

IMPLICATIONS OF RESTRICTIONS ON ALIENATION OF LAND UNDER THE LAND USE ACT 1978*

Abstract

The importance of land in the development of any nation cannot be over emphasized. This is predicated on the fact that most developmental activities of the government are done on land and its use and administration are a veritable source of revenue for the government. The Land Use Act (1978) introduced the right of occupancy system and restricts persons to alienate same only with the Governor's consent. In the light of the fact that most developments require the acquisition of land, this work undertakes a critical examination of the restrictions placed on alienation of land under the Act with a view to ascertaining their implications on the development of the country. It utilized the doctrinal methodology which entailed the analysis of relevant case law, statutory provisions, texts and journal articles. This work found that the said restrictions have serious negative implications for commercial and agricultural developments. Consequently, the work recommends an amendment of the Act to avert the said negative implications.

Keywords: Restrictions, Alienation, Land, Land Use Act, National Development

1. Introduction

There are several laws that regulate land tenure in Nigeria but the Land Use Act (1978)¹ is the principal legislation that governs the use and administration of land. Since its promulgation in 1978, it has generated a lot of controversies both in juristic and academic circles. The reasons for the controversies are not far-fetched. The major reason is that it brought about many innovations in the use and enjoyment of land. The relevance of land as a gift of nature to mankind cannot be over-emphasized. Every person requires land for his support, preservation and self-actualization in the society. According to Omotola:

Land is the foundation of shelter, food and employment. Man lives on land during his life and upon his demise, his remains are kept in it permanently. Even where the remains are cremated, the ashes eventually settle on land. It is therefore crucial to the existence of individual and the society. It is indispensable from the concept of the society. Man has aptly been described as a land animal².

Against the foregoing background, the United Nations resolved that countries should commit themselves to: promoting optimal use of productive land in urban and rural areas and protecting fragile ecosystem and environmentally vulnerable areas from the negative impacts of human settlements, *inter alia*, through developing and supporting the implementation of improved land management practices that deal comprehensively with potentially competing land requirements for agriculture, industry, transport, urban development, green space, protected areas and other vital needs³.

The relevance of land to man as highlighted above notwithstanding, it is unfortunate that land and issues connected therewith have been a subject of controversy among persons of different strata in the society; and also between the government and private persons. The primary reason for this controversy is the fact that the nature and scope of land and more especially, the interests incidental thereto are not easily discernible. Its meaning, especially in terms of the interest it confers differs as between jurisdictions and may also differ within a jurisdiction depending on the legal regime to which the land is subject. Moreover, even where the legal conception of land is substantially conterminous in all those systems, the incidents and rights that accrue to a land owner differ among the different regimes. Secondly, the ever-increasing rise in the world population tends to place great pressure on the limited available land. In view of the foregoing, most organised societies and States have, over time, through their laws, evolved different systems of land management and control towards achieving an equitable system of land redistribution.

There is no gainsaying the fact that sustainable development requires government to provide public facilities and infrastructure that ensure safety and security; health and welfare; social and economic enhancement; and protection and restoration of the natural development either by itself or providing an adequate regime that will enable private persons to provide these facilities. A proper step in the process of providing these facilities and

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¹ It is referred to hereafter as the Act.

²Omotola, JA. (1988). Law and Land Rights: Whither Nigeria, being the text of an Inaugural Lecture delivered at the University of Lagos, Nigeria.

³United Nations, Declaration of United Nations Conference on Human Settlement, www.Un.Org/Conference/Habitat, Retrieved March 18, 2024.

infrastructure is the acquisition of appropriate land as these facilities and infrastructure would be built on land⁴. Banire further underscored this point when he opined that “virtually every form of investment or development by government and private entities is dependent upon land in one way or another. It is now generally accepted that poor land administration can impede economic development and social welfare”⁵. Flowing from the above premise and consideration, every nation of the world ought, in the interest of its citizens, to take its land use and management very seriously and never allow it to fall in disarray⁶.

The land tenure system as it applied before 1978 is aptly described as one undermining effective control of land by the government as well as use and availability of land for public purposes. This hardship predominantly necessitated the promulgation of the Land Use Act. The Preamble to the Act, reflecting this, provides thus:

Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law and whereas it is also in the public interest that the rights of all Nigerian to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families be assured protected and preserved.

