

ENUGU FORUM POLICY PAPER 1

DEBATING POLICY OPTIONS FOR NATIONAL DEVELOPMENT

THE “ECONO-LEGAL” IMPLICATIONS OF MORTGAGE OF RIGHT OF OCCUPANCY: A HAMMER OR AN ILLUSION



AFRICAN INSTITUTE FOR APPLIED ECONOMICS

ENUGU FORUM POLICY PAPER 1

DEBATING POLICY OPTIONS FOR NATIONAL DEVELOPMENT

THE “ECONO-LEGAL” IMPLICATIONS OF MORTGAGE OF RIGHT OF OCCUPANCY: A HAMMER OR AN ILLUSION



AFRICAN INSTITUTE FOR APPLIED ECONOMICS

ENUGU FORUM POLICY PAPER 1

Series Theme

**DEBATING AND PROPOSING POLICY OPTIONS
FOR NATIONAL DEVELOPMENT**

Topic:

**THE “ECONO-LEGAL
IMPLICATIONS OF MORTGAGE
OF RIGHT OF OCCUPANCY:
A Hammer or An Illusion”**

Presenter:

**HON. JUSTICE I. A. UMEZULIKE (OFR)
(PROFESSOR - OF- PROPERTY LAW)**



AFRICAN INSTITUTE FOR APPLIED ECONOMICS
128 Park Avenue, GRA, P.O. Box 2147 Enugu, NIGERIA
Tel: +234 (042) 256644, 256035, 300096. Fax: 256035
E-mail: aiaeinfo@aiae-nigeria.org, aiae@infoweb.com.ng www.aiae-nigeria.org

PUBLISHED BY AFRICAN INSTITUTE FOR APPLIED ECONOMICS

FIRST PUBLISHED 2005

© African Institute for Applied Economics

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording or any information storage and retrieval system, without permission in writing from the copyright owner.

TABLE OF CONTENTS

About Enugu Forum	6
Enugu Forum Policy Papers	9
Abstract	10

THE “ECONO-LEGAL” IMPLICATIONS OF MORTGAGE OF RIGHT OF OCCUPANCY:

<u>A Hammer or An Illusion</u>	12
Prefatory Remark	12
Introduction/Conceptual Issues	13
A Right of Occupancy	14
Land as Subject of Mortgage	17
Nationalisation	18
Family and Communal Property	21
Land in Urban Area	26
Statutory Right of Occupancy	27
Problem Arising here-in from Consent Requirement	28
Customary Right of Occupancy	30
Mortgagee's Final Remedies	33
Vindicating Liquidity in Substituted Assets	38
Sundry Implications	39
Concluding Remark	42

ABOUT ENUGU FORUM

INTRODUCTION

Opening new spaces for domestic policy dialogue is one of the most important potential gains of democratic governance. Democratic space creates public policy arena in which government can be engaged by private sector and civil society on what it is doing or not doing, and hence be pressured to perform. Since the return to democratic rule in 1999, there has been an upsurge of private sector and civil society engagement with governments on economic policy and development issues. But, the upsurge of civic advocacy on economic and development issues has not been matched with commensurate improvements in the quality of debates on policy alternatives and roadmaps for national development.

ENUGU FORUM is intended to provide a civic arena for proposing and debating policy alternatives and roadmaps towards social, economic and political progress of the country. It is hoped that the FORUM will foster interaction between government and non-state actors towards good governance, accountability and participatory democracy.

IDENTITY AND MISSION

Enugu Forum is a civic platform devoted to intellectual conversation and of policy issues affecting the growth and development of the country. It was founded in 2001 to promote informed and credible avenues of stakeholder dialogue and policy advocacy. It seeks to improve the policy process through high quality debate and non-partisan discourse of alternative solutions to contemporary development questions.

The Forum deploys both intellectual and empirical insight to nurture a shared understanding and objective scrutiny of policy issues on social, economic and political development of the country.

ACTIVITIES

Enugu Forum's activities take several forms:

- ◆ Public Lectures
- ◆ Seminars
- ◆ Workshops



- ◆ Conferences
- ◆ Roundtables

The activities bring together diverse stakeholders including government officials, private sector operators, independent think-pots and civil society to exchange and constructively critique perspectives and experiences on critical policy imperatives. Attendance is by formal invitation.

