Occupancy by Government, Tenure of Right of Occupancy.

Chapter three is titled Alienation of Right of Occupancy. It starts with an Introduction, Meaning of Alienation, Nature and Scope of Alienation, Types of Alienation, Consequences of Alienation Without consent and Legal Restriction on Alienation of Land.

Chapter four deals with An Analysis of The Requirement of Governor's Consent for Alienation under the Land Use Act, It starts with Introduction, Brief History of Consent Requirement, One Who Seeks for Governor's Consent, Philosophical Basis for Governor's Consent, Emerging Issues of Governor's Consent Since Savannah v. Ajilo and Problems with Securing.

Chapter five is a Summary and Conclusion which comprises, Summary, Findings, Recommendations, and Conclusion.

CHAPTER TWO

ANALYSIS OF THE NATURE AND SCOPE OF RIGHT OF OCCUPANCY

2.1 Introduction

The Land Use Act introduced a new and uniform system called a Right of Occupancy for the entire country[1] which gives a holder a right to possession of a land. A Right of Occupancy however was not defined under the Act, but some authors[2] and judicial decisions[3] have linked it to a lease. Omotola[4] opined that a Right of Occupancy was a hybrid form of right, something between a personal and proprietary right. He however viewed that there was nothing wrong in the right being a new form of right as the categories of rights over land and need not be closed.[5]

A right of Occupancy was defined by Justice I. A. Umezulike[6] as the right to use and occupy land in accordance with the terms and tenure set forth by the state within the provisions of the Act. The researcher sees a Right of Occupancy as a right to possess or use a land subject to the stipulations of the Land Use Act.

More so, the Land Use Act conferred government with powers and control over land acquisition in Nigeria. Thus, Section 1 of the Act provides that:

> Subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.[7]

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[1] However, the Land Tenure Law of 1962 first introduced the right of occupancy system, though applicable only to northern Nigeria then.
[2] Elias, T. O. *Nigerian Land Law and Custom* Sweet& Maxwell London, (1971) p. 284, Onwuamaegbu, M. O. *Nigerian* Sweet& Maxwell, London,(1966)p. 216
[3] Director of Lands v. Sohan (1952)1 TLR 631, Henvinchsorft v. Dodd (1960) EAR 631
[4] Omotola, J. A. Press p.24
[5] Ibid
[6] Umezulike, I. A. *The Land use Act, More Than Two Decades After, And Problems of Adaptive Strategies of Implementation,*Snapp Press Ltd Enugu (2004) 45
[7] See generally Section 1 of the Land use Act cap L5 L.F.N 2004.

From the foregoing provisions of the Act it can be established that right of occupancy is subject to the control and management of the government be it local or state government.[8] This chapter analyzes the nature and scope of Right of Occupancy. It also discusses the problems the courts normally face when two grants are issued to two different grantees on same land. It again clearly states out the position of the law in that respect and offer some recommendations that the writer thinks will serve as solution to the problems.

2.2 Types of Right of Occupancy

Right of occupancy introduced by the Act are:

(a) Statutory Right of Occupancy and

(b) Customary Right of Occupancy.

However, the above two types are classified into four, namely:

(i) Statutory Right of Occupancy expressly granted by the Governor[9]

(ii) Statutory Right of Occupancy deemed granted by the Governor.[10]

(iii) Customary Right of Occupancy expressly granted by Local Government.[11]

(iv) Customary Right of Occupancy deemed granted by the Local Government.[12]

[8] Sections 1(2), 5 and 6 ibid
[9] Section 5(a) (a) Ibid, see also Dabo v. Abdullahi (2005) 2 S.C (Pt. II) 75.
[10] Section 34, Ibid
[11] Section 6, Ibid
[12] Section 36, Ibid

2.3 Statutory Right of Occupancy Expressly Granted

Section 51 of the Act defines Statutory Right of Occupancy as a right of occupancy granted by the Governor under the Act. Again Section 5(1) (a) provides that "*it shall be lawful for the state Governor in respect of land, whether or not in an urban area to grant statutory rights of occupancy to any person for all purposes*". However, this right is not absolute in that it is subject to some stipulations and conditions.[13] Thus, Section 8 of the Act provides that:

> Statutory Right of Occupancy granted under the provisions of Section 5(1) (a) of this Act shall be for a definite term and may be granted subject to terms of any contract which may be made by the Governor and the holder not being inconsistent with the provisions of the Act.[14]

The implication of the above section is that right occupancy has a life spam (99 years) and that once a holder does anything which is inconsistent with the provisions of the Land Use Act, his right may be revoked

However, by the provisions of Section 5, it can be deduced that the power of the Governor to grant Statutory Rights of Occupancy is not limited to land in an urban area; he may also grant land in non-urban area.[15] It is submitted that the determining factor in this case is not the location of the land (urban and non-urban), but the status of the person who grants the right of occupancy i.e. either the Governor or the Local Government as the case may be.[16]

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[13] Section 8, Ibid
[14] See also Olong, A. M. D. *Land Law in Nigeria* 2nd Edition, Malt house Press Ltd, Lagos (2011) p. 215
[15] Taiwo, A. *Nigerian Land Law*, Ababa Press Ltd, Ibadan, Nigeria (2011) p. 209
[16] Ibid see also the cases of Olagunju v. Adesoye (2009) 9 NWLR (pt 1146) 225 (a) 265 (SC) Teniola v. Oluhankan (1999) 5 NWLR (PT 602) 280

2.4 Statutory Right of Occupancy Deemed Granted

Where land in an urban area was developed before the commencement of the Act, it remains vested in that person as if the Governor had granted to that person a statutory right of occupancy.[17] Consequently Section 34(1) and (2) of the Act provides:

(1) ''the following provisions of this section shall have effect in respect of land in an urban area vested in any person immediately before the commencement of this Act ''

(2)'' where the land is developed the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act.''

The above implies that any holder of a developed land that holds prior to the commencement of the Land Use Act should hold such land as deemed grantee as if the was granted to him by the governor

Finally, whether it is express or deemed grant, the Governor can issue a certificate as evidence of right of a holder.[18] And once that certificate is issued a holder has a right to possession of the land granted.

Therefore, the distinction between actual and deemed grant is that where a grantee under actual grant holds a land subsequent to commencement of the Land Use Act a deemed grantee holds prior to the commencement of the Act, and it remains vested in him as if it were granted by the governor. However, in ***Savannah Bank of Nigeria Ltd.***

[17] Olong, A. M. Op.cit
[18] Section 9 of the Act

v Ajilo[19] the Supreme Court held that whether actual or deemed granted, Governor's consent is required for alienation. That notwithstanding the contention of Rotimi Williams that the provisions of sections 21 and 22 of the Act are not applicable to deemed grant as deemed grant is different from actual grant. The Supreme Court put it thus:

> The holder of a statutory right of occupancy granted by the governor, as contained in section 22 of the Act, includes the implied grant in section 34(2) and 36(2) of the Act. Any failure by a holder under section 34(2) or 36(2) of the Act to comply with the provisions of section 22 would attract the full regour of section 26 of the Act render a transaction or an instrument arising there from null and void.

The implication of the above decision is that, for the purpose of application of sections 21and 22 of the Act, there is no distinction between Deemed and Actual or Express grants. Consequently, the researcher is of the view that terms that are specifically mentioned in the certificate of occupancy but not mentioned under the Act may serve as features of distinction between the two grants.

2.5 Customary Right of Occupancy Expressly Granted

Section 51 of the Act defines Customary Right of Occupancy as "*the right of a person or community lawfully using or occupying land in accordance with customary law and includes a Customary Right of Occupancy granted by a Local Government under this Act*". This definition is vague in that it makes it as if it is only customary law that governs it and it excludes the Act from its operation. However, by Section 5(1) (a) the Governor can grant a Statutory Right of Occupancy whether or not the land is in urban area.[20] Thus in ***Olagunju v. Adesoye***[21] the Supreme Court held that the Governor of a

[19]Supra
[20] Taiwo, A. Op cit

State has the power to grant Statutory Right of Occupancy whether or not the land concerned is in urban or non-urban area.

Notwithstanding the above decision, the Act empowers the Local Government to grant Customary Right of Occupancy in respect of land not in an urban area to any person or organization, for agricultural purpose or for other purposes ancillary to agricultural purpose such as grazing, residential and other purposes.[22] Similarly, where a land was not in an urban area but such land was held and occupied for agricultural purposes, the holder after 1978 became entitled to continue to hold the land as if the customary right of occupancy had been granted to him by the Local Government.[23]

Thus, in ***Ogunleye v. Oni***[24] the Plaintiff claimed land based on document of grant made early 1978 and Certificate of Occupancy granted to him in 1983 by the Commissioner for Land. He asked for damages for trespass. The defendant on his part said he inherited the land from his father in 1936 for a valuable consideration. The court applied Section 34 of the Act and held that the plaintiff was not the holder of the land in dispute before 1978. The Certificate of Occupancy could therefore make him a holder of a Statutory Right from 1983. Again, since the defendant held the land before the Land Use Act came into force, the defendant was deemed to be the holder of Statutory Right of Occupancy granted by the Governor. Since the holder did not revoke the defendant Deemed Right before making a grant to the plaintiff, the Plaintiff's right was invalid and against the letter and spirit of the Act.

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

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[21] Supra
[22] Section 6 of the Land Use Act
[23] Ibid, Section 36.
[24]

Governor and it is clear from Section 5 that a Governor can grant a Statutory Right of Occupancy both in urban and non-urban areas.

2.6 Customary Right of Occupancy Deemed Granted

A holder of a Customary Right of Occupancy is deemed granted if he holds such land prior to the commencement of the Land Use Act and he will be said to be as a holder rightly granted by the Local Government.[25] Thus, Section 36(2) provides:

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

In affirming the right of a holder under a deemed grant, the Supreme Court held in the case of ***Adole v. Boniface B. Gwar***,[26] that the Land Use Act was not promulgated with the objective of abolishing all existing titles or rights to possession existing prior to its promulgation. Rather, it reinforces or strengthens title of prior holders who are deemed grantees but limits their interest to statutory or customary rights of occupancy as the case may be by removing radical title. So, Customary Right of title holder has not been taken away or extinguished with the coming into force of the Land Use Act. This case can be related with the case of Ajilo where the Supreme Court held that for the application of sections 21 and 22 there is no distinction between deemed and actual grants.

[25] Supra
[26] (2008) 11 NWLR (Pt. 1099) 562 (a) 588 & 606

Again, in ***CSS Bookshops Ltd & Ors v. Registered Trustees of Muslim Community of Rivers State & Ors***,[27] it was held that by virtue of Section 34(1),(2) and (3) of the Act where a developed land in an urban area was vested in any person immediately before the commencement of the Act, the land shall continue to be held by that person in whom it was vested as if the holder of the land was the holder of a Statutory Right of Occupancy issued by the Governor under the Act. And where the land is underdeveloped, portion of the land not exceeding half of one hectre in area shall continue to be held by the person in whom the land was vested as if the holder of the land was the holder of Statutory Right of Occupancy granted by the Governor in respect of the land.[28]

2.7 Acquisition of Right of Occupancy by Acts of Parties

The holder of a Right of Occupancy either Statutory or Customary has a power of disposal of his interest in land,[29] including improvements therein, by assignment, mortgage, transfer of possession, sublease or otherwise disposal of Right of Occupancy by assignment, mortgage, sale, etc. However this right is subject to the provisions of Sections 21 and 22 of the Act.[30]

2.8 Devolution of Right of Occupier upon Death

In the event of death of an occupier, the determining factors are whether the right of occupancy is statutory or customary. In this case, the personal law or customary law

[27] (2006) 11 NWLR (Pt. 992) 530 (a) 561-562, 567 & 574 See also Ilona v. Idakwo (2003) 11 NWLR (pt. 830) 53

[28] Ilona v. Idakwo Supra

[29] Babaji, H. Z. *Alienation of Right of Occupancy in Developing Economy:A Critical Analysis of the Provision of Land Use Act, No. 6 of 1978*. An LL.M. Dissertation (unpublished) Department of Private Law, Faculty of Law, ABU, Zaria (2008) p. 29

[30] For instance, Section 21 makes it mandatory for any transaction relating to land to be done with Governor's consent even though there are provisions under paragraph (a), (b) and (c) which provide exceptions to the general rule, e.g. paragraph (a) provides that consent is not required in case of equitable mortgage

existing in the locality where the land situate are generally applied respectively. Thus, Section 24 of the Act provides that:

> The devolution of rights of an occupier upon death shall (a) in case of a Customary Right of Occupancy (unless non-customary law or any other customary law applies) be regulated by the customary law existing in the locality in which the land is situate (b) in the case of a Statutory Right of Occupancy (unless any non-customary law or other customary law applies) be regulated by the customary law of the deceased occupier at the time of his death relating to the distribution of the property of like nature to right of occupancy.

