

LAND REGISTRATION AND ADVERSE POSSESSION*

Abstract

Adverse possession applies to unregistered and registered land, depending on the jurisdiction. While the former seems to be permissible, the latter is considered to be problematic as it is irreconcilable with the concept of indefeasibility of title similar to the principle of rectification and fraud, which could allow for the rectification of the register in favour of the adverse possessor and against the registered title holder which is contrary to the system of land registration. The work relied on the theory of indefeasibility of registered title and the theory of property right to justify that adverse possession of registered land is incompatible with the land registration system. The work adopted doctrinal methodology in its analysis of the development of the law on adverse possession regarding registered land. The work found that adverse possession of registered land is antithetical to land registration system and not only unfair but unjust to the registered owner. The work recommended and concluded that the best way to protect registered land owners is by applying restitution principles to the operation of adverse possession.

Keywords: Adverse Possession, Expropriation, Indefeasibility of Title, Land Registration, Unjust Enrichment

1. Introduction

Several jurisdictions world over use the Land registration systems to store information on the ownership of land, rights attached to it, and burdens affecting it. An efficiently operative land registration system guarantees the security of land transfer operations. Transactions with land are statutorily required where operational to be registered in the government agency usually referred to as the Land Registry or Bureau. The Nigerian Land Use Act, for example, mandatorily requires that the purchase, sale, transfer or alienation of any interest in land must be 'perfected' by way of: stamping of the title deeds; registration of the title deeds; and obtaining the governor's consent before such transaction may be deemed to be valid in law. Acquisition of registered title by adverse possession gives the adverse possessor the opportunity of defeating the interest of the actual holder of registered land while the State expropriates the interest of the holder in favour of the squatter or trespasser without compensation.¹ This scenario defeats the essence of land registration as an effective means of guaranteeing holders' title to land. It also runs counter to the fundamental concept of indefeasibility of title that is a feature of land registration, undermines the constitutional right to own property in modern and democratic society of today, is considered to be manifestly unjust and unfair in its harshness on the land owner, an illogical and a disproportionate consequence for the innocent owner's neglect of his land². The thrust of the work is basically the analysis of inadequacies in the adverse possession of registered land and to formulate a reform that will give better protection to the registered land owners while preserving the operation of adverse possession. The work advances some of the criticisms leveled against adverse possession of registered land and concludes that the doctrine is unjust to registered land owners being in conflict with the concept of indefeasibility of title, a violation of property right as constitutionally guaranteed and antithetical registration system by creating insecurity of registered title to land.

2. Land Registration System

Land Registration is simply the system by which all matters concerning possession, ownership, or rights conveyed in land can be registered and recorded with the government to provide evidence of title, facilitate transactions and prevent the unlawful transfer of ownership. Registration of land at the relevant Land Registry is one of the three stages of perfecting title to land to enhance the property rights enjoyed by the Assignee. The land registration process helps to give publicity to land transactions, that a claimed interest already exists on the land, and to establish priority against any subsequent claim to the same interest to prevent any form of concealed dealings and serves as an authentication of the ownership or legal interest in a land. As opined by Obadina the system simply confirms transactions that confer ownership or interest. When the land is registered in the register, it serves as conclusive proof of title.³ Lord Watson aptly captured the objectives of English Land Registration Act, 2002 in *Gibbs v Messer*⁴ and opined thus:

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¹ See section 100 Lands Registration Law of Lagos State No. 1 of 2015.

² See the judgment of Neuberger J in the case of *Pye (Oxford) Holdings Ltd vs Graham* (2000) ch 676. According to the Justice, 'I believe the result is disproportionate, because it does seem draconian to the owner, and a windfall for the squatter.'

³ See I. Obadina, 'e-Registration at Crossroad: An Appraisal of the Lagos State Lands Registration Law 2015' (2017) *Faculty of Law University of Lagos*, 78.

⁴ (1891) AC 248 at 254.

The main object of the Act, and the legislative scheme for the attainment of that object,... is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's titles.