The above lofty ideas notwithstanding, it seems that the promulgation of the Act has attended the current Nigerian land law regime with a plethora of controversies and problems. One of the basic innovations of the Act is the introduction of restrictions on alienation of land. In the first instance, the Act, by virtue of sections 21 and 22 introduced the requirement of Local Government’s or Governor’s Consent first had and obtained before the alienation of interests in land. In the second instance, the Act by virtue of section 36(5) of the Act, also places an absolute restriction on the alienation of land subject to deemed customary grant. It bears mentioning that the effect of a poorly conducted land reform cannot be over-emphasized; especially one that, in the long run, affects individuals’ right to property. Furthermore, Sections 43 and 44 of the Constitution of the Federal Republic of Nigeria, just like most modern constitutions, make adequate provisions for the protection of right to property which includes land rights. Against the foregoing background, this study sets out to critically examine the restrictions placed on alienation of land under the Act with a view to ascertaining their practical implications.

2. Restrictions Placed on Alienation of Land under the Act

As highlighted earlier, there are two basic forms of restrictions introduced by the Act in relation to alienation of land in Nigeria. The first is the introduction of the requirement of Local Government’s or Governor’s Consent first had and obtained before alienation while the second is the absolute restriction on the alienation of land subject to deemed customary grant.

Requirement of Consent before Alienation

For clarity of thought and argument, we shall reproduce the various provisions of the Land Use Act relating to the consent requirement thus:

21. except with requisite consent or approval it shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever—

- (a) without the consent of the Governor in 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 Law; or
- (b) in other cases without the approval of the appropriate local government.

22 (1) 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: Provided that the consent of the Governor—

(a) 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;

(b) 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) to the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sub-lease containing an option to renew the same.

(2) The Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said

⁴Otubu, A. (2012). Private Property Rights and Compulsory Acquisition Process in Nigeria: The Past, Present and Future, 8 *AUDJ*, p 5.

⁵Banire, M. A. (2006). *Land Management in Nigeria: Towards A New Legal Framework*. Ecowatch Publications Limited, Lagos, Nigeria, p 4.

⁶Datong, P. Z. (1991). The Role of the State Government in the Implementation of the Land Use Act, in Adigun O ed, *The Land Use Act Administration and Policy Implication*. UNILAG Press, Lagos, Nigeria, P. 64.

instrument to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by endorsement thereon.

26. Any transaction or any instrument which purports to confer on 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 void⁷.

The judicial interpretation of the foregoing provisions of the Act has burdened Nigerian judges. The consent provisions apply to both express and deemed grant⁸. It bears noting in the first instance that the consent provision does not prohibit alienation of a right of occupancy if such is consistent with the principles of the Act⁹. Therefore, the consent provision is not an impediment but a mere administrative hurdle¹⁰. Since the decision in *Savannah Bank v Ajilo*¹¹, there have been endless controversies over the consent provisions of the Act; especially the apparent inelegance of its drafting and consequent hardship caused by its interpretation on it, usually helpless victims¹². On this controversy, Smith has submitted that judicial opinion over the years is that a transferor whose duty it is to seek and obtain Governor's consent will not be allowed to use the statute as an engine of fraud by raising a plea of lack of consent to nullify a legitimate transaction; as any such plea is considered reprehensible and particularly so when consideration has passed¹³. Learned scholars have also opined that, on the issue of Governor's consent, the case of *Savannah Bank v Ajilo* only stands as an authority for the proposition that Governor's consent is required for all transfer permitted by the Act whether of actual grant or deemed grant and no more¹⁴. However, Umezulike on the other hand, has argued that the effect of not obtaining consent would be to invalidate the transaction; it does not matter if the person seeking to invalidate the transaction is the transferor. He added that apart from the exemptions contained in section 22, no other valid exemption exists under the Act. In fact, he overstated the principle by opining that the requirement of consent under the Act is all-pervading and would apply to such transactions under the Act as up stamping, vesting deed, irrevocable power of attorney and so on¹⁵.

This work has clearly established that the consent requirement is an integral component of the right of occupancy introduced under the Act. The reason for the foregoing observation is that the effect of any contrary interpretation would be to provide the citizens with a route through which to circumvent the express provision or requirement of the law; especially in a country like Nigeria where people have a penchant for doing the wrong things. The authors submit that the provision of the Act relating to consent is a salutary one as it enables the Governor who is the 'manager' of all lands in the territory of each state to efficiently superintend and manage the land which has been vested in him. However, it must be observed that it creates the room for arbitrariness on the part of the Governor. It has also in most cases militated against commercial transactions.