It is therefore worth noting that the in case of Customary Right of Occupancy, the relevant law applicable is *Lex Situs* (the law regulating land in the place where the deceased died). For instance, an Ibo man who died in Zaria, unless English Law or any other customary law applies, *Lex situs* will apply. However, in case of Statutory Right of Occupancy, the relevant law applicable is (unless English law or customary law applies) personal law of the deceased. For instance a Hausa man who died in Inugu, personal law will generally apply.

> The devolution of rights of an occupier upon death shall (a) in case of a Customary Right of Occupancy (unless non-customary law or any other customary law applies) be regulated by the customary law existing in the locality in which the land is situate (b) in the case of a Statutory Right of Occupancy (unless any non-customary law or other customary law applies) be regulated by the customary law of the deceased occupier at the time of his death relating to the distribution of the property of like nature to right of occupancy.

It is therefore worth noting that the law of succession determines essentially the applicable rule of devolution and the heirs. The heirs may be determined according to

the applicable law of succession of the deceased who died intestate or may be prescribed by him where he died testate.

2.8 Acquisition of Right of Occupancy by Court Order

Rights of occupancy can be acquired by a court order.[31] This arises where there is a judgment against the holder of Right of Occupancy and was unable to settle the judgment debt. Consequently, the judgment creditor is allowed by law under the Sheriffs and Civil Process Act to attach the immovable property of the judgment debtor for disposition in satisfaction of the judgment debt.[32] Section 21(a) of the Land Use Act also recognizes this procedure though subject to the consent of the Governor.[33]

2.9 Contents of Rights of Occupancy

A Certificate of Occupancy is a document which contains agreement under which a holder takes grant from the grantor, usually a State Governor.[34] It is therefore a contractual document imposing some obligation on the grantor to refrain from doing certain acts to the parcel of land covered by his Certificate of Occupancy.[35]

Furthermore, Section 10 of the Act provides for the content of certificate of occupancy and it provides:

> Every certificate of occupancy shall be deemed to contain provisions to the following effect (a) that the holder binds himself to pay the Governor the amount fixed to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation (b) that the holder binds himself to pay the

[31] Babaji, H. Z. OP cit p. 29
[32] Ibid
[33] See Oder V Rules 3 – 10 of the Sheriffs and Civil Process Act and Judgment (Enforcement) Rules, Cap. S6 Laws of the Federation of Nigeria, 2004 It provides that Governor's consent is required in cases where the property is sold by or under order of any court under the provisions of the applicable Sheriffs and Civil Process Law.
[34] Section 10 of the Act
[35] Aboki, Y. *Introduction to Statutory Land Law In Nigeria* (Unpublished class material) (20113) p. 11

> Governor the rent fixed by the Governor and any rent which may be agreed or fixed on revision in accordance with the provisions of Section 16 of this Act.

However, the question to be asked here is that how many holders comply with the above conditions? And what action(s) a governor takes when such conditions are breached. In fact many people do not comply and the governor does not take action on that. It is in this light that the researcher questions the efficacy of this provision.

2.10 Duties and Obligations of a Holder of a Certificate of Occupancy

Once a right of occupancy is granted, the holder would be issued a certificate of occupancy which contains some duties and obligations upon him. The following are the obligations of a holder of certificate of occupancy:

(a) The holder binds himself to pay rent as prescribed under the Act from time to time.[36] This provision is more of a theory as practically you hardly can see a holder that strictly complies with this provision,

(b) Payment of incidental expenses if the Certificate of Occupancy is revoked due to non-payment of rent or refusal to accept a certificate after it was issued.[37]

(c) Payment in respect of unexhausted improvements.[38]

(d) The holder shall allow the Governor or his agent to enter into his land for inspection whenever that is necessary but the entry should be in the day time only.[39] It is our humble view that this provision violates the provision of the Constitution that provides for the right to privacy[40]

(e) The holder shall at all times maintain good and substantial repairs of all beacons or other land marks which defined the boundary of the area covered by the

[36] Section 10(b) of the Land Use Act
[37] Section 9(3), Ibid
[38] Section 10(a), Ibid
[39] Section 11, Ibid
[40] Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (2011) as amended.

Certificate of Occupancy.[41] However, if he fails to maintain beacons or other land marks he should be liable for expenses incurred for erecting a beacon by the Governor.[42] This section is irrelevant as it will not serve as deterrence to a holder who refuses or fails to maintain beacon etc since he would be made to pay for the expenses incurred only. This by implication made the Governor a lender and holder a borrower.

(f) The Governor when giving his consent to an assignment, mortgage or sublease may require the holder to submit instruments executed in evidence of the easement, mortgage or sublease to the Governor for examinations.[43] This provision leads to nothing but delaying the process of procurement of consent.

(g) The holder shall not alienate a certificate of occupancy without the consent of the Governor or local government as the case may be.[44] This is a tautology; since section 22 of the Act has taken care of issues relating to consent, the researcher does not see the rationale behind the repetition.

2.11 Rights of a Holder of a Certificate of Occupancy

A holder of a Certificate of Occupancy has the following rights as provided under the Act.

(i) He has exclusive rights to the land, the subject matter of a Right of Occupancy against all persons except the Governor or the State where the land is situated.[45] The question here is what if another person has a better title? Can the word exclusive right to the said land still be applicable to extinguish the existing rights

[41] Section 13(1), Ibid
[42] Section 13(2), Ibid
[43] Section 22(2), Ibid
[44] Sections 22 and 21, Ibid
[45] Section 14, Ibid

of the one who has a better title? The answer to these questions will be provided in the course of this research.

(ii) He has the right to transfer, assign and mortgage any improvement on the land in accordance with the Act.[46]

(iii) An occupier has the sole right to the absolute possession of all improvements on the land.[47]

(iv) He is entitled to compensation if his certificate of occupancy is revoked for public interest.[48]

(v) The Governor should notify the holder of the new rent so fixed from time to time.[49]

(vi) As a lessee, a holder is entitled to quiet and undisturbed possession subject to good behavior.[50]

(vii) A holder is entitled to costs in respect of buildings, installation or improvement thereon after the revocation.[51]

2.12 Nature of Interest Created by Right of Occupancy

There have been divergent opinions as to the exact nature of interest created by Right of Occupancy. However, some writers view it as not a fee simple.[52] They base their argument on Section 1 of the Land Use Act which vests the government with the power and control of all land in the federation and this goes against the idea of fee simple estate under common law. For fee simple is highest interest an owner can have (radical

[46] Section 15(b), Ibid
[47] Section 15(a), Ibid
[48] Section 29(1), Ibid
[49] Section 19(3), Ibid
[50] Aboki, Y. Op cit pp. 11-13
[51] Section 29(4) (b) of the Act.
[52] Osimiri, U. J. *ApplicationforCertificateofOccupancy:PracticeandProcedure*: In (1991) Jus, Lagos, p.11, Ezejiofor, G. *"Land Use Decree: A Critical Review in Nigerian Judicial Review* (No. 2) 1997 pp.1-21"

title). Again, some of the sections of the Act tend to suggest that the interest created by the Right of Occupancy as a lease.[53] Thus, even Section 51 of the act defines "sublease" to include "a sub under lease" and the implication is that Right of Occupancy is a kin to lease.[54] However, this matter has been put to rest by the Supreme Court's decision in the case of ***Ezeanah v. Attah***.[55]where Niki Tobi JSC (as then he was) said:

> A holder of Certificate of Occupancy holds the title to the property and subject only to the conditions stipulated in the Land Use Act. A Certificate of Occupancy creates a term of years absolute or a lease for a number of years stated therein. The greatest legal estate that can now subsist under the Land Use Act is a term of years. The grant of term of years under a Certificate of Occupancy is in substance a lease.

Therefore, Certificate of Occupancy is merely evidence that a grantee has a Right of Occupancy customary or statutory.[56] Thus in ***Orlu v. Gogo Abite***[57] the Supreme Court held that a Certificate of Occupancy is never associated with title. A Certificate of Statutory or Customary Right of Occupancy issued under the Land Use Act 1978 cannot be conclusive evidence of any right; interest or valid title to land in favour of the grantee.[58]

2.13 How to Obtain a Certificate of Occupancy.

The procedure for obtaining Certificate of Occupancy varies from state to state; however, for the purpose of this research, we adopt that of Kaduna State as follows:

(i) **Application form:** This is obtainable from State Ministry of Lands and Survey. The form shall be completed and returned along with

[53] See Section 22 of the Land Use Act which provides that it shall not be lawful for the holder of a Statutory Right of Occupancy granted by the Government to alienate his Right of Occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise however without the consent of the Governor first had and obtained.
[54] See section 8 of the Act
[55] (2004)7 NWLR (Pt. 873) 468 (a) 500-501 paras A-H
[56] Olong, A. M. D. *Land Law in Nigeria* Op cit
[57] (2010) 8 NWLR (Pt.1196) 307 SC
[58] See also Boye Ind. Ltd v. v. Sowemino (2010) AAL FWLR (Part 521) p. 1642

(a) Passport photograph

(b) Tax clearance certificate

(c) Non refundable fee

This depends on whether the application is for residential, commercial, industrial, educational, agricultural or religious purpose.

(ii) **Survey:** Upon receipt of the application, the applicant will be required to pay a survey fees to enable the office of the Surveyor General carryout the survey of the land, determine its size and establish beacons. The office of the Surveyor General also draws a survey plan of the land.

For either developed or underdeveloped land, land officials will further carryout valuation of the property to determine its capital value upon which the applicant is required to pay six percent (6%) value of the property to the government. Upon approval of the survey plan by the Surveyor General, the applicant is processed by the land officials and set to the Land Use Act and Allocation Committee of the land.

(iii) **Letter of Grant:** After grant by the Governor, a letter of grant will be issued to the applicant for acceptance or rejection. The grant will spell out what has been granted.

(iv) **Endorsement of Certificate of Occupancy by the Governor:** Upon payment of prescribed fees by the applicant, a Certificate of Occupancy is printed and sent to the Governor for endorsement.

(v) **Preparation of Title Deed Prints:** This contains proper description of the property in terms of location, size and dimension upon which relevant charges would be assessed for payment by the allotee

(vi) **Registration of Certificate of Occupancy:** After endorsement by the Governor, the Certificate of Occupancy is sent to the Land Registry for registration.

(vii) **Release of Certificate of Occupancy:** After due registration, the original Certificate of Occupancy is released to the holder while a counterpart copy is kept at the Land Registry and the Land Administration office.

2.14 Effect of a Grant of Right of Occupancy by Government

Section 5(2) of the Act provides that "upon the grant of a Statutory Right of Occupancy under the provisions of Subsection (1) of this section, all existing rights to the use and occupation of the land which is the subject of the Statutory Right of Occupancy shall be extinguished". In interpreting the above section, the courts before the year 2003, arrived at divergent judicial interpretations.[59] In some cases the Supreme Court held that subsequent grant of a Statutory Right of Occupancy extinguished the previous one.[60] However, the principle of first in time, first in law was applied in ***Dantsho v. Muhammed***[61] and **Ibrahim v. Muhammed**.[62] In these cases the Supreme Court held per Katsina-Alu JSC (as he then was) that Section 5(2) of the Act cannot be construed to mean that once a Statutory Right of Occupancy is granted it extinguishes existing rights of particular interest.

In reviewing the Supreme Court's decision in Dantsho,[63] Madaki[64] opined that the Supreme Court's conclusion is correct but its interpretation and reasoning are defective,

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[59] Madaki, A. M. *''The Relevance Or Otherwise of Section 5 (2) of the Land Use Act Examined,''* Journal of Pr ivate and Property Law, University of Benin (2011) p. 185

[60] Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) p. 387, Titiloye v. Olu (1991) 7 NWLR (Pt.205) p. 519, Debup v. Kolo (1993) 12 SCNJI, etc. where the Supreme Court held that the grant of a Statutory Right of Occupancy extinguishes existing rights

[61] (2003) 6 NWLR (Pt. 817) p. 457

[62] (2003) 6 NWLR (Pt. 817) p.615

[63] Surpa note 3

[64] Madaki, A. M.Op cit.

in that their interpretation and reasoning seem to suggest that a Right of Occupancy consists of series of rights some lesser and others important rights.[65] Thus, to hold as they did in those cases in respect of Section 5(2) of Act amounts to drawing a distinction without a difference.[66]

The above view is what the writer subscribes to, for before the Supreme Court interpreted the section, it had to analyze the entire provisions of the Act as a single document so as to discover the true meaning of a particular section or provision.

