

USE OF RIGHT OF OCCUPANCY AS A SECURITY FOR ADVANCES AND ITS ROLE IN LAND DEVELOPMENT IN NIGERIA*

Abstract

Land is a veritable source of wealth in Nigeria that provides the physical bedrock for all communal social and economic interaction and as such, government, corporate organisation, and individual strives to own, hold, lives in and use land. One major means of owning, occupying and using land outside allotment, inheritance, lease; mortgage is through the grant of Right of Occupancy. The Right of Occupancy is a creation of the Land Use Act 1978 which likened it to a trust relationship wherein, the Governor is the trustee/owner while the citizens are the beneficiaries/owners of the land. The right of occupancy is a grant of term of years to a citizen to hold, occupy and use a particular land. This work basically examines the right of occupancy and demonstrates how the right of occupancy is used as advances for security and development of land in Nigeria. The work adopts analytical and doctrinal research method. It reveals that the right of occupancy is used as collateral for loan and generation of revenue. It argues that arbitrary revocation of right of occupancy and high cost of obtaining consent are the bane of the right of occupancy. It recommends amongst others the reduction of incessant revocation of right of occupancy of and use of mandamus to compel Governors to grant right of occupancy.

Keywords: Right of Occupancy, Security for Advances, Land Development, Nigeria

1. Introduction

Land is an important property to man and is seen as a basis of wealth and the heritage of the wise¹. The economic value of land has made it a commodity that government, corporate organisation and individual struggle and desire to own, occupy and use. Land is the most valuable physical possession of man. It is trite to say that on this planet, no man has ever or can ever live productively without having dealt with or having dealings with land in one capacity or the other. Simply put, in mans' activities on earth, man's struggles in life is to own landed property, a seeker of same or to be in possession of landed property, thus creating a landlord and tenant relationship once they are at *consensus ad idem*². Land was previously held by families, communities, or villages before the promulgation of the Land Use Act³ hence, the Right of occupancy was unknown to Nigeria before the promulgation of the Land Use Act 1978⁴. The Right of Occupancy is a creation of the Land Use Acts⁵. Right of Occupancy before the promulgation of Land Use Act, 1978 was commonly expressed as Land Ownership. Land ownership before the Act was mainly via conquest, gifts, settlement, sale, etc. It is argued that the emergence of Right of Occupancy divested land owners of all other forms of land holding for example the fee simple and freehold or absolute title system, communal, family and land holding. In fact, the Land Use Act provides that⁶ 'Upon the grant of 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 *Nkwocha v Governor Anambra State & Ors*⁷, Kayode Eso, JSC held:

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

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¹ Fortune Ebie, SOP cited 'Land Rights and Secure Tenure as the Basis of Economic Empowerment and Housing Delivery' being a paper presented at stakeholder's forum on land reform organised at rock view hotel Abuja by the FMEHUD on 6&7th November 2007, cited in Uwakwe Abugu *Land Use and Reform in Nigeria Law and Practice* (Immaculate Prints Gwagwalada 2012 pg.182)

² V C Arinze, 'Understanding the Legal Disparities among Leases, Tenancies and Other Forms of Occupation: The Convolutional Conceptions Of Tenancy Laws' *International Journal of Comparative Law and Legal Philosophy (IJOCLLEP)* 3 (3) 2021 p 47

³ B O Alloh 'Family right of occupancy and its alienation under the land use act 1978' *Port Harcourt journal of business law*, vol.2 no 1 (Faculty of la rivers state university of science and technology, Port Harcourt 2016) p.1

⁴ CAP L5 VOL. 8 LFN, 2004

⁵ Ibid s.5

⁶ Ibid ss. 5(2) : Olawoye C O, 'Statutory Shaping of Land Law and Administration up to the Land Use Act' in Omotala JA (ed) *The Land Use Act* p 18, 19, 20, 21 in Uwakwe Abugu, *Land Use and Reform in Nigeria Law and Practice* (Immaculate Prints Gwagwalada 2012 pg.19)

⁷ (1984) 1 SCNLR 634 at 652

In *Adole v Gwar*⁸, Ogbuagu JSC held that ‘...it must be borne in mind always and this is settled, that the only innovation introduced by the Land Use Act ... is that it divests any claimant of radical ownership of title and limits the claim, to a right of occupancy’. However, there is also an argument that notwithstanding the above position that the radical title to land is vested in the state governor subject to the provisions of this Act⁹, there exist this presumption that because the governor holds it in trust, the equitable title does exist and is vested in the citizens who enjoys physical possession and use of the land¹⁰. Justice Nnaemeka Agu summarised this view in *Ogunleye v Oni*¹¹ as

...That the Land Use Act never set out to abolish all existing titles and rights to possession of land. Rather, when such rights and titles relate to developed lands in urban areas, the possessor or owner of that right or title is deemed to be statutory grantee of a right of occupancy under section 34(2) of the act. Where it is non-urban land the holder or owner under customary law or otherwise is deemed to be a deemed grantee of a right of occupancy by the appropriate local government under section 36(2).