OUTPUTS

The outputs of the Forum's activities take the form of communiqué outlining key outcomes of discussions, conclusions and recommendations. The presentations and proceedings are further developed into Occasional Papers, Working Papers or Policy Briefs widely circulated to inform, sensitise and enlighten stakeholders.

STRUCTURE AND ORGANISATION

Enugu Forum is structured into a Steering Committee, a Coordinating Committee and the General Members. The Steering Committee governs the Forum through guides and policies agreed in consultation with the General Members. The Coordinating Committee executes the activities and programmes.

MEMBERSHIP

There are two classes of membership: individual and corporate. The Forums' activities are open and can be attended by all interested persons but formal invitations are issued to members and designated guests only. To be a member, one needs to register in the appropriate category. Registration can be done during the Forum's events, or at the Host Organization - *African Institute for Applied Economics, Enugu*.

SPONSORSHIP

Ownership of the Forum resides in the members. It is run on the goodwill contributions from corporate



bodies and individuals. Sponsorship includes provision of venue, refreshments, logistics, and facilitation of Guest Speakers and Resource Persons.

HOST INSTITUTION

The Enugu Forum is hosted by the African Institute for Applied Economics (AIAE) Enugu. AIAE is a non-governmental, not-for-profit and independent organization devoted to economic policy research for the purpose of promoting evidence-based decision making. It is located at 128 Park Avenue, GRA, Enugu, Phone: (042) 256644, 256035, 300096; Fax: (042) 256035. E-mail: aiaeinfo@aiae-nigeria.org, aiae@infoweb.com.ng; <http://www.aiae-nigeria.org>



ENUGU FORUM POLICY PAPERS

Enugu Forum Policy Paper Series publishes the proceedings and outcomes of workshops, conferences, seminars or public lectures held by the Enugu Forum. The Series provides documentation of the topical presentations, debate, comments and perhaps consensus at the Forum.

It is intended to disseminate the Forum's intellectual discourse to a wider audience. The essence is to stimulate broader policy debate and promote multi-perspective dialogue on policy options.

Enugu Forum Policy Papers constitute an advocacy instrument to canvass alternative development solutions and policy roadmaps, for the overall purpose of enriching the policy discourse in the country. The Series also draws attention of government, private sector and civil society to salient dimensions of contemporary development challenges in Nigeria.

Series Editors:

Eboh, Eric Chiedum

Ukeje, Stanley

Ibe, Chidiebere

Ikpo, Kobi P.

Abstract

The Land Use Act 1978 was intended to ensure citizens access to land in Nigeria by vesting ownership of all land within the territory of a State in the Federation on the Governor of that State. However, the interpretation and operation of this Act has generated controversies and difficulties with regards to citizens' rights of occupancy and ownership of lands in the country. These difficulties have created blockades for business in Nigeria, especially with regards to securitisation of credits from the financial institutions, and to a larger extent economic growth of the country.

Under the Land Use Act 1978 all forms of ownership or title to land both under the common law and customary law have been abolished. It however confers a possessor occupier status to a holder of a right of occupancy on either land in rural or urban areas. However, only holders of statutory right of occupancy (on land in non-rural areas) can pass their interest on the land (not the land itself) to another person or institution. In other words, it is only a holder of a statutory right of occupancy that could enter into a mortgage agreement; those with customary right of occupancy over lands in the rural areas could not mortgage such lands more especially agricultural lands.

In any case the holder of a right of occupancy can not pass a legal title to any other person because title to all lands vests on the State Governor. The effect of this is that borrowers who offer certificates of occupancy and banks who accept them for the securitisation of credits are treasuring only a piece of 'love letter'. This is because, the bank that is holding a mortgage (legal or equitable mortgage) vide a certificate of occupancy can not foreclose on the property so mortgaged, or sell it without the consent and approval of the Governor of the State.