Consequently, the above can go a long way to answer the question whether or not a grant of Certificate of Occupancy supercedes vested right. The Supreme Court in its recent decision in ***Omiyale v Macaulay***[67] held that the prerequisite for a valid grant of a Certificate of Occupancy is that there must not be in existence the valid title of another person with legal interest in the same said land at the time the Certificate was issued. In other words, there must not be in existence at the time when the certificate was issued a statutory or customary owner of the land in issue or dispute who was not divested of his legal interest to the land prior to the grant. Thus, where a Certificate of Occupancy to one of two claimants who has proved a better title (as the appellant in the instant case), it must be deemed to be defective, to have been granted or issued erroneously and against the spirit of the Land Use Act and the holder would have no legal basis for a valid claim over the land in dispute. This is because the effect of section 34 of the Land Use Act on or in respect of the title of a person with title to land before the coming into force of the Act is that vested rights cannot be defeated by the application of say sections 1 and 5 of the act. As such where it is shown by evidence that another person

[65] Ibid
[66] Olong, A. M. D. Op cit
[67] (2009) 7 NWLR (pt.1141) pp 605-607

other than the grantee of a Certificate of Occupancy had a better right to the land upon which the grant relates, a court would have no option but to set aside the said grant or otherwise discountenance it as invalid.[68]

On whether registration of the said Certificate of Occupancy cures irregularity therein, the court further held that it does not and cannot cure or validate any irregularities in its procurement. Mere registration (as was done by the appellant) does not and will not validate spurious or fraudulent instrument of title or transfer or grant which in law patently remains invalid or defective.[69]

Finally, the Supreme Court concluded that a Certificate of Occupancy whether statutory or customary, is at best *prima facie* evidence of title to the land covered by it. But its exclusive possession is rebuttable.[70]

2.15 Conclusion

Right of occupancy under the Land Use Act gives an occupier nothing more than right of possession, right to use or alienation but with the consent of the governor. However, the researcher has problem with Section 5(2) of the Land Use Act which provides that upon the grant of a Statutory Right of Occupancy under Subsection (1) of section 5, all existing rights to the use and occupation of the land which is the subject of the Statutory Right of Occupancy shall be extinguished in that it makes it as if a certificate of occupancy contains many rights with various statutes.

[68] Supra
[69] Supra
[70] See also Dapub v kolo supra.

CHAPTER THREE

ALIENATION OF LAND UNDER THE NIGERIAN LAW

3.1 Introduction

Alienation has been defined by the Black's Law Dictionary[1] to mean "the transfer of property and possession of lands, tenements, or other things, from one person to another. The term is particularly applied to absolute conveyance of real property''.[2]

In ***Ofodile v. Anambra State***[3] alienation was defined as the transfer of the right by the holder to another person or creation of interest in an estate for the benefit of another person. In other words, alienation of land can be defined as the power of an owner of property (e.g. land) to voluntarily transfer or dispose of his interest in the property to another.[4]

Be that as it may, alienation of land has been effective since before the commencement of the Land Use Act. The Act only hands over the total control and management of land to the Governor or Local Government as the case may be.[5] This chapter aims at analyzing alienation of Land under the Nigerian Law thereby briefly examining alienation under Customary Law, alienation under other laws, under statutory laws and alienation under the Land Use Act. It also examines at consequences of alienation of right of occupancy without requisite consent of the Governor first had and obtained.

3.2 Temporary and Permanent Alienation

As earlier stated while introducing this chapter, alienation is a voluntary transfer of interest in the property to another. Thus, generally the easiest identifiable form of

[1] Black, H.C.M.A *Black's Law Dictionary* 6th Ed. St. Paul, Minn West Publishing Co. U.S.A 1990
[2] Ibid
[3] (2001) 1 NWLR (pt.699) p.164
[4] (Supra)
[5] See Section 20(1)(a) and (b) of the Act.

alienation is parting with possession where a new occupier takes over the land as its new owner. Hence, transfer like mortgage, lease, sublease and sub under lease etc are regarded as temporary alienation while transfer such as sale, assignment, gift, etc are regarded as permanent alienation.[6]

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

3.3 Alienation under Customary Law

The history of alienation of land can be traced back to customary land tenure system. This is because it was not the practice in the past to alienate land. For land was considered to be held by its present owners in trust for future generations.[7] Therefore, the idea of inalienability was put by one of the Chiefs of Ijebu Ode when he said; "I conceive that land belongs to vast family of which many are living and countless members are yet unborn".[8] Elias also writes; "There is perhaps no other principle more fundamental to indigenous land tenure system through Nigeria than the theory of inalienability".[9]

Consequently, native law and custom do not recognize sale of land and the literature on this point is abundant.[10] This idea of indigenous land tenure system has been given judicial recognition in ***Lewis v. Bankole***[11] where

[6] Babaji H.Z. *Alienation of Right of Occupancy in Developing Economy* op. cit p.44
[7] Smith I.O. The Land Use Act, Twenty Years After. *University of Lagos Journal of Private and Property Law*, University of Lagos Press, Lagos (2003) p.200.
[8] He said this before the lands committee.
[9] Elias T. *Nigerian Land Law* (4th Ed) Sweet and Maxwell, London. 1971 p.147
[10] Coker, *Family Property among Yorubas* Sweets and Maxwell, London. (1966) p.40
[11] (1904) 1 NWLR p.102

Osborne C.J. declared: "The idea of alienation of land was undoubtedly foreign to native ideas in the olden days".

From the foregoing observations, it is not clear whether what is meant, is that alienation was forbidden by positive rule of customary law or whether it was merely not the practice in earlier times.[12] However, it is a well-known fact that under customary law, gift of land to closed relations and friends is common.[13] In addition to that, alienation of land may take the form of loan or borrowing, pledge and recently sale. So even though the above observations cannot be a justification for the origin of alienation in Nigeria, yet the consent principle has been the law and practice in alienation of family land.

3.3.1 Alienation by the Head of a family/ majority of principal members

Generally, for alienation of family land to be valid, all members of the family must approve otherwise it is void. However, alienation by head of a family without the consent of principal members is voidable. Thus, in ***Lukan v. Ogunsusi***[14]**.** The Supreme Court in that case held with reference to consent in the alienation of family land as follows:

1. The head of the family cannot alienate family property without the consent of the family, if he does, the sale will be voidable.
2. It must be taken to mean that every member has to give his consent. It is not enough if majority give their consent.
3. Whether the head of the family as against all principal members of the family, refused the alienation of family proper, the head cannot unreasonably with hold his consent for such a sale as against members of the family.

[12] Smith I.O. *TheLand Use Act, Twenty Years After.op. cit* p.200
[13] Ibid.
[14] (1972) 5 SC p.40

4. The effect of ***Ekpendu v. Erika***[15]***Esan v. Faro***[16] is that alienation of family land by the head of the family is voidable whilst sale by the principal members of the family in which the head does not consent is void *ab initio*
5. The principal member of a family cannot give any title in the conveyance of the family property without the head of the family joining in the conveyance even though he may be in agreement

Also going by the decisions in ***Usaibafor v. Usaibafor*** [17], where the family head of a family alienates without the consent of the principal members thereby misrepresenting that the family land is his, the alienation is void. However, where he only alienated without their consent but did misrepresent them that the land is his, the sale will be void.

Again, in the recent case of ***Achilihu v. Anyatonwu.***[18]One Lazaus Oguevule, as the head of the Umuagbaghigba family, pledged family land to the respondent in 1968. The said transaction was witnessed by one Jacob Amalaha, a principal member of the family. In 1970, the pledge was surreptitiously converted into a sale in favour of the respondent. The sole witness to the purported sale transaction was the wife of Lazarus. No principal member of the family witnessed the sale transaction.

The respondent took possession of the parcel of land and established an oil palm plantation in the life time of Lazarus Oguevule. The respondent occupied and harvested the oil palm plantation without hindrance from any one. Lazarus died in 1971 and in 1983, the appellant entered the said land at which point the respondent sued the appellants at Imo State High Court.

[15] (1959) 4 FSC p.75
[16] (1947) 12 WACA p.136
[17] (2005) 3 NWLR(part. 913) 665
[18] (2013) 1 MJSC (pt.II) p.2

The High Court gave judgment in favour of the plaintiff on 14/10/1996. The defendants, now appellants, were aggrieved by the judgment and appealed to the Court of Appeal, Port Harcourt Division. The appeal was dismissed. Aggrieved, the appellants further appealed to the Supreme Court, the respondent crossed appealed. The Supreme Court held that "the sale of a family property by the head of the family without the consent of other members of the family is voidable".

Fabiyi, JSC went further to declare that "perhaps I need to further elaborate on the point being made by stating in a clear fashion that in order to effect a valid sale or alienation of family land, the head of the family with the majority of principal members must participate".[19]

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

> The management of family property is put in charge of the family head and he acts as a trustees of such … He should exercise his power not for his own private advantage but for the benefit of the family and he does not enjoy absolute power in the management of family land per se. He is required to consult the other members of the family, and in case of important decisions such as sale of a family land, he must obtain the consent of the principal members of the family. As the head of the family cannot transfer family land as his own exclusive personal property, any transfer of the family property transferred by him without carrying alone the principal members is void *ab initio.*[20]

The implication of the above decision is that any transfer of family land by head of the family without the consent of the principal members is null and void.

[19] Supra p.29 paras. A-B.
[20] Supra p.15 paras D-G.

3.4 Alienation under Statutory Laws

Prior to the advent of colonialism the area that later became known as Nigeria, land was held absolutely under the indigenous tenure system of people.[21] Land was vested in either individuals, or on the family or community with the family head or chiefs, obas and emirs as trustees for the benefit of the people[22]. Thus, transfer or sale of land was seen as a taboo[23]. Apart from farming and grassing purpose, land was of higher sentimental value than economical, representing the permanent abode of the ancestors and providing comfortable residence for shrines.[24] This remains the position until the treaty of Cession of 1861 which ceded the land and the territory of Lagos to Queen Victoria of England, Thus, laying the foundation for colonial hegemony for the next 99 years.[25]

In 1863, when Lagos became a settlement, King Decemo alienated lands of the people under written grants[26]. This led to crisis until when the crisis were resolved by the promulgation of some ordinances between 1863 to 1865[27]. Similarly, in 1908 the Ikoyi and Ordinance of 1908 was enacted to enhance equitable distribution of land among Lagos population.[28]

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[21] Abugu, U *Land Use and Reform in Nigeria: Law and Practice.* Immaculate Prints Publishers, Abuja, 2012 p.187
[22] Ibid.
[23] Ibid 188
[24] Ibid
[25] Ibid
[26] Idowu, A.A. *An Appraisal of Land Law in Nigeria,* being a paper presented at the Presidential Land Reform Agenda in Nigeria organized by the Federal Ministry of Environment, Housing and Urban Development, Abuja (2007) p.6
[27] Abugu, U. *op. cit* 188
[28] Ibid

Another earliest legislation that dealt with alienation of land in Nigeria was the Public Lands Ordinance of 1876.[29]The Act of 1876 was re-enacted with modification as the Public Lands Acquisition Act of 1817[30]. It later became Regional (and later state) law following the introduction of the Federal Structure.[31] This Act empowered the Government to acquire land compulsorily for public purpose subject to payment of compensation to the expropriated owners and to also seek for Governor's consent before alienation.[32].

In the Northern part of Nigeria, the first of such legislation was the Land Promulgation No.8 of 1900 which vested powers of administration of land in the Protectorate of Northern Nigeria in the High Commissioner.[33] The Land proclamation provided that title to land in the protectorate could not be acquired by non-native without a written consent of the High Commissioner.[34]In 1902, the Crown Lands Promulgation No. 16 was also promulgated, which also provided that land, rights and easements which were vested in the Royal Niger Company became vested in the High Commissioner who was empowered to manage or alienate these lands in a manner which was most conducive to the welfare of the protectorate.[35] Again, in the same 1902, the Public Lands Promulgation No.13 was enacted which also gave the High Commission the power to manage, dispose and control of such lands as if they were crown lands.[36]

[29] Olang AMD. Op. cit. 140. It was a Gold Coast Colony
[30] Cap. 167 LFN – Lagos, 1958
[31] Olang, AMD *op. cit*. 140
[32] Ibid
[33]Aboki, Y. *Introduction to Statutory Land Law In Nigeria* (Unpublished class material) (2013) p. 3
[34] Ibid.
[35] Ibid
[36] Ibid.