The Right of Occupancy is likened to trusteeship wherein the governor of a state holds the land in trust for her citizens (beneficiaries)¹². In *Nkwocha v Governor of Anambra State*¹³ Justice Irikefe held that ‘...by this piece of legislation, a legal trust affecting every inch of Nigerian land is created, constituting every state military governor as trustee in respect of land within the limits of his state for the benefit of Nigerians’. The Land Use Act does not define right of occupancy and there also appear to be no clear definition of right of occupancy. It is describable by a careful study of the entire Land Use Act, that is, its precursor; the Land Tenure Law (Northern Nigeria) defines it as ‘a title to the use of and occupation of land¹⁴. The court in *Ezennah v Atta*¹⁵ defines right of occupancy as the grant of term of years to a citizen to hold, occupy and use the land. The Right of Occupancy can be statutory or customary. It is statutory when it is granted or deemed to be granted by the State Governor in respect of lands in Urban Areas and customary when granted by the local government¹⁶. Simply put, the Right of Occupancy means taking possession of real property subject to, or in the absence of a legal right or title. Right of Occupancy is not granted in vacuum, this means that ‘Land’ is the subject matter for which Right of Occupancy is granted; it is the very basis for Agricultural, commercial and industrial development. Land has remained the most valuable property in the life of man and is seen as the grandfather of all properties, almost all human needs are dependent on land¹⁷. This work adopts the definition of land given by Edward Coke, for purposes of clarity; the definition is reproduced as;

Land in its restrained sense to mean soil, but in its legal acceptance, it is a generic term, comprehending every species of ground, soil or earth, whatsoever, as meadows, pastures, woods, moors, waters, mashes, furze and heath; it includes also houses, mills, castles and other buildings, for which the conveyance of land, the structures upon it pass also. And besides an indefinite extent upwards, it extends downward to the globe’s centre, hence the maxim *cugus est solum ejus est usque and coelum et ad inferos*...¹⁸

It is as a result of these values of land that man craves its use as subject matter for advances. The end product of the use of Right of occupancy as security is to develop land. Therefore, Land development could mean altering the landscape in so many ways such as changing landforms from a natural or semi-natural state for the purpose of agriculture or housing; Subdividing real estate into lots, typically for the purpose of building homes¹⁹. This work attempts to distinguish the Right of occupancy and other terms like licence, lease and freehold. Most importantly, it deals more on the use of Right of Occupancy as security for advances and its role in land development. It identifies high cost of obtaining consent, arbitrary revocation of right of occupancy as part of the challenges of Right of occupancy. This work recommends that where government refuses to renew right of occupancy without

⁸ (2008) 5 M.J.S.C 38 at 66 : *Savannah Bank Ltd v Ajilo* (1989) 1 NWLR (pt. 79) 805; *Salami v Oke* (1987) 4 NWLR (pt. 63) 1 cited in Dorothy Udo Umotan Umotan , ‘ The land Tenure System and Right of Occupancy in Nigeria’ *International Journal of Legal Development and Allied Issues* Vol 4 issues 2 2008

⁹ (n 4) s. 1

¹⁰ *Ibid* s34(2) , 36(2)

¹¹(1990) 2 NWLR (pt. 135) 745, 784

¹²(n 4) s.1 : John K Synger, *The Nigerian Land Use Handbook* (Odade Publishers, Comfort House 3rd Floor Yaba, Lagos pg1) : Chris C Wigwe, *Land Use and Management Law* (Mountcrest University Press, Osu-Accra 2016 pg 203)

¹³ (1984) 6 S.C. at p. 364

¹⁴ Law of Northern Nigeria Cap 59 1962 s.1

¹⁵ (n 4) s.1 : (2004) All NWLR pt. 202 p 1858 1884

¹⁶ *Ibid* ss. 2 (1) (b), 6 and 36

¹⁷ E. Essien, *Land Use and Security in Real Estate in Nigeria* (University of Lagos Press 2003) 279

¹⁸ Chris C Wigwe, *Land Use and Management Law* (Mountcrest University Press, Osu-Accra 2016 pg. 7)

¹⁹ Business Dictionary www.businessdictionary.com accessed 15/1/2022

cogent reason, an order of mandamus should be given to compelled him to so do, Reduction of incessant revocation of Right of Occupancy amongst others.