The consent of the Governor is also required while entering into the mortgage agreement by a holder of a right of occupancy. However, it has been argued that because of the significant importance of mortgage transactions to the overall economic development of the country, they ought to have been taken outside of the requirement of consent under the Act because the power of the Governor to give consent to the wishes of the parties to create a mortgage is not mandatory and it is free from judicial control. Notwithstanding the merit of this argument, it does not obviate the requirement of consent under the Act. There have been cases where borrowers entered into mortgage relationship with banks without a proper consent of the Governor; and upon default in the repayment of the mortgage debt, the debtors were urging the court to declare the mortgage null and void for lack of Governor's consent as



the bank was taking steps to realize the mortgage in court.

This situation is exacerbated by the fact that obtaining the Governor's consent and approval for the purposes of entering into a mortgage or discharging remedies under a mortgage has proved an extremely cumbersome venture, and a constrain to effective and efficient discharge of debt obligations by borrowers. The lending institution, more often than not, is the victim of this circumstance with enormous losses to it as a consequence.

Furthermore, under the Land Use Act a mortgagee is neither 'an occupier' nor 'a holder' of the right of occupancy created under the Act. Therefore, there is no platform upon which he can exercise his right of sale or foreclosure of the mortgaged property. So until the Land Use Act is amended to confer the status of a holder or occupier on the mortgagee he is, in strict law, left with no remedies in the event of a default under a mortgaged debt.

Besides, the mortgagee is also left without remedy when the property, the subject of mortgage, is revoked by the Governor; because the compensation upon revocation is payable to the mortgagor/borrower who is, under the Act, the occupier/holder of the right of occupancy. Also, there is no judicial control, under the Act, over a Governor who refuses to grant his consent either for vested interests or any other reason so far.

So, the mortgagee under the Land Use Act is left without final remedies in a case of default on mortgage debt. This no doubt has significant impact on the country's economic activities which is lubricated by credits from the banking and financial sector of the economy. Therefore, there are calls for a review of the Land Use Act 1978, to reflect the agitations for adequate property rights for citizens to facilitate business transactions and economic development of the country.

THE “ECONO-LEGAL” IMPLICATIONS OF MORTGAGE OF RIGHT OF OCCUPANCY: A Hammer or An Illusion

PREFATORY REMARK

Deep debt of gratitude is owed the ENUGU FORUM for finding me worthy to share my thoughts on the question of economic and legal implications of mortgage of right of occupancy.

I feel happy in being obliged to do so, because, obviously, the least known, most generally ignored and least carefully evaluated provisions or sections of the Land Use Act,¹ are those dealing with the complex and subtle issues of mortgage of right of occupancy in Nigeria².

There is little doubt that lawyers the country over, form one of the most conservative elements of our population. Similarly the big land owners, the large manufacturers, industrialists, capitalists generally, are naturally fearful of changes, the effect of which they cannot wholly foresee. It is therefore equally natural that their legal advisers thrown into intimate contact with them and thus learning to see and appreciate their point of view should share the lawyer's conservatism.

Again, the daily training of a lawyer, the eternal hunt for precedent,³ the desire to be able to advise with certainty and clarity; the fulsome flattery of the common law in legal treatises, old and new, all incline the lawyer to look to the past and trust it only, or at least mainly. Therefore any thing the lawyer cannot locate in precedence or from superior authority or decisions of superior appellate courts has little meaning to him.

Consequently in urging a proposed change upon the law and directing attention to recondite areas of mortgage of right of occupancy, one must expect even a strong case to receive scant recognition and appreciation. But we must be willing to state the facts and the law as we see them, satisfied as we do that time, even if slowly, will finally produce results.

1 Promulgated in 1978 by the General Obasanjo Military Regime as Land Use Decree No. 23 of 1978. The Land Use Act by section 315(1) and (5) of the Constitution of the Federal Republic of Nigeria 1999 shall have effect as part of the provisions of the constitution can invalidate the said land use Act.

2 These include but by no means exhaust the following sections of the Act; Sections 1, 2, 3, 5, 9, 0, 21, 22, 24, 26, 28, 34, 36, 41, 49, 50 and 51

3 These are decisions of say, house of Lords in England, Supreme Court of Nigeria, Court of appeal and the like in other common law jurisdictions.



It is therefore in this chastened spirit and climate that we make this presentation wherein we intend to direct attention to the complete sterilisation of mortgage transaction in Nigeria.