Due to various problems in relation to land law, administration and control faced by the government the Land and Native Rights Proclamation No. 9 of 1910 was promulgated to address the above problems.[37]This promulgation was substantially re-enacted in 1916 as Land and Native Rights Ordinance No.1.This was also revised and re-enacted in the Laws of Nigeria.[38] The major provision of this Ordinance was to vest the power, control and management of the land in the Northern Protectorate to the governor for the common benefit of the natives. It is therefore worth noting that all the above Ordinances and Acts provided for the requirement of High Commissioner's or governor's consent before alienation[39].

However, the above Ordinance (Native Rights Ordinance) did not solve the problems faced by the government, and due to severe criticism, the Northern Legislature of Nigeria in 1962 took delight to solve the problems of land tenure law that was facing it.[40] Consequently, they enacted the Land Tenure Law of Northern Nigeria, 1962 in which they adopted the principles, values, philosophies, ideologies and concepts that were embedded in the Land and Native Rights Ordinance of 1948.[41] The purpose of the law was to replace the Land and Native Rights Ordinance by a new law but nevertheless to preserve the existing basic principles of that law while introducing some modifications and improvements.[42]

Despite all these legislations, still the South and the North faced many problems of land law and administration in Nigeria. Thus, there were problems of land speculations,

[37] Ibid.
[38] Cap. 105, 1948.
[39] Sections 28 and 32 of the Land Tenure Law 1962 and section 11 of the Land and Native Rights Act, 1916
[40] Aboki, Y. op. cit.
[41] Ibid
[42] Ibid.

exorbitant demand for compensation, alienation etc.[43] In every part of Nigeria, acquisition of land was becoming impossible.[44] Consequently, after forming Panels, Tribunals and Decrees for purposes of solving the aforementioned problems [45] the Federal government under the then Obasanjo regime established the Land Use Panel of 11 members on 16th April, 1977 Chaired by Justice Chike Idigbe.[46] The report of the communitee was the immediate base of the recent Land Use Act No.6 of 1978 b which all lands comprised in each states of the federation is vested in the Governor of that state.[47] Such lands shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act.[48] It also provided for consent of the Governor before alienation.[49]

It is however worth noting that the Land Use Act 1978 is an offshoot of the Northern Nigeria Land Tenure Law of 1962 that faced serious problems and called for the enactment of the Land Use Act of 1978. Thus, it is our humble view that the reason for the hardship and difficulty created by the present Land Use Act may not be unconnected with adaptation of the substantial provisions of the Land Tenure Law of 1962 by the Land Use Panel Committee.

[43] Ibid.
[44] Ibid.
[45] E.g Anti-inflation Panel headed by H.A. Onitiri in 1975, Land Tribunal headed by Omolayowe, Public Land Acquisition Decree No.33 of 1976 etc.
[46] Olong, AMD op. cit p.142 also see Aboki Y. op. cit. p.7.
[47] Ibid
[48] Sections 1 of the Act
[49] Ss.21 and 22 of the Act.

3.5 Alienation under Other Laws

Some legislation [50] also aid in regulating alienation of land in Nigeria. The Nigerian Coal Mining Act[51] prescribes for seeking of the consent of minister in charge of a department when dealing with an authority that is alienating its property[52]. It is important to examine the legislation setting it up to see whether consent is a requirement and to apply for it and obtain consent. Hence, the Nigerian Coal Authority Act[53] provides in Section 12(4) that "corporations shall not alienate, demise, mortgage or charge any land vested in the corporation without the prior approval of the minister". Thus, in the case of ***Rockonoh Property Co. Ltd v. NITEL Plc[54],*** the court held that "it must not be accepted, the absence of the necessary ministerial approval or consent is a serious defect which affects the title sought to be conferred by the relevant instrument.

Town planning laws and regulations may restrict alienation of certain lands where the purpose which they are intended to be used are contrary to the purpose of town planning laws.[55] For instance, certain areas of a state may be designated for commercial purposes and industrial use. e.g., sale of land for residential purpose is not permissible. Similarly, the need for public utilities and infrastructure may restrict the transfer or alienation of interest in land in Nigeria.[56] Thus, in Lagos State for example, the Land Development Law[57] provides that "the sale of any land which the prescribed authority has directed to be reserved for roads development shall be

[50] For example, Nigeria Coal Authority Act, Cap N95, Laws of the Federation of Nigeria, 2004,
[51] ibid
[52] ibid
[53] ibid.
[54] (2011) FWLR (pt.67) p.885 @ 910 (per Uwaifo JSC)
[55] See. e.g. Lagos Town Planning Ordinance 1928 (1988as amended)
[56] Ibid
[57] Cap. L57 Law of Lagos State, 2003.

null and void.[58]Again, the Finance Act[59] provides that no property shall be alienated without the consent of the Minister.

Doctrine of Lis Pendens: This is another restriction of alienation of land. This is latin expression for *"pending law suit"* signifying the power and control of a court of law, the effect of which is to restrict alienation or transfer of any interest in land while legal proceeding is pending.[60] The objective of the doctrine is to preserve the subject matter of litigation.[61] Thus, it has been held that a person, who purchases a property for a valuable consideration while proceedings are pending even though without actual notice, cannot sustain the purchase.[62]

3.6 Consequences of Alienation without Requisite Consent

By the provision of Section 22 of the Land Use Act, the holder of a statutory right of occupancy granted by the Governor cannot alienate his right of occupancy or part thereof without the consent of the Governor first hand and obtained. Thus, failure of securing consent where one is required, may lead to the following consequences.

(a) Nullity of Transaction

By virtue of Section 26 of the Land Use Act "any transaction or instrument which purports to confer or vest in any person any interest or right over Land other than in accordance with the provisions of this Act shall be null and void. Moreso, the combined effects of the decisions in ***Savana Bank v. Ajilo[63]Union Bank of Nigeria Plc & Anor V. Ayodire & Son Ltd[64]*** and ***Phametic Industrial Project Ltd v. Trade Bank***

[58] Section 6 Ibid, See also sections 8 9, 16 – 21 Urban and Regional Planning Board Law, Cap. L52 laws of Lagos State 2003.
[59] Section 3 of the Finance Act, 1983
[60] Ezomo v. NNB Plc (2007) All FWLR (pt.368 p.1032
[61] Dadem Y. Y. *Property Law Practice in Nigeriaop. cit. p.180*
[62] Ogundiana v. Araba (1978) 6 & 7 SC p.55
[63] (1987) 2 NWLR (pt.57) 421
[64] Supra

Nig. Plc & Ors.[65] Any alienation of any interest in land without Governors consent is null and void *ab initio*.

(b) Prohibition of Registration

The Land Registration Laws of Various States of the Federation prohibits registration of any instrument transferring any right or interest in land without the requisite consent to that effect. Thus, Section 10 of the Kaduna State Land Registration Law[66] provides that an instrument transferring interest in land which is procured without the consent of the Governor of a State is not registrable. This implies that for an instrument to be registered in the Land registry, consent to that effect must be obtained. Almost same provision is provided under various Land Registration Laws of the Federation.[67]

(c) Prohibition of Pleadings

Additionally Land instrument registration Laws of various states of the Federation also provide that any registrable instrument which is not registered cannot be pleaded or given in evidence in any court of law as affecting any instrument in Land.[68] Again, in ***Lawson V. Afani Continental Company Limited***[69]**,** the Court of Appeal held that:

> By virtue of 15, Land Registration Law, Cap 85, no instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall be registered in the appropriate office. In other words, a registrable instrument which is not registered cannot be pleaded and if pleaded, it is not receivable in evidence, but where though in advertence, it is admitted, it should be expunged.

[65] Supra
[66] Cap. 85 1991
[67] E.g. Section 11, Oyo State Land Registration Law, Cap.56 (1978) and Section 14 of the Land Registration Act of 1925
[68] Section 15 Kaduna State Land Registration Law, Cap. 85 (1991) See also Section 16 Oyo State Land Registration Law *op. cit.*
[69] (2000) FWLR (pt.109) 1766 @ 1741

(d) Forfeiture or Revocation

In addition to nullity of transaction entered into without consent, the Land Use Act goes further to stipulate that the Governor of a State can revoke right of occupancy of its holder, who alienates by way of sale, assignment, mortgage, transfer of possession, sublease bequest etc. without the requisite consent or approval.[70]

(e) Imprisonment or Payment of Fine

The Act further provides that a holder who alienates or transfers his right of occupancy without requisite consent will be liable to imprisonment or payment of fine. Thus, Section 28(7) of the Land Use Act provides that "no land to which subsection (5)(a) or (6) of this Section applies held by any person shall be transferred to any person except with the prior consent in writing of the Governor".

Subsection (8) of same section goes further to provide:

> Any instrument purporting to transfer any underdeveloped land in contravention of subsection (7) of this section shall be void and of no effect whatsoever in law and any party to any such instrument shall be guilty of an offence and liable on conviction to imprisonment for one year or a fine of ₦5,000.

However, the question to ask here is that, what if the land subject matter of alienation is developed and the holder alienates without consent? Does that mean that Section 28 will not apply? The researcher seems to answer such question in the positive. And it is in that light that he doubts the rationale behind restricting section 28 to underdeveloped land only. This is because, any holder who wants to alienate his right of occupancy may connive with another person to develop the land and later alienate it.

[70] Section 28 (3)(d) of Land Use Act

It is however worth noting that there are some exceptions to this general rule in that in some cases, the court may refuse to declare a transaction illegal as a result of lack of consent. Thus, in the case of ***Solanke v. Abed,*** [71] the Supreme Court held that notwithstanding that the consent of the Governor was not obtained as provided under Section 11 of the Native Right Ordinance the transaction was not illegal but can be avoided. Again in ***Awojugbabe Light Industries Ltd. V. Chinukwe.*** [72] The Supreme Court per Iguh JSC held that any transaction without Governor's consent is inchoate until the consent is obtained after which it can be said to be complete and fully effective. What is meant here is that it is lawful for parties to a mortgaged transaction to begin some negotiation for alienation before seeking for consent. However, the consent must be obtained at the perfection of the transaction.

It is again worth noting that even though the above cases state the position of the law, yet those decisions have in our view been taken over by event. This is because; the current position of the law is that any alienation without the consent of the Governor is null and void.[73]

Under the customary law, where the family head of a family alienates without the consent of the principal members thereby misrepresenting that the family land is his, the alienation is void. However, where he only alienated without their consent but did misrepresent the land to be his, the sale will be void.[74] However, same consequences

[71] (1962) NRNLR 92
[72] (1993) 1 NWLR (pt.270) 485
[73] In *Union Bank of Nigeria Plc & Anor v. Ayodire & Sons Ltd* (2007) 12 NWLR (pt. 1052) p. 567 and *Phametic Industrial Project Ltd v. Trade Bank Nig. Plc. & Ors* (2009) 13 NWLR (pt. 1159) 577. In these cases, requisite consent were sought and obtained but only obtained from persons not delegated by the Hon. Commissioner for land and the court held that the mortgage transactions were void and illegal and that notwithstanding the fault of the mortgagors who obtained the said consent from wrong persons, they (the mortgagors) can benefit from their own wrongful conducts.
[74] *Osaibafor v. Osaibafor* (2005) 3 NWLR(part. 913) 665

that are provided under the Land Use Act will be applied under other laws where there has been alienation without consent.

3.7 Legal Restriction on Alienation of Land

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

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

(a) Governor's consent shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor. This section is problematic in where it exempts equitable mortgage from the series of transactions that require governor's consent, while section 51 of the same Act comprehensively defines mortgage to include equitable mortgage. This is a serious conflict that misleads courts to give controversial judgments[75].

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

[75]As in Okuneye v. F.B.N PLC(supra), where the Supreme Court without considering the comprehensive definition of mortgage under section 51 of the Act (which includes equitable mortgage) decided that consent of the Governor is not required in equitable mortgage.