Absolute Restriction on Alienation of Land Subject to Deemed Customary Grant

Section 35 (5) & (6) of the Act which embody the non-alienation policy provides as follows:

(5) No land to which this section applies shall be sub-divided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested as aforesaid.

(6) Any instrument purporting to transfer any land to which this section relates shall be void and of no effect whatsoever in law and every party to any such instrument shall be guilty of an offence and liable on conviction to a fine of N5, 000 or to imprisonment for one year

The above provision of the Land Use Act has generated serious controversy because such restriction placed on alienation of land subject to deemed grant has serious implications on constitutional right to property as provided under sections 43 and 44 of the Constitution. There is no doubt that the most complete of relations that may exist

⁷ See Taiwo A. (2016). *The Nigerian Land Law*. Princeton & Associates Publishing Co. Ltd, Lagos, Nigeria, P.242.

⁸ Akujobi, O. R. (2003). Governors Consent under Section 22 of the Land Use Act: The Position Since *Savannah Bank v Ajilo*, in Smith I. O ed, *Land Use Act – Twenty Five Years After*. Forlan Printers, Lagos, Nigeria.

⁹ Ezejiofor. G. (1977). *The Land Use Decree: A Critical Review*. 2 Nig. B.R. See also, Omotola, J. A. (1985). Does The Land Use Act Expropriate? 3 *JPLP*, PP.1-5.

¹⁰ Sholanke, O. O. (1990). Is The Grant of Governor's Consent under the Nigerian Land Use Act Automatic? *Journal of African Law* Vol 34 Issue 1, PP. 42-52.

¹¹ (1989) 1 NWLR (Pt. 97) 305.

¹² Utuama, A. A. (2003). The Crocodile Tears in *Savanna Bank v Ajilo and anor*, in Smith I. O. (Ed). *Land Use Act – Twenty Five Years After*. Forlan Printers, Lagos, Nigeria. See also Okoli, K. C. (1989). *Savannah Bank vs Ajilo: Crocodile Tears at the Supreme Court*. 2 *GRBPL* No. 7, P. 37; Osho PE. (1989). Farewell to Consent Controversy. 2 *GRBPL*, No. 7, P.29; Nwaduabo, V.A. (2003). A Way Out of The Quandary of *Savannah Bank v Ajilo*, in Smith I. O. *Land Use Act – Twenty Five Years After*. Forlan Printers, Lagos, Nigeria and Sholanke, O. O. (1989). Is The Grant of Governor's Consent under the Nigerian Land Use Act Automatic. *GRBPL Vol 2 No. 2*.

¹³ Smith, I. O. (2007). *Practical Approach to Law of Real Property in Nigeria*. Ecowatch Publications Ltd, Lagos, Nigeria, P. 511.

¹⁴ Nelson, D. E. (2003). Mortgage of Land as Security under the Land Use Act. *Nig. JR* Vol. 11. See also, Osimiri, U. (1995). Post Land Use Act 1978 Conveyancing: *Ogba vs Adoga Revisited*. *Lawyers Bi-Annual* 2 (1).

¹⁵ Umezulike, I. A. (2013). *ABC of Contemporary Land Law in Nigeria*. Snapp Press Nig. Ltd, Enugu, Nigeria, P. 180.

in land or indeed any other property is that expressed in the notion of ownership¹⁶. As the court observed in *Abraham v Olorunfunmi*¹⁷, it connotes a complete and total control which a person can exercise over land¹⁸. The ultimate expression of this right is the power of alienation. Flowing from the above, one may describe this section as ‘a legislative fiction or at best a legislative misadventure’ which is ‘unfortunate and exhibits a striking example of bad drafting.’¹⁹