INTRODUCTION/CONCEPTUAL ISSUES

It is generally agreed that a mortgage is a conveyance or transfer of title to land to secure the payment of money or the discharge of some other obligations⁴. It is security taken for credit advanced on the mortgagor's demand. This form of credit transaction in Nigeria is decisively important and of course constitutes a significant expression of and contributor to rapid national economic development and prosperity⁵. Since the commencement of the Land Use Act twenty four years ago, a number of legal problems have arisen from this form of credit transaction including of course, a number of issues which are of much concern to the banks as mortgagees, the industries or corporations and the individual as mortgagor, legal practitioners, conveyances and the public. In other words, mortgage transaction has a direct bearing upon the state of economic or industrial development in Nigeria. It also nurtures or lubricates the growth of public utilities, banking activities, real estate and agricultural development. And to some lesser extent aeronautics⁶, aviation⁷, oil and gas sector activities⁸.

Many banking and mortgage institutions above also come into existence specifically for, inter-alia, accepting deposits from the public and granting of loans and advances for sundry purposes which cover the above sectors and sub-sectors.

A legal mortgage is created when an agreement under seal is executed or the transfer of the legal title from the borrower/mortgagor to the creditor/mortgagee subject to re-conveyance back to the mortgagor on the payment of the mortgage debt. On the other hand, an equitable mortgage is created

4 See, *Saptley V Wilde* (1899) 2 Ch. 474

5 See, I. A. Umezulike, “Issues in contemporary Nigerian Land Law” (1995) Fourth dimension Publishing Co. Ltd. p. 252.

6 The Science and practice of flight by aircraft.

7 Includes the science of manufacturing aircraft

8 Exploration and exploitation of oil and gas in Nigeria are capital intensive projects usually but not exclusively sustained by allocation of credit by the banks.



whenever there is an agreement to enter into a legal mortgage or mere deposit of the title deed with the creditor for the credit⁹.

Obviously, mortgagees, especially the banks and the proliferating mortgage institutions in Nigeria have special preferences for land as security for their credits. Thus mortgage of land has increased in commercial importance in their security portfolio¹⁰.

A RIGHT OF OCCUPANCY

In this presentation we are concerned with mortgage of right of occupancy. Having given an outline of what a mortgage is, it is necessary to explain what a right of occupancy represents. As we shall show shortly, land as a corporeal thing can no longer be mortgaged. What can now be mortgaged are the various interests, such as right of occupancy existing on land.

The Land Use Act did not specifically define a right of occupancy it introduced. But it however defines a Customary Right of Occupancy as

9 In *Jacobson engineering Ltd Limited Bank for Africa Ltd (1993) 3. N. W. L. R.* (As he then was) stated the practice thus: “Generally and before the land use Act was promulgated an equitable mortgage could be created either by an agreement in writing showing an intention to charge the property by deposit of title deed accompanied by a memorandum of deposit or by deposit of title deed by way of security without a memorandum provided this amount to an act of part performance of the agreement”.

Prior to the Act, the method of mortgaging property depended on what part of the Country which the subject property is situated. In the Northern and Eastern part of Nigeria where the Conveyancing Act of 1881 still applies, a legal mortgage of free-hold was created by the conveyance of the fee – simple subject, of course, to a proviso for in conveyance. But in the former Western and Mid Western States of Nigeria whose the property and Conveyancing law of 1959 applies, a mortgage was seated by way of a charge by way of legal mortgage or by a demise for subject to a proviso for cesser on redemption in respect of both freehold and leasehold. For land subject to the Native Lands Acquisition by Aliens Law 1925 in Western and mid Western States and Acquisition of Law and Aliens Law 1957 in Eastern States of Nigeria, a mortgage can only be created by demise for a term of years not exceeding ninety-nine years. In the case of lease as in right of occupancy, it is usual to take an assignment where the covenants are not unduly onerous or by a sub-demise.

10 Though some banks have developed a policy which looks to the *quantity* and standing of the individual in society as adequate scarcity for credit. For example, A Governor or Minister of work or Nigeria’s Oil Minister who has no land can upon his official standing obtain huge credit from the bank much more than a trader in Onitsha or Aba Market who has so many real estates in those towns. We are here however concerned with mortgage of right of occupancy and not the individual as subject of mortgage.