(ii) The Governor of a State cannot grant a statutory right of occupancy to a person under the age of twenty one (21) years.[76] This provision also has an exception that where a guardian or trustee for a person under the aforementioned age has been duly appointed for such purpose, the Governor may grant or consent to the alienation of a statutory right of occupancy to such guardian or trustee on behalf of such person under age.[77] Moreover, the proviso goes further to stipulate that a person under the age of 21 years upon whom a statutory right of occupancy devolves on the death of the holder shall have the liabilities and obligations under and in respect of his right of occupancy as if he were of full age notwithstanding the fact that no guardian or trustee has been appointed for him.[78] However, it is our humble view that this restriction maintains an old Common Law position, in that our legal system has since provided legal capacity to be 18 years. Thus, contractual capacity, capacity to vote etc is 18 years[79]

(iii) A person who is not a Nigerian citizen cannot be granted right of occupancy, nor can a right of occupancy be transferred to him, except with the approval of the National Council of States.[80]

3.8 Conclusion

It our humble view that alienation in Nigeria creates so many problems ranging from problem with governor' consent or local government as the case may, consent of principal members of a family in case of family or communal land and consent of the minister for mining purpose. However, these problems can be minimized if consent

[76] Section 7,Land Use Act.
[77] Section 7(a), Ibid.
[78] Section 7(b), Ibid.
[79] Section 1(b), Electoral (Amendment) Act (No.2), 2011.
[80] See Section 46(1) of the Land Use Act.

provision on the instances is either deleted or amended. This will make land transaction simple and interesting.

CHAPTER FOUR

ANALYSIS OF THE REQUIREMENT OF GOVERNOR'S CONSENT FOR ALIENATION UNDER THE LAND USE ACT

4.1 Introduction

The requirement of Governor's consent has over the years created and is still creating endless controversies in land transaction in Nigeria. These problems can be attributed to the Supreme Court decision in ***Savanna Bank Ltd. v. Ammel Ajilo***[1] as well as the inadequacy of the provision of consent requirement. Thus, the consequent hardship meted out by interpretation of Ss. 21 and 22 of the Act by the court makes land transaction very frustrating. Therefore, for proper analysis of the provision, section 22 of the Act provides thus:

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

Therefore, this chapter analyzes Governor's consent under the Land Use Act. The problems and controversies created by the consent requirement as well as the hardship meted out by its interpretation. It also critically analyzes the development in the provision right from the Supreme Court decision in ***Savanna v. Ajilo*** to date.

4.2 Brief History of Governor's Consent.

The history of Governor's consent can be traced back to 1900, when the Government in Northern Nigeria decided to take over lands and they become crown lands[2]. Thus,

[1] (1989) INWLR (pt. 97) p. 305
[2] Olakanmi, J. *Land Law in Nigeria*, First Edition, Law Lords Publications, Abuja, 2009 p. 22

Crown land was vested in the Governor in trust for Her Majesty, while public land was vested in the Governor in trust for the people.[3]

In 1908, the Government set up a committee- the Northern Nigeria Lands Committee to recommend a system of land tenure to be adopted in the protectorate.[4] The committee came to the conclusion that the whole of the land in the protectorate should be vested in the Government in trust for the natives and that no title to the use and occupation of land was valid without the consent of the Governor.[5]

However, in 1962, the Land Tenure Law of 1962 re-enacted the Land and Native Rights Ordinance of 1916 with some amendments.[6] The provision of Governor's consent for occupation was amended to include occupation by non-natives and the power of the Governor became vested in the Minister responsible for lands.[7] However, where a native or non-native applied for Governor's consent and it is refused, mandamus should not lie to compel the Governor to give consent.[8] Furthermore, whereas alienation by a non-native was unlawful, unlawful transfer by a native was not void[9]

Consequently, the Land Use Act[10] was enacted in 1978, which also makes provisions for Governor's consent, thereby vesting the all lands in the Governor of a state as a trustee for all Nigerians.[11] It also renders any alienation without Governor's consent null and void.[12] However, the law imposes the duty of seeking and obtaining consent on the mortgagor. Thus, In ***Akunne Bosa Mbanefo v. Mofunanya ACBU & Anor[13],*** it was

[3] Crown Lands Promulgation 1902
[4] Olakanmi, J. *Land Law in Nigeria*. Op.cit p. 23
[5]Ibid, see also Land and Native Rights Ordinance of 1916
[6]Olakanmi, J. Land Law in Nigeria. Op. cit. 23
[7]ibid
[8]R v. Minister of Lands and survey; Exp. The Bank of the North, (1962) N.N.L.R.
[9]Sections 28 and 32 of the Land Tenure Law, 1962.
[10]Cap L5, Laws of the Federation of Nigeria, 2004
[11]Section 1 of the Act.
[12]Sections 21, 22 and 26 of the Act.
[13] (2014) LPER SC 179/2007.

held that it is the duty of the mortgagor and not the mortgagee to seek for Governor's consent.

4.2.2 Philosophical Basis for Governor's Consent:

Consent as defined by the Black's Law Dictionary is a concurrence of wills. It is an agreement, approval or permission[14]. It also means voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intellectual choice[15]. Consent in this research means nothing more than permission or concurrence of the governor to alienate right of occupancy.

Governor's consent has its philosophical basis in the concept of ownership of land.[16] Ownership is of both legal and social interests, hence, the courts utilized the idea in such a way as to give effect to views of changing individuals and social interests[17]. Since alienation is one of the incidents of ownership, one can alienate his interest without the consent of anybody.[18] The title in all lands comprised in every state became vested in the Governor as a trustee for all Nigerians.[19] Therefore, since the land use Act has placed some restrictions before one can exercise right of ownership (which consists of limitless number of claims, liberties and so on with regard to the land owned), one wonders if indeed land can be owned.[20]

Nonetheless, the basis for its justification can be traced back to the customary jurisprudence of (1) consent of the family head before alienation of family property and

[14] Black, H.C. M.A. *Blacks Law Dictionary* (6th Edition) St. Paul Trina West Publishing Co. U.S.A. 1990
[15]Ibid
[16] Smith, I. O, Op cit p. 199. See also section.22 of the Land Use Act.
[17] Ibid
[18] This was the position in southern part of Nigeria before the promulgation of the Land Use Act 1978. The only consent needed then was that of the family head if It was a family property or consent of the landlord if it was a leasehold land with assignment covenant.
[19]See S.1 of the Act, which provides that "subject to the provisions of this Act, all land compromised in the territory of each state in the federation are hereby vested in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provision of this Act.
[20]Smith I.O. op. cit

(2) consent of the landlord in a leasehold relationship before transfer of interest by the tenant where there is a covenant to that effect.[21]

From the foregoing, it can be summarized that consent provision has the following philosophical basis; to keep the governor informed of all developments in relation to lands in his state since he is the trustee of all lands in any state[22]. This he does through, Land Office or Land Agencies such as KASUPDA, Environmental agencies such as KEPA, etc. However, it creates unending problems and controversies which in turn creates hardship and obstacles in land transaction in Nigeria. The *locuss classicus* case on this requirement was the one in ***Savanna Bank Ltd v. Ajilo***.[23]

The facts of the case were that, the proceedings leading to the appeal were initiated in the High Court of Lagos State by the respondents, Ammel O. Ajilo and Ammels Photo Industries Limited as plaintiffs. The first/plaintiff/respondent became the owner of the land in dispute by a deed of conveyance dated 23rd June, 1965. By a deed of mortgage dated 5th September, 1980 the land was mortgaged to the defendant appellant Bank to secure money owed to it by the second plaintiff/respondent. When the first defendant/appellant attempted to exercise the statutory power of sale conferred by law on a mortgage of the legal estate, the first respondent mortgagor, brought an action in the Ikeja Division of the High Court of Lagos, claiming that the deed of mortgage was invalid on the ground inter alia, that the consent of the Governor was not obtained for the creation of the mortgage as required by section 22 of the Land Use Act 1978.

Hotunu J. after considering all the submissions of counsel made to him granted all the reliefs claimed by the plaintiff(s) respondents. Thus, he declared . . . "I am of the

[21] See *Cook v. Shoes* with (1951) IKB p. 952
[22] Section 1 of the Land Use Act
[23] Supra

opinion that failure to obtain the required consent of the Governor under Section 22 of the Act has rendered the deed or mortgage Exhibit 'A' null and void abinitio and the mortgage transaction illegal''.

Dissatisfied with this judgment, the appellants appealed to the Court of Appeal, and the question for determination was whether a holder of a deemed statutory right of occupancy in respect of developed land under section 34(2) of the Act requires the consent of the Governor under S. 22 of the Act to alienate the right of occupancy in any manner. The Court of Appeal answered the question in affirmative, thereby unanimously dismissing the appeal and upholding the decision of the trial court. Dissatisfied again, the appellants appealed to the Supreme Court which also dismissed the appealed and upheld the decision of the Court of Appeal.

Obaseki JSC who read the lead judgment held different views which appeared to be illuminating. This is because; he took time to consider every point raised by Counsel in that case. He therefore noted thus:[24]

> Although the first Plaintiff/Respondent by the tenor of the Land Use Act committed the initial wrong by alienating his statutory right of occupancy without prior consent in writing of the Governor, the express provisions of the Land Use Act make it undesirable to invoke the maxim *ex turpi causa non oritur actio* and the equitable principle enshrined in the case of Bucknor-Maclean v. Inlaks Ltd (1980) 8-11 SC1.

He also went further to draw a distinction between the actual grant under sections 5 and 6 of the Act. However, his Lordship was of the view that the distinction between deemed and actual grants is only in form but not in substance[25]. This goes to show that

[24] Ajilo (supra) p. 350, see also Omotola, J.A. *"Interpreting theLand Use Act"* The Journal of Nigeria Law (JNL) (1992) Vol. I No. I p. 108 at 109
[25] (supra) per Obaseki JSC,

it was mere a distinction without difference, since the deemed grant must be treated as if it was a grant actually made by the Governor.

On the above regard, his Lordship put it thus:[26]

> That there is a distinction between a deemed grant and an actual grant goes without saying that the same incidence flows from both grants also goes without saying. Both the actual and deemed grants being grant, the deemed grant being regarded by the law as if made by the military Governor also became subject to legal controls as if granted by the military governor.

With respect to his Lordship, this writer submits that the distinction leads to further confusion as nothing is said to make a demarcation between the two grants. His Lordship also opined that the provisions of section 34 (7) which requires Governor's consent before alienation of deemed statutory right of occupancy under that section is limited to underdeveloped land under section 34 (5) and (6) and does not apply to developed land under section 34 (2).

In short, the Supreme Court unanimously held that all transactions under which interest in Land is being transferred require Governor's consent for their validity. Though the decision may be said to settle consent controversy, it opened up new line of debate.[27]

4.3 Emerging Issues in Governor's Consent since *Savannah Bank v. Ajilo*

It has been submitted that subsequent judgment of both the Supreme Court and the Court of Appeal are now in support of equities of a case rather than strict interpretation of Land Use Act which may lead to injustice[28]. Thus, in ***Adedeji v. National Bank of***

[26] Ajilo (supra) p. 350, see also Omotola, J.A. *"Interpreting theLand Use Act"* The Journal of Nigeria Law (JNL) (1992) Vol. I No. I p. 108 at 109
[27] Smith J.O op cit 210
[28] Taiwo, A. The Nigerian Land Law, Ababa Press Ltd. Ibadan, Nigeria 2011 p. 224.

Nigeria Ltd.[29] the Court of Appeal refused a mortgagor who sought to rely on the provisions of the Land Use Act to invalidate a mortgage to which no Governor's consent had been obtained. The court distinguished the case from Ajilo's case and held as follows: "apart from the principle of law involved in this case, it is morally despicable for a person who had benefited from an agreement to turn round and say that the agreement is null and void".[30]

In the case of ***Attorney General of the Federation & Others v. Sode & Others***[31] A leasor pleaded that a lease agreement could not be enforced on ground of non compliance with the provision of the Land Use Act. Thus, he raised the issue of the maxim *"exturpi causa non oritur actio"* in which he contended that the Court lacked jurisdiction to hear the case. However, Belgore, JSC, held that the principle of exturpi could have been applied in ajilo's case if it had been canvassed by counsel to the appellant and he would have applied it also in Sode's case but for the ouster provision in the statute governing the matter before the court.

It is therefore worth noting that equity inclines itself to conscience, reason and good faith. It implies a system of law disposed to a just regulation of mutual rights and duties of a man in a civilized society. More so, it does not envisage a sharp practice, undue advantage of a situation or intentional refusal to honour reciprocal liability arising therein[32]. It is therefore suprising that the Supreme Court which is the pinnacle of justice in Nigeria could find itself so helpless and would refuse to raise an equitable point suo motu even when the point was present in the mind of justices simply because

[29] (1998) 1 NWLR p. 212
[30] Adedeji (Supra) pp 226 and 227
[31](1990) WWLR p.500
[32] Taiwo, A. op cit p. 225

it was not canvassed by the Appellant[33]. The court should do more than that and move forward to do substantial justice and provide answers to social problems to enable the law grow[34].