3. Implications of the Restrictions on Alienation of Land on National Development

On the shortcomings of customary forms of tenure, the problems relate to communal tenure, fragmentation, customary tenancy and the use of land as collateral. Adegboye while identifying defects in customary land tenure, farm tenancy and the provision of agricultural credit as obstacle to agriculture, argued, with regards to land tenure that the then structure of land tenure made it impossible for enterprising young farmers to mobilize their labour and capital as freely as they would like to²⁰. The reason for the foregoing may be found in the fact that sales of land were rare, and thus the cultivator and his descendants were confined to family land, and the division of land upon inheritance leads to the holding becoming uneconomic in size and productivity. All these necessitated the promulgation of the Land Use Act and the incidental restrictions on alienation. On the issue of Consent of the Governor or the Local Government, it may be justified on the ground that in most transactions before the promulgation of the Act, the consent principle has always been the law and practice. The sale of family land by the principal members of the family or indeed anybody required the consent of the family head. The sale of family property by principal members of the family or any other person without the consent of the family head is void *ab initio*. This principle may have informed the wisdom behind the requirement of Governor’s consent under the Land Use Act as the Governor is regarded as the ultimate authority in land transfers. The merit of this argument could be seen from the fact that the Governor as a trustee of all land within the territory of the state under the Land Use Act represents the position of the family heads under customary law who are seen as trustees of the family land for the benefit of the whole family and should be aware of transactions in land. On the issue of the total bar on alienation of land subject to deemed customary grant, a community examination of sub-sections (2) and (3) of section 36 will bring to light the intention of the lawmakers which is that the land to which the prohibition relates was intended to be land used for agricultural purpose. The restriction contained in section 36(5) of the Act was made to address the issue of unavailability of land for agricultural purpose and also the issue of fragmentation which usually leads to land being so small that it becomes of no economic or developmental value.

In the light of the foregoing discussions, the question that one is bound to ask is whether the restrictions placed on alienation of land further the general purpose of the Act as well as their implication to national development especially as it relates to agriculture and housing. As stated previously, part of the underlying objective of the Land Use Act is to ensure that land is made available to all those who are willing, ready and able to use it for all purposes in the interest of the economy. It is evident that land occupies a central position in economic development in developing countries. As earlier observed, this stems from the fact that most of the developmental projects executed by the government, individuals or corporate bodies are done on land. It is based on the foregoing reasons that section 1 of the Land Use Act proceeded to vest all land in the territory of each state on the Governor to hold same in trust for all Nigerians.

From the above provision, it is apparent that the provisions of the Land Use Act were meant to protect the right of Nigerians to the use and enjoyment of lands comprised in the country. Consequently, the function or practical implications of the Land Use Act would be more readily appreciated if viewed from the point of view of the requirement of the ordinary land owner. The need for ensuring a proper and adequate economic use of land is of special importance in agricultural economics. Indeed, the study of land law should concern itself more with the aspects of this function than with the analysis of rules defining the rights of the owner²¹. Section 36(5) of the Act provides that no land to which the section applies shall be sub-divided or laid out in plots and no such land shall be transferred to any person by the persons in whom the land was vested. The restriction placed by the provision of that section is that such land shall not be partitioned or transferred. Furthermore, section 36(6) makes any

¹⁶Qin, L. M. (1994). Reform of Land System in China. *Singapore Journal of Legal Studies*, PP. 495-520. See also, Olawoye, C. O. (1974). *Title to Land in Nigeria*. Evans Brothers, Lagos, Nigeria. Agbosu, L. K. (1988). The Land Use Act and the State of Nigerian Land Law. *Journal of African Law*, Vol. 32, No.1. Waldron, J. (1988). *The Right to Private Property*. Clarendon Press, Oxford, United Kingdom.

¹⁷ (1991). 1 NWLR (Pt. 165) 53.

¹⁸Garner, J. F. (1976). Ownership and the Common Law. *JPEL*. See also, Dias, R. W. M. (1985). *Dias on Jurisprudence*. Butterworths, London, United Kingdom.

¹⁹ Smith, I. O. (2007). *Practical Approach to Law of Real Property in Nigeria*. Ecowatch Publications Ltd, Lagos, Nigeria, P. 324.

²⁰Adegboye, R. O. (1967). The Need for Land Reform in Nigeria. *Nigerian Journal of Economic and Social Studies*, Vol. 9, No. 4.

²¹Chukwu, L. O. C. (2003). Practical Implications of Deemed Grants under The Land Use Act, in Smith, I.O ed, *The Land Use Act - Twenty Five Years After*. Forlan Prints, Lagos, Nigeria, PP. 140-169.

purported transfer of such land void as well as making any person who is party to the instrument of transfer criminally liable.