*the right of a person or community lawfully using or occupying land in accordance with customary law and included a right or occupancy granted by a local government under this Act*¹¹.

It went on to define a Statutory Right of Occupancy as

*A right of occupancy granted by the governor under this Act*¹².

The above definitions provided under the Act do not give meaning to the status and nature of a *right of occupancy*. We shall however look at other jurisdictions or foreign statutes, which had introduced a right of occupancy and therefore draw a surmise there from. The Land Ordinance of Law of Northern Nigeria¹³ prior to the Act defines a right of occupancy as a *title* to the *use* and *occupation* of land. In other words, right of occupancy is concerned with occupation and use of land rather than ownership of same¹⁴.

The starting point in understanding the nature of right of occupancy introduced under the Act is to appreciate that all forms of ownership or title to land both under common law¹⁵ and customary law¹⁶ have been abolished under the Act. Typically the former private owner of land became automatically

11 See, Sections 50 or 51 of the Act.

12 Ibid

13 Laws of Northern Nigeria 1962.

14 Abernathy J. in *Director of Lands V Sohan* (1952) I. T. L. R. 631, felt that for all practical purposes a right of occupancy is the same thing as a leasehold. A similar conclusion of law was reached by the courts in *Havinchorff V. Dodd* (1960) I. E. A. 327 at 335; *Magiyayge V. A. G. Northern Region* (1957) N. R. N. L. R. 158; Professor Elies in his book, *Nigeria Land Law and custom* (1962) p. 284; and Dr. M. O. Onwuamaegbu, *Nigerian Law of Land Lord and Tenant* (1966) p. 126; all maintain that a right of occupancy is the same thing as a lease. But the council in England in the case of *Premchand Nathu V. Land Officer* (1962) A. C. 177 and Professor J. A. Omotola in his book *Essays on the Land Use Act* (University Press) (1980) p. 24; take the Position that a right of occupancy is a right *sui-generis*, that is a right different from all others. Omotola postulates that there was nothing wrong in the right of occupancy being a new form of right, as the categories of right over land need not be closed.

15 All the English doctrines of estates inherited under Nigerian Property Law such as fee simple, fee tail and life estates (Estate of Freehold). A common feature of all estates of freehold is that the duration of the estate, though limited, was uncertain. A fee simple descended to the heirs general, including collaterals; a fee-tail descended to special heirs i.e. lineal descendants only while a life estate is not an estate of inheritance and could not continue beyond the life time of the tenant.

16 Alodial family and communal land. This is absolute ownership of land by the family or the community.



divested of his title. And he now enjoys a mere right of occupancy on the land and it is that interest on the land rather than the land itself that he can now give as security for credit. In *Salami V. Oke*¹⁷, the Supreme Court, speaking through Kawu J. S. C. Said:

*Absolute ownership of land is no longer possible since according to the provision of section 1 of the Act, all land comprised in the territory of each state in the federation are hereby vested in the Governor of the State and such land shall be held in trust and administered for the use and common benefits of all Nigerians in accordance with the provisions of this Decree*¹⁸.

Thus an examination of the nature of right of occupancy under the Act must proceed contextually against the background of nationalisation of land in Nigeria. As the Supreme Court made it clear in the above case:

*The only land, which is not affected by the provisions of section 1 of the Act, is any land which was held by the Federal Government, or any of its agencies as at the commencement of the Act*¹⁹.

In other words, the only land not affected by section 1 which vests all land in the state in the Governor, is the land, which under section 49 was held by the Federal Government at the commencement of the Act. Evidently a right of occupancy is the right to merely *occupy* and use land. It is not a right to own land, if I may use the popular language. It is a right that is not alienable unless with the consent of the government. The super-imposition of the consent of the state as a crucial component of the right of occupancy system and the transactions there under, deprived the right of any ownership character. In other words, the invalidity of alienation for lack of consent deprives the interest affected of any proprietary quality. It is a right highly inferior to a lease²⁰.