The basis of the land registration system therefore is meant that it is the act of registration that confers property rights to land, as opposed to deed, which in the previous system transferred the interest in land. The land registration system was developed as solution to the problems and inefficiencies of title by deed.⁵ Registration is notice to the whole world, including the adverse possessor who it is incumbent on to inspect the registrar before dealing on the land⁶. The registration system eliminates the copying of documents and examination of long chains of past transactions because proof of ownership is accomplished merely by recording a certificate of ownership issued by a land court or registrar and giving a copy to the owner.⁷ The land registration system comprises of three fundamental principles:

- (i) The principle that everything that can be registered has been registered, and thereafter, the registered owner's title is immune from attack from anyone holding an unregistered interest.
- (ii) The Register contains the name of the registered owner, the nature and limitations of ownership, and any other interests that may be held by third parties over the land such as easements and equitable interests.
- (iii) The principle is compromised when a purchaser makes every attempt to search for all interests relating to the title and fails to find an interest which may very well be in existence and yet, unregistered.⁸

Ruoff⁹ introduced the mirror and the curtain principles in description these characteristics. He describes the mirror principle as 'the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man's title.' The Register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man's title. The Register is not only paramount but also a mirror of all material information about an owner's estate. The Register book reflects all facts material to an owner's title to land and the title is a mirror, and that one can rely on it completely.¹⁰ The curtain principle on the other hand most effectively ensures 'simplicity in the general operation of the registration system'.¹¹ The register ought to reflect the correct legal situation and there is no need for further investigation of the past transaction on the land beyond the Register. The curtain is lifted, and buyers want easy access to earlier transaction documents to verify themselves how the current right holder on the title came into that position.¹² The assertion that land registration guarantees landownership security is common knowledge. Thus, efforts at securing land ownership have concentrated on the formulation and implementation of land registration policies. However, over the years, whilst some studies claim that land registration assures security, a lot of other studies have established that security cannot be guaranteed by land registration. Also, there is evidence from research that has shown that land registration can be a source of ownership insecurity in some cases.¹³ The title register under the land registration laws provide for a definite record of landholding and mirrors the interests of the proprietor in respective parcels of land for Conveyancing and other land transaction purposes. As rightly posited by Smith, the idea of the record is that the holder of a registered interest in land is assured of protection against adverse claimants while the title of the holder is guaranteed.

Under a registration system a list is maintained of items of property, each uniquely identified and associated with the name of its owner. When there is a sale of registered property, the acquirer's name is recorded as the new

⁵ See R. Sackville and M.A. Neave, *Australian Property Law*, 8th ed. (LexisNexis: New York, 2008)

⁶ *Ibid.*

⁷ See R. M. Friedman and J.C. Smith, 'Friedman on Contracts and Conveyances of Real Property' (2006) *PLI*, 9.

⁸ See A. Goymour, 'Mistaken Registration of Land: Exploding the Myth of "Title by Registration"', [2013] *The Cambridge Law Journal*, 617-650.

⁹ T.B. Ruoff and R.B. Roper, *On the Law and Practice of Registered Conveyancing*, 4th ed. (Sweet & Maxwell, London, 1979)

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ R.T. Abdulai and E. Ochieng, 'Land registration and landownership security: An examination of the underpinning principles of registration' (2017) *Property Management*, 2447.

owner. Under this system, if anyone desires to know the identity of owner of a particular item of property in the registry, he need only check the registry, because the person whose name is in the registry is deemed to be the owner.

3. Adverse Possession of Registered Land

A right of action for the recovery of land is barred following adverse possession by another for the duration of the statutory period in the absence of fraud, mistake or disability. The limitation law provides that this period is 12 years from the time of accrual of such right.¹⁴ At the expiration of the period fixed by the limitation laws the title of the person out of possession of the land shall be extinguished. The land must be in possession of some person in whose favour the period of limitation can run. Such possession constitutes adverse possession. Time runs from the date the right of action accrues. **However**, a mere claim that the applicant has acquired title by operation of the Statute of Limitations is not of itself sufficient and should not be accepted. It is for the applicant to prove the facts on which he bases his claim, and it is a matter for the officer dealing with the case to decide whether on the facts proved, the title sought has been established. Each case is to be considered on its merits in relation to adverse possession. The Supreme Court reiterated this position in the case of *Majekodunmi v. Abina*¹⁵ when it held *inter alia*:

It is not enough that a claimant is able to show that he has been in possession of land for the requisite number of years. The burden on him is higher than that. He has to show something more. He is the one claiming that land owned by the title holder has now become his. It has become his because the owner has either been dispossessed or has discontinued his possession. Therefore, the claimant has the clear onus to prove that the title holder has been dispossessed, or has discontinued his possession.