Chukwu has argued that it is not easily understandable how the policy of making land available for agriculture could be accomplished by an absolute prohibition of transfer and partition of agricultural land²². On the contrary, the prohibition, if it is construed to be absolute, makes it rather difficult, if not impossible, for prospective farmers who do not belong to the land owing families to obtain land for agricultural purposes. It is submitted, in consonance with the observation made above that the policy if implemented will provide a negative result. The fact is that not all holders of deemed customary right of occupancy would want to use it for agricultural purposes. Even where they do, it is predominantly for subsistent agriculture as they rarely practice it on a commercial scale. In some cases also, such holders of deemed customary rights may have no use for the land. Consequently, if they are prohibited from transferring such lands it may lead to a situation whereby those who may need the land for agricultural and housing purposes or other developmental purposes would not be able to gain access to it. Another justification that may be advanced for the consent provision and non-alienation policy is that they conform to the customary tenure principle of consent of the family head and the inalienability of family or communal land. However, these cannot be said to be more important than the developmental purpose which the Act is made to serve. It must be noted that a society seeking land reform must make a choice between economic efficiency and retention of traditional ties and institutions. It is submitted that economic efficiency benefits the country better. Another problem incidental to the consent provisions and the implementation of non-alienation policy is about the employment of land as security for agricultural loans. In the first instance, the consent provision has become a clog in the wheel of economic development as in most cases it usually takes more than one year to obtain an exorbitant amount.

The prohibition of transfer and partition under S. 36(5) if implemented will constitute a serious impediment to the effective implementation of the Agricultural Credit Guarantee Scheme Fund Act²³. The prohibition of transfer of agricultural land would make it imprudent for a lender to accept same as security for agricultural loan, for though the prohibition of transfer is, strictly speaking, not a bar to the creation of an agricultural charge, yet it constitutes a permanent barrier to enforcing the charge by usual means of a sale or the appointment of a receiver. It is therefore submitted that the total ban on alienation of undeveloped land in non-urban areas excludes the use of these lands as subject of security for advances for the purpose of its development. The policy if implemented, especially with regards to inability to partition such land, would create hardship in devolution of title to land at the death of a holder of such deemed grant. This provision of the Act that no land to which section 34 or 36 applies "shall be subdivided or laid out in plots" has far-reaching negative implications. For example, if the owner of the land has 3 children, he cannot subdivide the land among them so that each of them gets an individual plot, or in case of a family or communal land it cannot be partitioned (no matter how large it may be) among their members. This could lead to conflicts which could have been simply avoided by partitioning the land in accordance with customary law.

These restrictions may also lead to the available land being unreasonably costly and hard to purchase since the cost of obtaining consent is usually included in the price of the land. The prohibition of alienation of land would lead to alienable land being so scarce that those who have alienable lands to sell would offer it at very high prices.

4. Conclusion and Recommendations

This work has examined the practical implications of the restrictions placed on alienation of land under the Land Use Act. It found that originally, the requirement of consent was motivated by the need to monitor and regulate land transaction by the legal owner - the Governor in whom all lands in the territory of each state are vested. It is a platform through which the Governor stays in control of the land vested in him by Section 1 of the Land Use Act. It also discovered that the non-alienation policy relating to land subject to deemed customary grant was originally made to preserve land for agricultural purposes and deal with the issue of fragmentation. However, the consent provisions and the non-alienation policy will if implemented to the letter, form a cog in the wheel of national development especially as it relates to agriculture, housing and commerce for plethora of reasons; especially when one considers that they are susceptible to abuse. The consent provisions and non-alienation policy if implemented, may lead to a situation where those who may need the land for agricultural and housing purposes or other developmental purposes would either find it difficult to or not be able to gain access to it. They will also constitute serious impediment to the effective application of land, especially non-urban land as a security for loans. It is therefore concluded that the consent provisions and the non-alienation policy are detrimental to agricultural and housing development. In view of the foregoing, it is recommended that the Land Use Act be amended to exclude transactions short of outright transfers from being subjected to the consent requirement. It is also recommended that the Land Use Act be amended to expunge the absolute prohibition of transfer and partition in section 36(5) of the Act.

²² Ibid.

²³ Ibid.