17 (1987) 9 - 11 S. C. 43

18 Ibid at p. 63

19 Ibid

20 The right of occupancy is revocable under sections 5 and 28 of the Act in very wide and uncertain conditions. But revocation is unknown to leasehold. And even forfeiture of a lease, unlike revocation is not automatic or self operating; secondly, a lessee enjoys exclusive possession of the estate described in the lease, the holder of right of occupancy does not enjoy exclusive possession against the Governor under sections 11 and 14 of the Acts; Thirdly, a right of occupancy under the Act is not alienable unless with the consent and approval of the Governor, but a lease is alienable without the consent of the lessor.



Thus given the vesting of ownership of land in the Governor under the Act, the right of occupancy therefore creates a tenurial relationship between the Governor of the state as the Supreme landlord and the holder of the right as tenant. The holder, of course, holds in consequence an interest, which is inferior to ownership and which is clearly marked by such subordinating incidents as follows:

- (a) The right cannot be transferred without the consent of the Governor first had and obtained²¹.
- (b) The Governor can enter upon the land for inspection without the consent of the holder of the statutory right of occupancy free from any civil or criminal sanction²².
- (c) The holder's right is subject to the Governors wide and uncertain power of revocation²³.
- (d) Upon revocation by the Governor, compensation is not payable to the holder of the right for the land per-se but for the unexhausted improvements on the land²⁴.
- (e) Devolution of land upon the heirs of the holder under a WILL or intestate is no longer automatic. The consent of the Governor is required, which consent may be refused²⁵.

LAND AS SUBJECT OF MORTGAGE

As Simpson once pointed out:

Land is the source of all material wealth. From it we get everything that we use of value, whether it be food, clothing, fuel, shelter, metal or precious stones. We live on land and from the land and to the land our bodies or ashes are committed when we

21 See, Sections 21, 22, 24 and 26 of the Land Use Act.

22 See, Sections 11 and 14

23 Section 28

24 Section 29

25 Section 24, 22, 1



*die. The availability of land is the key to human existence and its distribution and use are of vital importance*²⁶.

It is scarcely arguable that the availability of land, its commercial use, its distribution and secured credit user are all of great importance to human existence. But as we shall see shortly, the secured credit user of land has been attenuated by nationalisation of land in Nigeria. It is to that, we must now turn.

NATIONALISATION

In outline, the Land Use Act nationalises all land in Nigeria by a combination of two methods, namely by vesting it in the state²⁷, and by the abolition of private ownership of it²⁸ which it did by making *a right of occupancy*, the largest interest capable of existing in land in favour of a private person or body²⁹. It is also explicitly provided that under the Act, no greater interest than a right of occupancy can pass to any person or body under any existing instrument³⁰. In fact any transaction or instrument entered into after the Act, whereby ownership of land is purported to be created in favour of any person is null and void³¹; and in any matter pending at the commencement of the Act, no court can grant to or recognise in either of the parties any greater or higher interest in land than a right of occupancy³².

It is important to note that with the exception of land belonging to the Federal Government or its agencies at the commencement of the Act³³, all land comprised in the territory of each state, including land already owned by the government (state – land) is declared by the Act to be vested in the Governor of the state³⁴.

26 Quoted extensively by Professor S. N. C. obi, in Third party Rights under the land Use Act (Being Paper Presented at the 2nd National Conference on the Land use Act).

27 Section 1

28 Sections 34 and 36

29 Ibid

30 Section 25.

31 Section 26

32 Section 40.

33 Sections 49 and 50 (2)

34 Section I.



In property law, the vesting of all land in the government has the effect of conferring ownership on it³⁵. This is because, to vest corporeal land is to vest its ownership. It cannot be said that ownership in private land is in the clouds or in limbo after it has been unequivocally abolished by the Act. It must be vested in somebody. The state is therefore, clearly the repository by virtue of the provision vesting all land in it³⁶.

The combined effect of vesting all land in the state and the abolition of private ownership of it is that the state becomes the owner of all land in the country and all land has become, state land, in strict law. It becomes so in exactly the same sense as land acquired by the state before the Act by private purchase under voluntary agreement or by compulsory purchase under statutory powers.