However, there seems to be a wave of change and Nigerian courts are now inclined to doing substantial justice rather than relying on technicalities. Thus, in ***Chief Belonwo Ugochukwu v. Cooperative and Commerce Bank Nigeria Ltd***[35]. The Supreme Court frowned at conducts similar to that in Ajilo's case. In that case, the appellant filed a suit seeking declaratory reliefs and challenged the validity of the deed of mortgage on the ground of non-compliance with the Land Use Act relying on the Supreme Court's decision in ***Savannah Bank v. Ajilo***.

In dismissing the appeal Balgore J.SC put it thus:

> The holder of a right of occupancy, evidenced by a certificate of occupancy is the one to seek the consent of the Governor to alienate, transfer, mortgage, etc. There is no doubt the consent given in exhibit 3 was at the instance of the appellant who was in need of fund from the respondent by way of mortgages. It is not from him one must hear that the consent he obtained was void… The appellant being the holder of the right of occupancy over the house i.e. No 239 Cameroun Road, Aba, was to seek consent and it is unconscionable for him to turn roundabout and maintain that the consent of the Governor he obtained was flawed having received valuable consideration i.e. the Loan from the respondent.

Additionally, Ogundare, JSC on his part went further to add that:

> … It was the duty of the plaintiff, as mortgagor to seek the consent of the Governor for him to mortgage his

[33] Omotola, J.A. "Interpreting theLand Use Act", Journal of Nigerian Law 108 at 110 (1992). See also Savannah Bank v. Ajilo at 354 where Belgore J.S.C held "that the feature of appeal is that the issue based on the grounds of interpretation of section 34 and 22 of the Act. This is unfortunate as this court must confine its decision to the argument of the parties. To do otherwise will amount to raising issues Suo Motu for the parties. Otherwise, all equities were not canvassed.

[34] Yakubu J.A. "The Equal and unequal scale of Justice" Vol. 3 *Journal of Private and Business Law* Pp. 194-210.

[35] (1996) 6 NWLR (pt. 456) 524

> property to the defendant. This is what the law says: See sections 21 and 22 of the Land Use Act. For him to turn round years after executing the mortgage deed (and when as a result of his default, the mortgagee, that is the defendant, sought to exercise its right under the mortgage deed) to assert that the mortgage deed was null and void for lack of Governor's consent is to say the least, rather fraudulent and unconscionable. It has become a vague these days for mortgagors in similar circumstances to fall upon the decision of this court in Savannah Bank Ltd. v. Ajilo (1989) I NWLR (Pt. 97), 305 as a vehicle to escape from liability under the mortgage deed they have entered into. I think that this is an unfortunate development and I do not think that case, that is, Savannah Bank V. Ajilo (Supra) decides such a thing… his liability on the ground of his failure to do that which the law enjoins him to do will only result in paralysis of economic activities in this country. This court, I dare say, will not allow such situation to arise.[36]

It is worth noting that the above decision has given a legal impetus to transformation in judicial decisions on the application of the maxim *"extur pi causa non oritu actio"*.(no action can raise on an illegal base) In subsequent cases, the courts have been more assertive on the applicability of the maxim. Thus, in ***Alh. Ayotunde Seriki v. Sefi'u Olukorede***[37]. It was held that one cannot have a right of action when he or she comes to a court of justice in an unclean manner. It goes to say that equity will not allow a person to benefit or profit from his own crime, fraud, immorality or illegality as in the case of failure to obtain the Governor's consent to alienate his or her right[38].

Thus, in ***Nigeria Industrial Development Bank Ltd v. Olalomi Industrial Ltd***[39]**,** the court held inter alia that "… It is my view that it will be in the interest of justice to do so rather than allow the mortgagor to eat his cake and still have it back, the court shall resist at all cost the attempt at using it as an engine of fraud or cheating or dishonesty''.

[36] Supra 542
[37] (1999) 3 NWLR pt. (595) p. 469 at 480-481.
[38] See Taiwo, A. *The Nigerian Land Law* op. cit. 230
[39] (2002) 5 NWLR (pt. 761) 532 at 548

However, after all those notable pronouncements of both the Court of Appeal and the Supreme Court, recent development reveals that the controversies created by S.22 of Act is still lingering and continues to create more and more problems of both interpretation and application. Consequently, fraudulent people (some mortgagors) can still eat their cake and still have it back. This is because the Supreme Court decided to go against the already settled rules that equity will not allow a statute to be used as an engine of fraud. Thus, in ***Union Bank of (Nig.) Plc & Anor v. Ayodire & Sons (Nig) Ltd***[40]. In this case, the 1st respondent sometimes in 1980 obtained loans from the appellant and together with the 2nd respondent, executed Deeds of legal mortgage over two landed properties; one in an urban area and the other in a non-urban area (both in Kogi State). Approval of the Local Government in respect of alienation of the property in the non-urban area was communicated to the respondents by the Chief Lands Officer for the Permanent Secretary on behalf of the Honourable Commissioner while consent of the Governor in respect of alienation of the property in the urban area was communicated to the respondents by the Chief Lands Officer for the permanent secretary who acted for the Honourable Commissioner for Lands and Housing to whom power to give consent was delegated. Upon the default of the respondents in repaying the loans, the appellant sought to exercise its power of sale over the mortgaged properties.

In reaction, the respondents instituted an action against the appellant, contending that the consents obtained by the respondents covering the mortgaged transactions in respect of the two properties were invalid, arising from the fact that the Governor or the Local Government who should give these consents had not done so. In upholding the respondents contention, the Supreme Court purportedly following its earlier decision in

[40] (2007) 12 NWLR (pt. 1052) 567

Ajilo, held that non conformity with the provisions of sections 21(5) and 22 of the Land Use Act rendered the mortgage void under section 26 notwithstanding that it was the respondents who procured the invalid consent.

The Supreme Court's reliance on its earlier decision in Ajilo is without foundation, in that it has to consider the distinction between the case of Ajilo and that Ayodare. This is on the strength of the facts in Ajilo, the issues canvassed therein and the consequent decision of the court in Ayodare are tenuous. Again, the Supreme Court ought to have distinguished the facts in Ayodire with that of Ajilo before deciding the way it did.

The main issue before the Supreme Court in Savnnah Bank v. Ajilo was whether the provision of section 22 of the Land Use Act applied to a person who was deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of his being deemed such holder. The question whether a mortgagor who failed to obtain consent to a mortgage deed could later rely on the initial wrong to assert that a mortgage deed was void for lack of consent was not canvassed before the Supreme court. In Ayodire, the main issue for determination was whether a Delegate can Sub delegate. And going by doctrine of judicial precedent, the Supreme Court could rely in Ajilo if its facts were the same with that of Ayodire. Thus, major point of distinction between Ajilo and Ayodare was not identified by the Supreme Court. Consequently, the court's pronouncement in Ajilo that "the express provisions of the Land Use Act makes it undesirable to invoke the *maxim ex turpi causa non oritur* action (an action cannot flow from a bad cause) was made abiter and therefore not binding on the court in Ayodare.

Also, where as in Ajilo, governor's consent was not obtained, in Ayodere, requisite consent was communicated via a letter to the holder/mortgagor, but was alleged to be invalid on the ground that the consent was communicated either by an unauthorized

person to whom no power was expressly delegated by the Governor, or by a person in respect of whom the law recognizes no delegation by the Governor facts unknown to the mortgagee and factors over which the mortgagee had no control. Thus, for proper understanding of the distinction between the facts in Ajilo and that of Ayodire, the contents of the letter conveying Commissioner's consent is reproduced as follows:

"Ref. No. LAN/CUS/MORT/331/38
Ministry of Works/Land Housing Environ
Land Division
P.M.B. 1425, Ilorin, Kwara State.

Date 8th August, 1980.

Ayodele Dare
P. 0. Box 37
Koja

Sir,

Approval of Sublease/Mortgage/Assignment of property erected at Kabba covered by Customary Right of Occupancy No 05581/81/77 to the Union Bank of Nigeria Limited at Lokoja.

I am directed to refer to your letter application of 14/9/79 to inform you that the Sublease/ Mortgage/Assignment of your landed property covered by customary right of occupancy No.005581/77 at Kabba, has been approved by the Honourable Commissioner for ₦20,000,00 (Twenty Thousand naira) only.

……
……

With effect from 1st August, 1980 subject to the submission of a satisfactory deed of mortgage within four months and payment of stamp duty and registration fee. If a satisfactory deed of xxxxxxxxxxxxxxx/Mortgage/xxxxxxxxxxxxxxx is not received for registration within four months, then a penal rent of 10k per day will automatically be imposed after four months, with effect from the date of this letter, and will remain in being until some time as a satisfactory deed is received in this Ministry for Registration.

Yours faithfully,
Signed (B.D.Olle)
Ag. Chief Lands Officer
For Permanent Secretary

Copy to:
The Zonal Officer,
Ministry of Works, Lands and Housing

……

Above for your information.

Your file Reference is No. ……..

Delete as appropriate.

.....

Chief Lands Officer,"

Again, the respondent (Ayodire) did not contend that there was no consent; neither produced any witness or adduced any evidence to the effect that the Governor did not give consent but only that it was not given by the person authorize by law. However, the content of the respondents' pleadings did not indicate that the consent obtained was invalid but only that it was communicated by a Chief Land Officer for the Permanent Secretary for and on behalf of Commissioner for Land. Thus, ***Walter Samuel Nkanu Onnoghen*** JSC as she then was who had a dissenting opinion declared:

> It is my view that to hold that the document attached to Exhibit 1 does not constitute evidence of the fact that the appropriate authority did approve the transaction as held by the learned trial Judge is to be very technical particularly having regards to the fact that it was the respondent who applied for the consent or approval and did present same for the purpose of obtaining the loan which he duly utilized only turning around, when called upon to repay same with interest as previously undertaken, to say that there is no approval to the transaction.....Where there is anything or evidence from which the court can infer such an approval under the circumstances, it is my view that it will be in the interest of justice to do so rather than allow the mortgagee to eat his cake and still have it back. The court should resist at all cost the attempt at using it as an engine to further fraud or cheating or dishonesty.... It must be borne in mind that it is the duty of the respondents to obtain the consent of the appropriate authority, in this case, the Commissioner for Lands of Kwara State, to the transactions in issue

> which they purportedly did and on the basis of which they obtained the credits in issue. Now that they allege that the consents they obtained never came from the proper source and therefore invalid, it is their duty under the law to so prove. Having failed to discharge that burden, it is my considered view that the trial court was in error in holding as it did and that the lower court equally erred in affirming the erroneous decision of the trial court on the matter.

We submit that a mortgagor who sought and obtained consent from a person not authorized by law and then later turned round to assert that the mortgaged deed was void is more fraudulent than one who did not obtain consent at all. We again submit that the recent position of the Supreme Court will impose serious hardship on the mortgagee who is now put under an unfortunate obligation to inquire about the regularity of the consent obtained by the mortgagor, with the latter at liberty not only to refuse to obtain consent, but also given the latitude to remain indifferent about the regularity of the consent obtained, knowing full well that the Courts will allow him to benefit from the wrongs he might have committed. Therefore, the equitable jurisdiction of the Court is Jettisoned with the rough edges of the law preserved, and all hopes of the mortgagee dashed.[41]

This could be seen in the recent case of ***Pharmatic Industrial Project Ltd v. Trade Bank (Nig) Plc 84 others***[42] (coming barely two years after the Supreme Court decision in Ayodere where the Court of Appeal was faced with similar facts as in Ayodere though the Court frowned at the mortgagor's conduct, it nevertheless allowed the mortgagor to "benefit from his own wrongful conduct.

[41] Statutory Requirement if Governor's Consent in Mortgage Transactions: The Journey So Far. www.diaryfasmartlawyer.wordpress.com/2012/06/15. Last visited on 10th February, 2014 at 5:00 pm.
[42] (2009) 12 NWLR (pt. 1159) p. 577

Thus, the facts of the case were that the 1st and 4th respondents granted loan and over draft facilities to the appellant. The appellant executed the deed of loan, mortgage agreement and mortgage debenture in favour of the 1st respondent. The appellant in essence charged all its fixed and floating assets as collateral security to the 1st and 2nd respondents. After utilizing the facilities, the appellant defaulted in repayment. Now the 1st respondents re-called its investment and in exercise of its powers, appointed the 2nd respondent as a receiver for the appellant. The 2nd respondent gave notice of his appointment to the appellant and called for the submission of the statement of affairs. He also notified the general public, particularly the secured creditors of the appellant. The appellant failed to react to the notice and also failed to avail the receiver of any statement of its affairs. The 2nd respondent therefore took physical possession of the appellant's fixed and floating assets charged in favour of the 1st and 4th respondents, and sold them.