The relevance of adverse possession of registration land is among other things therefore questioned on the basis of its conflict with the doctrine of indefeasibility of title which is a fundamental feature of land registration, the unfairness and unjustness of the doctrine as it violates constitutionally guaranteed property right.

Indefeasibility of Title

Indefeasibility of title involves the proposition that once a person is registered as proprietor of a certain estate or interest in land, he or she acquires a title that cannot be vitiated except as prescribed in the legislation establishing the system.¹⁶ The indefeasibility principle was designed not only to protect title of the registered proprietor from unregistered interests, but also to save persons dealing with registered land from the trouble and expense of going behind the Register Book in order to investigate the validity of title or possible rival claims to the land.¹⁷ The aim was to simplify and expedite the process of transfer of title to land.¹⁸ The fundamental concept underlying the registration system is the idea that one can 'rely on the Register' to determine who owns or has an interest in a piece of real property.¹⁹ Registration provides for the concept of indefeasibility wherein all registered title and interests are guaranteed by the State to be good against the whole world in the absence of fraud or other vitiating circumstances statutorily specified or judicially laid down. The concept of indefeasibility of title was well explained by the Privy Council in the case of *Frazer v Walker*²⁰, per Lord Wilberforce as follows:

The expression ['indefeasibility of title and interests'] ... is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which ... a registered proprietor enjoys. This conception is central in the system of registration. ... as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

The conviction that developing land in some way is a higher or better use than doing nothing with it is also anachronistic. In the early days, it was reasonable for a 'highest and best use' analysis to focus on economic

¹⁴Such similar provision is contained in the English Limitation Act. However, under the English Act, the claims of persons entitled to the estates of deceased persons dying after 1st January, 1967, may be barred after 6 years under section 126 of the 1965 Act. This period is extended by a further period of 3 years in the case of shares of persons under disability (section 127 of the 1965 Act). But legal personal representatives are not barred except after the full period of 12 years. See *Gleeson v Feehan and anor*, 1991 ILRM P. 783.

¹⁵ (2002) 3 NWLR (PT. 755) 720.

¹⁶ *Supra* note 38.

¹⁷ *Ibid.*

¹⁸ The concept of indefeasibility of title will be discussed in Chapter five on the effect of adverse possession under the LRL 2015.

¹⁹See Fox, 'The Story Behind the Torrens System' (1950) 23 ALJ 489 and Whalan, 'The Torrens System in Australia' (Sydney: The Law Book Co Ltd, 1982) Chap 1. 20 [1967] 1 AC 569 at 580-581.

concerns and profitability which generally meant the most development. In a present market across the globe, the 'highest and best use' of a piece of property may be merely to hold it to wait for a future better market.²¹ Today the 'highest and best use' should emphasize environmental consequences.²² Thus, perhaps the title owner who is not 'using' the land is being civic-minded and responsible and should not be punished by giving an advantage to a trespasser. Property rights should not be subject to trickery and deceit. Even if trickery is not involved, people generally feel dissatisfied when one person gets something valuable for nothing at the expense of a relatively innocent other. People do have the perception that taking someone else's property without paying for it and without their permission is wrong and, if the law allows it, then the law is wrong, unfair, and should be changed. One of the biggest problems with the adverse possession doctrine is that it can produce results that people perceive as completely unfair. Being fair and creating a perception of fairness have always been important elements in the legal system. The results of taking away property from owners of record who have, in the eyes of lay observers who have never heard of adverse possession, done nothing wrong, encourages those observers to react negatively to the law and to their neighbours who are the adverse possessors.²³ The purpose of land registration system is to provide a method for making title to land certain, indefeasible and readily ascertainable. The registration system also eliminates the copying of documents and examination of long chains of past transactions because proof of ownership is accomplished merely by recording a certificate of ownership issued by a land Registrar and giving a copy to the owner. Given computerization of the present age, it is relatively easy and inexpensive to determine who has record title.²⁴ Similarly, technological advances such as Global Positioning Systems make surveys easier and cheaper to do, providing a better solution to boundary disputes.²⁵