We may have to emphasize three points concerning the effect of nationalisation of land under the Act. First, as with state land existing before the Act, the title of ownership acquired by the state under the Act is a beneficial one. The declaration by the Act under section 1 that “*such Act shall be held in trust and administered for the use and common benefit of all Nigerians*”, in no way detracts from the beneficial character of the state's ownership. The declaration is a mere window – dressing to disguise the takeover by the state of the beneficial ownership of all land in the country. It was not intended to confer upon the citizen of Nigeria, the benefit which a beneficiary has against a trustee under the common law³⁷. The real beneficiary is the state. “All Nigerians” as used under section 1 can only mean in law, “all Nigerians organized as a state”. The state is defined by reference to either the *people, territory or government* or all the three together. But the primary conception is that a people or community of people³⁸.

35 See, *Nkwocha V. Governor of Anambra State* (1984) G. S. C. 164 where the Supreme Court made it clear that the tenor of the Act was complete nationalisation of land in Nigeria; *Sule Shedo V. Murtala Alao* Suit No. CA/L/159/84 of 7/10/85;

36 See note (33) ante.

See also sections 2,3,4,5, 34 and 36 among other. We may also note the startling idea under section I about vesting all land in the state in the Governor and his holding same as “*trustee*” for the benefit of all Nigerians. In the property law, a person in whom property vests cannot hold same as *trustee*. This is because property vests essentially in ownership.

See, also, *Marble V. Manitoba Farm Assoc.* (1954) 14 W.L.R.289; *Richardson V. Robatson* (1862) L. T. R. 275.

37 See, Balogun J. in *Otumba Bola Adewunmi V. Ogunboale & Ors* unreported suit No. LD/115/81 of 28/5/82. See generally sections 1, 2,3,4,22,24,26,34,36, of the Act, among others.

In property law, a person in whom land it vested cannot hold same as trustee. The word *trustee* under section I is a loose form of expression.

38 Per Chief Justice Chase, while delivering the opinion of the U. S. Supreme Court in *Texas White* 7 Wall 700, 720.



Secondly, as with state land existing before the Act, the governments ownership is not like the bare, empty radical title vested in the British Crown relative to English land. It carries with it full rights of ownership including the power of alienation except that the ownership itself cannot be disposed of. But the state can grant occupancy rights³⁹, licences to take gravel, sand and other similar materials⁴⁰; issue certificates evidencing occupancy rights⁴¹; levy rent on holders of rights of occupancy granted by it⁴². Furthermore, the state can also revoke an occupancy right for breach of the terms and conditions of the right⁴³. Above all, no sale or alienation of right of occupancy is valid without the consent of the state⁴⁴.

These are all manifestations of a tenurial relationship between a holder of right of occupancy (as tenant) and the state as owner; they are all incident of tenure. All the power of the government as lessor/owner under the state Land Laws e.g. the power to exact forfeiture⁴⁵, ensured to it by virtue of the provision in the Act making the law applicable in the management and control of land after its nationalisation⁴⁶.

The quantum of the rights and powers which the state under the Act may exercise depends, of course, on what interest has been granted to private persons before its enactment⁴⁷ or is recognised in favour of former owners of land under its provisions.

Obviously the interest so recognized is only a right of occupancy, which being revocable at the will of the state and not being alienable without its consent is grossly inferior to a lease and no more than a

39 Section 5.

40 Section 12

41 Section 9

42 Sections 5, 16 to 20

43 Section 28

44 Section 21, 22 and 26

45 Section 7 state Lands Law cap 130 laws of Lagos State 1973.

46 Section 4.

47 For example, leases on existing state land before the commencement of the Act.



right to occupy and use. A lease of state land granted before the Act is also converted to a right of occupancy under the Act and therefore loses its character as an estate in land, which is not revocable at the will and pleasure of the state land lord⁴⁸.

Thirdly we have seen that land as a corporeity now vests in the state. The individual can only hold a right of occupancy on the land. And the right itself has been shown to be weak and exists essentially at the caprice of the Governor⁴⁹. This therefore emphasises the precarious nature of land as security for mortgage. We shall return to this point shortly. But it is not therefore surprising that in the security portfolio of some banks and mortgage institutions, attention is now shifting from land to the quality of the individual⁵⁰ as security for credit. Land is now essentially a precarious security.