The appellant by a suit challenged the appointment of the 2nd respondent as a receiver based on the deed of appointment. By another suit, the appellant challenged the deed of appointment granted to the 2nd respondent by the 4th respondent. The suits were consolidated and they went to trial, at the conclusion of the trial, the trial court dismissed the suit.

Dissatisfied with the trial Court's decision, the appellant appealed to the Court of Appeal. The kennel of the appellant's case on appeal was that the mortgage transaction between the appellant and the 1st and 4th respondents were null and void under the Land Use Act because the Governor's consent to the same was conveyed by a person other than the commissioner to whom the Governor delegated his power to grant consent under the Land Use Act.

In determining the appeal the Court of Appeal considered sections 22 and 26 of the Land Use Act and 393(1) of CAMA and court held such alienation was null and void.

Agube J.C.A. who lamented on the conduct of some mortgagors declared:

> It is a sad commentary on the current state of our jurisprudance that in spite of the unconscionable consequences suffered by the respondents as a result of the appellant's failure to obtain the necessary consent from the Governor before embracing on the entry into the Mortgage Agreement and Deeds of Debenture, the appellant can turn round to benefit from his fraudulent act which culminated into the derivation of value consideration in the form of loans.
> By the recent judgment of our apex court in U.B.N. v. Ayodare & Sons (Nig.) Ltd. (2007) 4 KLR (Pt. 235) 2022: (2007) 13 NWLR (Pt. 1052) 567 particularly the dictum of My Lord **Muktar J.SC;** equity has not only remained silent on the reserve bench while the Land Use Act, is actively at play but equity now lies prostrate and has bitten the dust while the harshness of the Land Use Act, is being exploited and shall continue to be on rampage as a vehicle for the perpetration of fraud by persons of the appellant's ilk and other smart elecs. However, as my Lord has penultimate Courts to at all times abide by aptly put it, we are bound as the magisterial pronouncements of the apex court whether we are persuaded or not by the reasonability or otherwise of the interpretation of the sections of the Land Use Act, 1978, in question, nay any other enactments, in view of the impregnable doctrine of stare decisis and the indubible reality of the finality of such decision by the Supreme Court[43].

It is therefore our humble view that the above controversial decision of the Court of Appeal hinged on Ayodare & Sons (Nig.) Ltd[44]. It turns things upside down and puts the lower courts in a delimma as to which of the Supreme Court's decisions to apply[45],

[43] at pages 645-646 paras E-B:

[44] (2007) 13 NWLR (pt. 1052) 567

[45] This is because the decision in U.B.N v. Ayodare conflicts those of *Awojugbagbe Light Industries Ltd. v. Chinukwe* (supra) and *Alh. Ayo Tunde Seriki v. Sefi'u Olukorede* (supra), despite the fact that both of the two cases were the decisions of the Supreme Court.

and this shows with due respect, to the Supreme Court justices a level of inconsistency in the interpretation of section 22 of the Land Use Act. As such, it is rather unfortunate that the Supreme Court gives judgment that conflicts its earlier decision without making reference to the previous one. This we think leaves the penultimate court to act without proper direction.

We submit that even though one case can be distinguished from another, the court should not be helpless in deciding issues as in Pharmatek. There has to be equity in courts and the court of equity always tries to provide a remedy for any given problem. Thus, we suggest that fraudulent people like those in Ajilo's and Pharmatek's cases should not be allowed to benefit from their own wrong i.e. they should not be allowed to either invalidate a transaction as a result of either irregularity obtaining consent of failure to obtain the consent. This we view will stop people with unclean hands from seeking justice under false pretence.

This state of hopelessness was one time attempted to be addressed in a Bill submitted before the National Assembly (2009) for the amendment of the Land Use Act[46]. The proposed Bill seeks to restrict the requirement of Governor's Consent to permanent alienation such as an assignment, thus, effectively excluding mortgage transactions from the ambit of the existing consent provisions. If the Bill is eventually passed into law, the existing trap set against the mortgagee by law will be removed and sanity consequently returned to mortgage transactions.[47]

[46] www.diaryfasmartlawyer.wordpress.com/2012/06/15. op cit
[47] Ibid

4.4 Problems with Securing Consent:

Whoever needs to obtain consent for alienation will no doubt face many problems, which include:

a) **Cost of Processing Consent**: It is unfortunate to note that the cost of processing consent is so exorbitant in this country. In Kaduna for instance, an application for consent is submitted along with evidence of payment of some unnecessary fees such as payment for file folder, payment for land 1 form, survey fees, payment for land development, processing fees, revenue fees and many other fees that make land transaction too costly.

Another one that needs to be stated here is that of Lagos state, where evidence of tax clearance certificate, certified true copy of the title document obtained from the Registrar of titles, Bank draft of the prescribed fees, including 15% of the consideration or value of improvement on and in case of assignment etc are required in Kaduna State before processing consent[48]. Ultimately over 50% of the economic value of the land would be payable to government otherwise spent in the course of obtaining consent to alienate[49]. It is for this reason, that the ***Supreme Court in Williams v. LSDPC***[50] categorically declared as "illegal fees" charges of 5% of the consideration (amount) or value of leasehold property. These charges were demanded by the LSDP as consent fees.

To press the argument of the Supreme Court further, James asserts that:

> The propriety of using the powers in the Land Use Act for income tax collection is questionable. The use of provision of a statute for purposes not authorized by it is to exceed one's jurisdiction and any action pursuant

[48] Babaji H. Z. Op. cit 77
[49] Ibid P.77-78
[50] (1978) 3SC II

thereof as illegal. However, this topic raises the wider issue of the ultra vires principle[51].

b) **Bureaucratic Impediment:** The hardship created by complex administrative procedures together with undefined administrative discretion of the Governor in granting consent or right of occupancy actually lead many customers into frustration and countless plots of land that would otherwise be developed remained underdeveloped.

Thus, in re-emphasing the complex administrative procedure of securing consent, Nnamani J.S.C observed that: "The applicant is subjected to the vagaries of bureaucratic act, which demands for survey plans, documents and a lot of to and from. These cumbersome procedures have adversely affected economic business activities and make industrial take off a matter very much in the future''.

Again in ***Savannah Bank v. Ajilo***[52] Obaseke, JSC conceded to the submission of Chief F.R.A Williams (SAN) that: "the implementation or consequences of the implementation of the consent clause in the Decree; it is bound to have a suffocating effect on commercial life of the land and house owing class of the society who use their property to raise loans and advances from Banks"

c) **Judicious Exercise of Power of Discretion:** This exercise of power(the discretionary power of the governor of a state in granting consent for alienation that a holder cannot challenge even by a court's order of mandamus)[53] certainly frustrates land transaction in this country.

This is because; the Land Use Act which gives the Governor the power to grant consent does not define how these powers can be exercised. There are no criteria

[51] James, R.W. Op.cit p.60
[52] Supra
[53] Yakubu M.*G. Land Law in Nigeria*, Macmillan Publishers; Nigeria (1985) p. 206

as such to guide their exercise[54]. These may be the reason why Governors have tended to believe that these powers are absolute[55]. Their beliefs are probably strengthened by the fact that they are also empowered to fashion out regulations under which their consent may or may not be given[56]. More so, it has been said that the power vested in the Governor to grant or withhold consent to a subsequent alienation of right of occupancy is couched in a language, which makes the exercise discretionary[57]. It has again been argued that the discretion contained in the various consent provisions is for the holder to obtain the consent of the Governor, but not for the Governor to give his consent[58]. Consequently, it is for this reason that this power being discretionary "cannot be enforced as of right or by the order of Mandamus from the High Court or any other court of record''[59]. However, the Supreme Court in limiting the power of the Governor's discretion held in the case of ***Stitch v. AG.F & others***[60] that:

> the discretionary power of the minister under Section 3 of the Finance Act 1981 is clearly within the reviewable jurisdiction of the courts whether the Minister failed to exercise his discretion, or refused to exercise the discretion or misused the discretionary power, and whether he gave reasons for the exercise, it being a principle established by the courts that once a *prima facie* case of misuse of power had been established, it will be opened to court to enter that the Minister acted unlawfully even if he declined to supply a justification at all or supplied a justification which is untenable in law. The minister must act fairly and not to the prejudice of the citizens[61].

[54]Smith J.O., op cit
[55]Ibid 215
[56]Yakubu, M.G. op.cit p.206,
[57]Ibid at 206. See also Smith 1.0. op cit. 215.
[58]See the case of RV Minister of Land Survey (1963) NRWLR 58 where Reed Ag. SPJ held that order of mandamus did not lie against the governor in the circumstances.
[59] Smith I.O. op. cit
[60](1968) INWLR (pt. 46) 1007,
[61]See also Iwuji v. Federal commissioner of establishment (1985) INWLR (pt. 3) p. 497 where it was held that once the exercise of such power is based on condition precedent and the beneficiary has satisfied or fulfilled such condition or requirement, the donor i.e. the person empowered to exercise such power is duty bound to do so.

Notwithstanding the above development, the exercise of power of discretion to grant or not to grant consent hinders the development of land transaction in Nigeria and it still continues to do so until when such power is authoritatively defined and limitations are clearly set out.

d) **Security Risk:** The case of Ajilo[62] further shows that banks are in precarious positions when advances are made before obtaining consent on securities offered by customers. This is because; mortgagors who failed to obtain consent to a mortgage deed could later rely on their initial wrong to assert that the mortgage deed was null and void for lack of consent. Yet, the law provides that it is the duty of the mortgagors and not the mortgagees to seek for consent[63] and most often, the mortgagors remain indifferent about consent let alone regularity of the consent obtained. Thus, the Supreme Court's decision in Ayodire[64] and the recent Court of Appeal's decision in Pharmatic Industrial Project Ltd.[65] are typical examples where the Supreme Court allowed a mortgagor to benefit from his own wrong. The position that imposes serious hardship on mortgagee who is now put under an unfortunate obligation to inquire not only about consent but the regularity of how it is obtained by the mortgagor. The position that also makes land transaction a risky business most especially for the banking industries.

e) **Delay and Waste of Time:** Unnecessary delay which emanates from the rigorous procedure of securing consent of the Governor, sometimes leads holders of land into frustration and dissatisfaction. For this reason, James asserts that:

> The system is potentially open to abuse large areas of administrative discretion exist in the controlling mechanism and potentially so in establishing priority in processing applications. A lethargic administrative

[62]Supra
[63]See *Akunne Bosa Mbanefo v. Mofunanya ACBV & Another* (2014) *LPER* SC 179/2007.
[64]Supra
[65] Supra

> machinery slows down many proposed development. As a partial response to delays in getting transactions approved, and reaction to exorbitant charges therefore, many transactions are taking place without the parties seeking consent. This practice could have an adverse consequence on the individual rights holder. Contravention of the regulations are likely to lessen respect for this and other administrative procedures, while at the same time it sacrifices the national interest which justifies the existence of the regulations.[66]

Therefore, this unnecessary delay results in waste of time of holders of land. For, before the consent of the governor is sought, a holder has to fill some forms and pay some charges that sometimes take some months before the consent is granted. This therefore hinders the development of lands in Nigeria.

f. Conflict of Interpretation: This is one of the fundamental problems of consent provision. For in applying section 22 of the Act, the courts in many cases decided that lack of consent does not render a transaction illegal, while in other cases they held otherwise[67]. More so, it has been held in some cases that fraudulent mortgagors would not be allowed to benefit from their own wrong, but they were allowed to do so in recent cases[68]. This in fact is a controversy that creates too much hardship to mortgagees that can easily be defrauded by fraudulent mortgagors. Thus, unless the courts especially the Supreme Court carefully looks at its previous decisions before judging on the ones at hand, this problem will continue to create more and more difficulty to people which will finally paralyze land transactions in Nigeria.