Property Right

Adverse possession conflicts with the constitutional safeguard to right of ownership of property and prohibition of compulsory acquisition of same without compensation. The Constitution thus not only guarantees and safeguards the right to acquisition of property but also prohibits the compulsory acquisition of private property without compensation; hence, owners today can get compensation when the title is actually taken, when the property is physically invaded by government order, either permanently or temporarily; when regulation for other than health or safety reasons takes all or nearly all of the value of the property; and when government attaches conditions to permits that are unreasonable, disproportionate, or unrelated to the purpose behind the permit requirement. John Locke²⁶ proposes the theory of property rights and states that the theory is rooted in laws of nature which permit individuals to appropriate, and exercise control rights over things in the world, like land and other material resources which is a justificatory account about the legitimacy of private property rights. The determination of property rights is often regarded as particularly disputatious in a liberal democracy that embraces both individual liberty and the right of the majority to govern.²⁷ On the one side is the protection of intensive property rights as manifestations of a property owner's individuality. Property is an essential natural right; to take it is to take one's labour, to make one a slave. Seen in this way, property rights owe nothing to society; on the contrary, property owners form society and governments to protect their property.²⁸ The very purpose of social organization is that property is an end in itself. Intensive private property rights are to be protected because they provide incentives to entrepreneurs.²⁹ Property rights are the social institutions that define or delimit the range of privileges granted to individuals of specific resources, such as parcels of land or water. Private ownership of these resources may involve a variety of property rights, including the right to exclude non-owners from access, the right to appropriate the stream of economic rents from use of and investments in the resource, and the rights to sell or otherwise transfer the resource to others. Property rights institutions range from formal arrangements, including constitutional provisions, statutes, and judicial rulings, to informal conventions and customs regarding the allocations and uses of property. Such institutions critically affect decision making regarding resource use and, hence, affect economic behavior and economic performance.³⁰

21See S.L. Martin, 'Adverse Possession: Practical Realities and an Unjust Enrichment Standard' (2008)37 *REAL EST. L.J.*, 133, 138-42.

22 *ibid*; citing S. Sussna, 'The Concept of Highest and Best Use under the Takings Theory' (1989)21 *URB. LAW.* 113, 115.

23 See Landowner Fights Squatter's Rights to Vacant Lot, All Things Considered (NPR radio broadcast, Dec. 10, 2007).

24 *Supra* note 337.

25 *Ibid* at 2447-49.

26 The Second Treatise of Government 1690.

27M.J. Horwitz, *The Transformation of American Law 1780-1860*, (Harvard University Press: Cambridge,) pg 9-10; H. Demsetz, 'Toward a Theory of Property Rights' (2002) 31 *Journal of Legal Studies* 331.

28See 'Property Rights and the Right to the Fruits of One's Labor: A Note on Adam Smith's Jurisprudence' - Volume 21 Issue 2. Available at <https://www.cambridge.org>. Accessed on 10/08/2021.

29See G.D. Libecap, Douglass C. North 'Transaction Costs, Property Rights, and Economic Outcomes' (2018) NBER Working Papers 24585, *National Bureau of Economic Research, Inc.* available at <http://www.nber.org/papers/w24585> (accessed 30 August 2021)

30B. Klein and R.G. Crawford and A.A. Alchian, 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process' (1978) *Journal of Law and Economics: The University of Chicago Press*, 297.

Ownership of land is the right of every citizen in Nigeria, the right to acquire as well as the right to dispose of is enshrined in the constitution and legislation. However, this right to acquire and hold land is subject to the power given to the governor of each state by the Land Use Act as well as the right given under the constitution; therefore, the government can only acquire individuals' lands compulsorily upon the payment of compensations. Where any individual finds the acquisition of his/her land to be unlawful, such an individual can successfully challenge the acquisition in the court of law. The application of adverse possession to registered land is therefore a violation of property right hence the recommendation of restitution principle to restore those rights.