2. Right of Occupancy and Its Differentials

Lease, Licence, Freehold and other several holdings or possessions are erroneously thought or seen as same as right of Occupancy. Whereas the Right of Occupancy is granted by the Governor for a fixed period which makes it look like lease, charge, licence, mortgage etc. Strictly speaking, they are not the same. According to per Onalaja J.C.A. (as he then was);

A lease is the demise by the landlord of a less estate than that which himself possesses in the land. If he transfers his entire interest, it is an assignment. The estate created in a lease is designated 'Terminus' owing to its duration or continuance as being defined and limited. A lease may take effect without necessity of actual entry but to be effectual an agreed rent must be made between the parties and this is to be derived from the intention of the parties.²⁰

A lease therefore is a document creating an interest in land for a fixed period of certain duration in consideration of payment of rent.²¹ Accordingly, Lord Templeton laid down the hallmark in *Street v Mount Ford*²² that for a lease to be valid there must be exclusive possession at a rent and for a term, but a holder of a Right of Occupancy under the Act does not enjoy exclusive possession against the Governor. The Governor or any person authorized by him has unfettered access to and can freely enter upon and inspect the land comprised in any statutory Right of Occupancy or an improvement affected there on for inspection of any reasonable hour in the day time²³. License is characterised by easy revocability and the lack of prospective certainty of duration, unlike a licence, the right of occupancy is alienable, transferable and transmissible²⁴. The Right of Occupancy has also been thought of as freehold, but it is not a freehold because as already stated the right holder has no exclusive possession and in the case of actual grant of statutory right, it is not indefinite in duration but rather it is for a term of years certain and is subject to payment of rent to the Landlord (Governor). The intention of the lawmakers in introducing the right of occupancy system was to establish new interest in land. However, the Right of Occupancy is a hybrid between a licence and a lease on terms and conditions which upon breach by a right holder is subject to revocation by the governor *LSDPC v Foreign Finance Corporation*²⁵

3 The Role of Right of Occupancy as a Security for Advances

It is now a general practice that the owner of a piece of land would find it extremely difficult to use his property as security for advance as most, if not all financial or lending institutions or commercial banks would not accept a landed property as a collateral for advances except and unless the owner is a holder of a Right of Occupancy over the land. It is important to note that Right of Occupancy is evidence by a certificate of occupancy. When we say the Right of Occupancy is a security for advances we simply mean that the certificate Right of Occupancy is an instrument to get money from the bank (collateral) in form of loan, mortgage, lease, Assign, under-let or sublet; Assent, Gift. This is to say that it is the most required document or right any lending institutions or banks need for transaction with individuals. The Right of Occupancy as a security for advances we simply mean that the certificate Right of Occupancy is an instrument (collateral) to get money from the bank, that is to loan, mortgage, lease, Assign, under-let or sublet; Assent, Gift. The Right of Occupancy is the most required document or right any lending institutions or banks can do business with you in respect to land. Modern trend is that mortgage of land remains one of the most popular securities for bank advances²⁶ and right of occupancy is a major requirement in preparing the legal document²⁷. The holder can assign his interest by totally giving out his right or some of his right. He can also sub-let or under-let part of his or all his residual rights therein. This position as given judicial blessings by the Supreme Court of Nigeria in *Abioye v Yakubu*²⁸ that Right of Occupancy bears resemblance to leasehold interest, they can be assigned, mortgage and can also be under-let or sub-let. The above position is

²⁰ *Lewis Opara v. D S (Nig.) Ltd.* (1995) 4 NWLR (pt.390) p. 440

²¹ S.A. Oretuyi, Some Reflections on Leases/Tenancies in Relation to the Land Use Act 1978 in essays on the Nigerian law of Landlord and Tenant pg. 206 cited in V C Arinze, 'Understanding The Legal Disparities Among Leases, Tenancies And Other Forms Of Occupation: The Convolutional Conceptions Of Tenancy Laws' *International Journal of Comparative Law and Legal Philosophy (IJOCLLEP)* 3 (3) 2021 p 50

²² (1985) 2 All E R 289

²³ (n 4) s. 11

²⁴ *Ibid* ss. 21,22,23, and 24

²⁵ (1987)1 NWLR

²⁶ E Chianu, 'Land Administration and Economic Development in Nigeria 292, Seminar Paper Presented at University of Lagos Faculty Akoka, Lagos

²⁷ Chris C Wigwe, *Land Use and Management Law* (Mountcrest University Press, Osu-Accra 2016 pg 321)