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[66]James, R.W. NigerianLand Use Act: Policy and Principles University of Ife Press Ltd. Ile-Ife Nigeria 1982 p.181

[67]See the cases of *Awojugbagbe v. Chinukwe*, (supra) Savannah Bank v. Ajilo (supra), UBN v. Ayodare (supra), Trade Bank v. Pharmetic Industrial Project (supra)

[68]Compare Ajilo (supra) Awujugbagbe v. Chinukwe (supra), UBN v. Ayodare(supra) and Pharmetic Industrial Project (Supra)

4.5 The Point at Which Governor's Consent Is Required.

The position of the law is that consent of the Governor for alienation is required at the time of perfection not the time of negotiation.[69] Hence, parties to land transaction can commence performance or negotiation before obtaining governor's consent. But the contract will be incomplete until consent is obtained.[70] Thus, in Awojugbagbe Light Industries Ltd v. Chinukwe[71] and Federal Mortgage Bank of Nig. Ltd v.Mrs. Agnes Omolora Akinola,[72] the court held that it is a common practice that before the Governor's consent is sought, a form of tentative agreement for alienation of the property must have been entered into by the parties but such agreement is only inchoate and can only be completed when the governor finally approves or gives his consent. It also held that a holder of statutory right of occupancy is not prohibited by section 22(1) of the Land Use Act from entering into a form of negotiation, which may end with an executed agreement for presentation to the governor for his necessary consent or approval[73].

4.6 Instances Where Consent is not Required.

Governor's consent is not required in the following circumstances:

(a) ***Equitable Mortgage:*** Section 22 (a) of the Land Use Act provides that:

''Governor's consent shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor''. This section is problematic in that it exempts equitable mortgage from the series of transactions that require governor's

[69] Taiwo, A. *The Nigerian Land Law.* Op.cit. 234
[70]Ibid
[71]Supra
[72](1998) 1 NWLR (Pat.270) 485
[73]Calabar Central Co-operative Thrift and Credit Society Ltd and 2 others v. Bassey Ebonng Ekpo (2008) 6 NWLR (pat.1083) 362 at 417.

consent, while section 51 of the same Act defines mortgage to include equitable mortgage. This is a serious conflict that misleads courts to give controversial judgments[74] However, towards the end of our research; we realize that proviso (a) to section 22 of the Land Use Act makes it discretionary to a holder to seek consent for alienation. So, it is our view that said section (though by strict interpretation of section 51 of the Act, it requires consent) makes it easier for a holder to alienate his right.

(b) ***Reconveyance or Release:*** Section 22 Paragraph (b) of the Act also provides ''consent shall not be required to the reconveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Governor''.

(c) ***Up-stamping of Mortgages:*** Governor's consent is not required in granting new facility so long as consent had been obtained when the first mortgage was created[75]. Thus, in ***Owoniboys Tech Service Ldt. v. U.B.N*** Plc[***76***]. The Supreme Court held that Governor's consent is not required for Up-stamping. Again, this principle of no further consent is required for Up-stamping applies even where the previous consent was granted under a law that ceases to exist[77]

[74]As in Okuneye v. F.B.N PLC(supra), where the Supreme Court without considering the comprehensive definition of mortgage under section 51 of the Act (which includes equitable mortgage) decided that consent of the Governor is not required in equitable mortgage.
[75] Dadem, Y.Y. Op cit P. 138
[76] (2003) 15 NWLR, pt. 844, P.545
[77] See Adepate v. Babatunde (2002) FWLR pt. 91 p. 1503

4.7 Extent of Governor's in Granting or Refusing Consent

It is very difficult to delimit the extent and scope of powers of the governor in granting or refusing consent[78]. This is more so as no provision is made in the Act that consent should not be unreasonably withheld and so the powers of the governor appears to be absolute[79]. This therefore indicates that nothing could a holder do when he complied with all the necessary requirements and consent is withheld or refused. The basis for this conclusion is founded on the language of the consent requirement, which obliges the holder to seek for the consent without directing the Governor to give the consent, thus making the power discretionary[80]. Hence, in the case of ***R v. Minister of Lands and Survey***[81] Reed, Ag S.P.J in interpreting Section 11 of the Land and Native Rights Ordinance which is *in pari material* with Sections 21 and 22 of the Land Use Act held that the plain and ordinary meaning of the section is to confer on the Minister discretionary power to grant or withhold consent to alienation of a right of occupancy and accordingly an order of mandamus cannot lie to compel consent to the alienation[82]. It is our humble view that since governors have made regulations for procurement of consent in their various states, they should not (when holders comply with the regulations) withhold consent. And if they refused after holders comply, the court should compel them to give consent.

[78] Abugu, U Opcit 92
[79] Ibd.
[80] ibid
[81] (1963) NRNLR P. 58
[82] However, in the case of *Stitch v Attorney General of the Federation* (1986) NSCC 1389 (pat.II), it was held that discretionary powers must be exercised judiciously and when a citizen fulfilled some conditions precedent for the exercise of such powers and the powers was not exercise, it is the citizen's right that is at stake and must not be ignored.

CHAPTER FIVE

SUMMARY AND CONCLUSIONS

5.1 Summary

This research has discussed the problem and implication of consent requirement on alienation of right of occupancy under the Land Use Act. It started with the general introduction, the statement of the problem of the research which is basically conflict of interpretation of the provision of Section 21 and 22 of the Act. This conflict of interpretation leads to problem of conflicting decisions by the courts. Consequently the lower courts are always faced with difficult task as to which of the decisions of the Superior Courts to follow. This was seen in the case of ***Pharmatic Industrial Project Ltd V Trade Bank (NIg) Plc & 4 Ors.***[1] ***w***here the Court of Appeal was confused as to which of the decisions of the Supreme Court to apply. The reason being that the Supreme Court held in many cases that a mortgagor shall not be allowed to rely on the provisions of Sections 21 and 22 of the Land Use Act to invalidate a mortgage to which no governor's consent had been obtained.[2] But in its recent decision in ***Union Bank of Nigeria Plc and Anor v. AYodire & Sons Nigeria Ltd***[3] the Supreme Court went against its previous decisions and applied the principles in ***Ajilo v. Savannah***[4]**.**Thus, when the Court of Appeal was faced with this task, it also went back to the decision in Ajilo and applied the Supreme Court's verdict in ***U.B.N. Plc v. Ayodire***[5]

This recent development is one of the problems of the research. It hinders the development of land transactions in particular and problem of interpretation and

[1] (2009) 12 NWLR (pt.1159) p.577
[2] Adedeji v. National Bank of Nigeria Ltd (1998) 1 NWLR (p.11) p.212, *Chief Belonwo Ugochukwu v. Cooperative and Commerce Bank (Nig) Ltd.* (1996) 6 NWLR (pt.456) p.524, *Alh. Ayotunde Seriki v. Sefi'u Olukorede,* (1999) 3 NWLR (pt.595) p.469 at 480-481; *Nigeria Industrial Development Bank Ltd v. Olalomi Industrial bank Ltd.* (2002) 5 NWLR (pt.761) p.532 at 548 etc.
[3] (2007) 12 NWLR (pt.1052) p.567
[4](Supra)
[5](Supra)

application in general. Consequently, the Court of Appeal per Agube J.C.A declared that:

> it is a sad commentary on the current state of our jurisdiction that in spite of unconscionable consequences suffered by the failure to obtain the necessary consent from the Governor … the appellant can turn round to benefit from his fraudulent act... equity has not only remained silent on the reserved bench while the Land Use Act is actively at play but equity now lies prostrate and has bitten the dust while the harshness of the Land Use Act is being exploited and shall continue to be rampage as a vehicle for perpetration of fraud by persons of the appellant's ilk and other smart elecs. However, as lower courts we are bound by the magisterial pronouncements of the Apex court whether we are persuaded or not of the reasonability or otherwise of the interpretation of sections 21 and 22 of the Land Use Act.[6]

The research also discussed the problem of non compliance. People alienate land without complying with the provisions of the Land Use Act. This is due to the cumbersome nature of the consent provision on the one hand and the hardship created by the conflicting interpretation and application of sections 21 and 22 of the Act

5.2 Findings

Therefore, having discussed and analyzed the entire chapters of this research, the writer finds that sections 21 and 22 of the Land Use Act are full of complex provisions that create and continue to create controversies of both application and interpretation by our courts. Hence, the following are the findings of this research.

1. ***Inconsistency in the Interpretation:*** It has been found that there is inconsistency in the interpretation of consent provision by the courts. Thus, the lower courts are always in dilemma as to which decision of the apex court to apply on issues relating to consent. Thus, the lower courts have to follow any most recent

[6] In Pharmaetic Industrial project (supra).at pp. 645-646 paras E-B

decision of the Supreme Court whether or not it is reasonable and whether or not it may lead to perpetration of fraud by the mortgagors.

2. ***Evading of Consent***: It is found that consent requirement leads to hardship in land transactions. Subsequently people engage in land transactions without compliance with the provision of the law. This is a problem to the land transaction in particular and a setback to the Nigerian legal system in general.

3. ***Consent Provision is Too Wide***: It has also been found that consent provision is too wide. The reason being that even equitable mortgage by strict interpretation of section 51 of the Act is subject to consent requirement. For the Act under that section defines mortgage to include equitable mortgage.

4. ***Discretionary Nature of Consent Provision:*** It has been observed that powers of the Governor in granting consent is discretionary and without limitation. This is because the power is not subject to any interpretation. It obliges the holder to seek for consent before alienation, but it does not direct the Governor to give consent. Consequently, Governor may without any reason refuse consent, and the holder cannot challenge the refusal.

5. ***Security Risk:*** Cases of ***Ajilo v. Savannah;***[7] ***Ayodare v. UBN Plc***[8] ***and Pharmetic Industrial Project v. Trade Bank (Nig) Plc***[9] are clear indications that Financial Institutions are in precarious positions when advances are made before obtaining consent on securities offered by customers. This is because; mortgagors who failed to obtain consent to a mortgaged deed could later rely on their initial wrong to assert that the mortgaged deed was null and void for lack of consent. This is notwithstanding the fact that the mortgagor is under duty to secure consent. And most often, the mortgagors remain indifferent about consent

[7] Supra
[8] Supra
[9] Supra.

let alone regularity of the consent obtained. It is observed that this position has put the mortgagee under an unfortunate obligation to inquire not only about consent but also the regularity of how it was obtained by the mortgagor. Thus, land transaction is now a risky business most especially for financial institutions.

6. ***Delay, Waste of Time and High Cost of Land Transactions: -*** The rigorous procedure of securing consent of the Governor leads holders of land into frustration. Sometimes it takes months or even years before the consent is granted. This hinders land transactions in Nigeria. Moreover, the nature of cost of securing consent as a result of Government increase in charges before securing consent, lead to the high cost of land in Nigeria. This makes land transaction in this country very expensive and difficult for ordinary citizens. Consequently, many plots of land remain unused and unsold.

7. ***Lack of Uniformity of Implementation:*** It has been observed that the procedure for securing consent differs in various states of the federation. Although the Act under section 46 empowers the National Council of States to make regulation for the purpose of carrying the Act into effect. And these powers include power to provide guidelines for uniform procedure of securing consent of the Governor. However, securing consent in Lagos differs from that of Kaduna State even though the Act is a national legislation. Hence, this creates problems of implementing consent requirement because what is obtainable in one state is different from another.

5.3 Recommendations

Consequent upon the above findings, the researcher has the following recommendations:

i. ***Uniformity of Decisions:*** That the courts especially the apex ones should judicially and judiciously look at their previous decisions on consent provision before judging on subsequent cases. This will minimize problems of conflict of interpretation faced by the lower courts.

ii. ***Time Limit for Consent to Be Granted:*** That consent clauses under Sections 21 and 22 of the Act should completely be removed or alternatively there should be a time limit within which Governor should give consent. If the time expires and the governor did not give the consent it should be deemed that consent is granted. This will bring sanity to land transactions and will reduce unnecessary delay that hinders the development of land transaction in Nigeria. Most importantly, people that engage in land transactions without compliance of the requirement of the law will now comply.

iii. ***Financial Institutions to Precautionary measures:*** We recommend that **Financial Institutions should be very careful.** They should ensure that any person who wants to mortgage his land has obtained consent and obtained same from proper authority. This will ameliorate the risk banks face when involved in mortgage agreement.

iv. ***Governor's Powers Be Defined:*** It has been recommended that the powers of the Governor to give consent should be defined and subject to court's interpretation. So, if a governor unnecessarily refuses consent, a holder may legally challenge the refusal.

v. ***Uniform Implementationorm***: uniform procedures of securing consent needs to be made. This could be achieved when the National Council of States exercise their powers given to them under section 46 of the Land Use Act to ensure that

all the 36 states of the Federation including the Federal Capital Territory (FCT) follow uniform procedure.

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