4. Conclusion

The indefeasibility principle was designed not only to protect title of the registered proprietor from unregistered interests, but also to save persons dealing with registered land from the trouble and expense of going behind the Register in order to investigate the validity of title or possible rival claims to the land. It is conclusive proof of ownership and any interests, exceptions and/or reservations that may affect ownership.³¹ Given computerization of the present age, it is relatively easy and inexpensive to determine who has record title, so that purpose does not justify the adverse possession doctrine.³² It is interesting to note that there is no defence or bar to the claim.³³ The doctrine of adverse possession of registered land practically defeats the whole essence of registered title. Registration is notice to the whole world, including the adverse possessor who it is incumbent on before dealing on the land to inspect the registrar before dealing on the land. Registration ought to be conclusive ownership and ought not to be defeated by any form of adverse claim, but as it is, the doctrine of adverse possession of registered land makes nonsense of registration if the registered title holder cannot be given assurance of the security of his title after registration. The best approach is for restrictive judicial interpretation of the adverse possession provisions laws in relation to registered land is by the application of established unjust enrichment and restitution principles which will be the best way of protecting the interest of registered land owner.³⁴ An appropriate time for the rules of adverse possession to be limited by unjust enrichment occurs when strict adherence to the legal rules would be harsh or oppressive, creating unfair surprise and hardships for title holders by violating their reasonable expectations.³⁵ To eliminate the unfairness and the perception of unfairness associated with the adverse possession doctrine, courts should modify its results by applying unjust enrichment and restitution principles in the operation of adverse possession rule.

The concept of unjust enrichment states that: 'A person who has been unjustly enriched at the expense of another is required to make restitution to the other'.³⁶ The first and central principle is that '[a] person who is unjustly enriched at the expense of another is subject to liability in restitution.'³⁷ The fundamental concept underlying the registration system remains the idea that one can 'rely on the register' to determine who owns or has an interest in a piece of real property. The fact that the person has registered his interest is proof positive that he holds a particular interest in a piece of land. It is trite that the concept of indefeasibility of title and interests is central in any system of land registration.³⁸ Registration provides for the concept of indefeasibility wherein all registered title and interests are guaranteed by the State to be good against the whole world in the absence of fraud or other vitiating circumstances statutorily specified or judicially laid down. The advantages of proprietary restitutionary claims include, first, that they may lie against an innocent recipient of the property, even where no personal claim, whether in tort, unjust enrichment, or equity, would lie against him;³⁹ secondly, if the recipient of the property is insolvent, the true owner may, subject to statutory requirements in certain cases,⁴⁰ claim specific property⁴¹ in priority to the claims of general creditors; thirdly, if the true owner traces his property into investments bearing interest, he will be entitled to claim the interest in addition.

³¹Ryan-Frosie J in *Jen-Sim Cattle Co Ltd v. Agricultural Credit Corporation of Saskatchewan*[2006] SKQB 173 (available on CanLII) at para 18 [Jen-Sim Cattle].

³²*ibid* at 2447-49.

³³See G. Virgo, 'Principles of the Law of Restitution' (2007) 11 *Edinburgh Law Review*, pp. 461-62. available at <https://doi.org/10.3366/elr.2007.11.3.461>. (accessed 2 July 2021)

³⁴ See generally E. Sherwin, 'Reparations and Unjust Enrichment' (2004) 84 *B.U. L. REV.* 1443, 1448

³⁵See S.L. Martin, 'Adverse Possession: Practical Realities and an Unjust Enrichment Standard' (2008) *REAL EST. L.J.*, pp.37 133, 138-42 citing J. McConvill & M. Bagaric, 'The Yoking of Unconscionability and Unjust Enrichment in Australia' (2002) *DEAKIN L. REV.* pp.7 - 13.

³⁶ J.P. Dawson, 'Unjust Enrichment: A Comparative Analysis' (1951) 12 *La. L. Rev.* 40-60.

³⁷American Restatement (Third) of Restitution & Unjust Enrichment § 1 (2011). Unless otherwise stated, all section references as well as references to the 'Restatement' are to this Restatement.

³⁸ See D. Fox, 'The Story Behind the Torrens System' 23 (1950) *ALJ*, 489; D.J. Whalan, 'The Torrens System in Australia' (1983) *U.N.S.W. Law Journal*, 269.

³⁹ *Sinclair v Brougham* [1914] A.C. 398; *International Sales & Agencies Ltd v Marcus* (1982) 34 *C.M.L.R.* 46. *But cf. Thavorn v Bank of Credit & Commerce International SA* [1985] 1 *Lloyd's Rep.* 259.

⁴⁰ *Re Bond Worth Ltd* [1980] Ch. 228; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25; *Re Peachdarl Ltd* [1984] Ch. 131.

⁴¹ At common law it will not be possible, however, to ensure the return of the property in specie.