²⁸ (1991) 5 NWLR pt 130 pg 223; *Union Bank of Nigeria PLC v Austral Builders* (2010) 5 NWLR

further illustrated or given statutory blessings by the provisions of the Act²⁹ which recognizes the right of occupancy as a security with a proviso or condition that before it can be used the holder must first seek and obtain consent from the Governor or Local Government authorities. S.21³⁰ prohibits the alienation of customary right of occupancy of possession, Assignment, sublease or otherwise howsoever:

- a. Without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable sheriffs and civil process laws or:
- b. In other cases without the approval of the Local Government. S.22 (1) prohibits the alienation of statutory Right of Occupancy without the consent of the Governor. Simply put, the holder of statutory right of occupancy is barred from alienating his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub lease or otherwise without the consent of the Governor.

This was the position in *Savana Bank Nig. Ltd V Ajilo*³¹ where the Supreme Court held that consent must be obtained prior before the mortgage transaction except in a situation where the party have obtained consent to equitably mortgaged the property to the same person whom the legal mortgage is contemplated.

4. The Role of Right of Occupancy on Land Development

The question that readily comes to our minds is; has right of occupancy played any role in land development, if yes. What are those roles? It is with certainty that we answer this first question in the affirmative and state that the right of occupancy has played several roles on land development which includes but not limited to:

- a. Revenue Generation: The right of occupancy gives conveyance validity. Today, it is very difficult to convey a landed property without the right of occupancy. The right of occupancy is a tool for revenue generation. It has been argued that without conveyance, there are no means of enforcing the revenue generation through stamp duties³². When an application is made for stamp duties the applicant pays a fee to government. The same apply to those who make application for Consent. The fees or monies collected from payment for stamp duties and application for Consent are used by the government to develop the land in form of infrastructures.
- b. The Act³³ generally provides for or allows for compulsory acquisition of land and subsequent compensation. The Right of occupancy becomes relevant and a tool for land development because a non-holder cannot be paid compensation. Compensation paid to a holder, is in-turn used to develop other areas of his land.
- d. Planning Regulation: This regulates the type of building in specific area. When you apply for building permit and pay the fee, government will reinvest your fee to creating infrastructure while the permit given to you will describe the nature of building to be built in line with developmental plan of government.
- e. The rents payable and penalty payable by defaulters each day in line with ss. 16, 20 and S.5(1) (f) are all used to develop land in building roads, housing estate, boreholes, schools etc.
- f. The right of occupancy is playing its role on land development as it is been used to apply for C. of O and the payment for C of O is use to develop land
- g. Registration Fee for Right of Occupancy: Money payable for un-exhausted improvement and tenement rate paid are used to develop land by ways of creation of basic amenities.

5. Challenges

The right of occupancy as a security for advances and development is not without problems. The problems associated with the right of occupancy include;

1. High cost of obtaining consent: There has been complaint that governments are using the consent provision as a clog to extort money from transferees of land.
2. Fraud Associated with Consent: A person who sells right of occupancy without consent goes to court to declare the said sale void and thereby defrauding the purchaser.
3. Arbitrary revocation of the right occupancy.

6. Conclusion and Recommendations

Land is so dear to mankind that Government, corporate organisation, and individual strive to own, hold, lives in and use land. One major way of owning land is by right of occupancy which is a grant of term of years. The right of occupancy is a creation of the Land Use Act. This work argues that the right of occupancy is different from a lease, mortgage, freehold no matter how alike they may appear to be. It is a security or a tool for advances because it is the most required document for a lease, mortgage, conveyance etc. Revenue generation from payment for

²⁹ (n 18) ss 21 and 221

³⁰ *ibid*

³¹ (1989) NWLR (pt. 997) 305

³² U J Osimiri, Conveyance as a Tool for Effective Stamp Duties Operation (2004) vol. 24 *Journal of Private and Property Law*

³³ (n 3) s 44

stamp duty, rents, penalty from defaulters etc are reinvested in development of land. This work identifies high cost of obtaining consent, fraud associated with consent and arbitrary revocation of right of occupancy as major problems of right of occupancy. This work recommends that an Order of Mandamus for applicant where the Governor maliciously refuses consent. The court should rather order for specific performance instead of making or declaring the holder of Right of Occupancy transaction void. The holder of Right of Occupancy whose Right of Occupancy is arbitrarily acquired should go to court for recovery of the land especially where the land is not used for the purpose it was acquired and the court should be bold enough to make an order against the government by reverting back the land to them. There is need for reduction of incessant revocation of Right of Occupancy. A holder of right of occupancy that has built on the land be allowed to renew his right of occupancy to encourage development.