FAMILY AND COMMUNAL PROPERTY

In *Union Bank of Nigeria Ltd. V. Alhaji Fatai Jimba*, the 2nd respondent, a legal practitioner was a customer of the 1st appellant (BANK). In 1980, the 2nd respondent applied for a loan, which he used as security, the family house at No. 121 Balogun Jimba Road Ilorin upon which a deed of legal mortgage was created. The 2nd respondent defaulted and failed to pay the principal sum and the interest due. The 1st appellant through the 2nd appellant sold the property by public auction. It was

48 In point of fact under sections 34 and 36 of the Act, it is not in respect of all land formerly in private ownership that right of occupancy is recognised in favour of the former owner or occupiers. The recognition is limited in two important respects. First where the land, being undeveloped in an urban area is more than hay hectare in extent, then the occupancy right over the excess is extinguished and transferred to the state. (See section 34(5)). For this purpose all undeveloped lands owned or occupied by a person in the urban areas are to be put together. And any attempt to evade or circumvent this limitation as by subdividing the land into plots or the sale of parts of it is punishable as a criminal offence. (See section 34(7) and (8) of the Act.

Secondly, any occupancy rights over land in a non-urban area is also extinguished, if at the commencement of the Act, the land was not being used for agricultural purposes as defined under the Act. (See section 36 of the Act).

49 In *Salati V. Shehu* (19860 NWLR pt 7 p. 198 at p. 209 Uwais J. S. C. (as he then was) said: “Unlike what obtained in the past, when the Land Use Act came into force, all land in the territory of each state became vested in the Governor, who is to administer it”. In *Monodu Ilo V. G. A. Danies* unreported suit No. CA/L/84, the Court of Appeal, per, Adeneken Ademola J. C. A. declared: “What is important now is to bring it home to them that the land in dispute will now be administered and regulated by the Land use Act. Individual holders of parcel of land will have to deal with the land with the consent of the Governor”. In *Savannah Bank Ltd. V. Ajiola* (1987) 2N. W. L. R. p. 421, Kolawole J. C. A. was impressively emphatic that: “The mischief aimed at by the Land Use Act was the abrogation of absolute ownership or freehold interest by the community, the family and the individual. That was a complete evolution of the land tenure system in Nigeria”.

50 Under the failed Banks Tribunal established in 1995 under the failed banks (recovery of debtors and Financial malpractice) Decree No. 18 of 1994 as Amended, most of the advances or credits were without security/collaterals. The individuals bring for better or worse what was regarded as adequate security for the credits. But however in the period of chronic insolvency, the recovery of those debts became heady and uncertain.



contended that the mortgage by the 2nd respondent without the knowledge of the 1st respondent was illegal, null and void. The Court of Appeal held the sale was proper as to do otherwise would leave the mortgage bank without security and without remedy.

We have given the facts of the case to show that the Court of Appeal has proceeded on the assumption that communal and family land ownership⁵¹ survived the Land Use Act. But did they? We shall quickly direct attention to the fact that family and communal land holding has been abolished under the Land Use Act. And the banks embarking on allocation of credit upon the security of family or communal property may find themselves burning their fingers on a transaction which is a *nudum-pactum* or statutorily non-existent.

At the commencement of the Act, all communal and family corporate interests in property were extinguished. In the first place it must be observed that sections 34 and 36 of the Act are the only provisions that specifically and emphatically deal with the recognition and preservation of existing occupancy rights in land in Nigeria⁵². In other words, sections 34 and 36 of the Act are solely determinative of the question whether occupancy rights are recognised in favour of communal and

51 *Communal Land* includes land which is owned by the community as a whole. The principle of effective occupation and acts amounting to exercise of sovereignty play important roles in deserting title to communal land. Family land is land which belongs to the nuclear unit called the family consisting of the founder or father and his children.

52 34. (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.

(3) In respect of land to which subsection (2) of this section applies there shall be issued by the Governor on application to him in the prescribed form a certificate of occupancy if the Governor is satisfied that the land was, immediately before the commencement of this Act, vested in that person.

(4) Where the land to which subsection (2) of this section applies was subject to any mortgage, legal or equitable, or any encumbrance or interest valid in law such land shall continue to be so subject and the certificate of occupancy issued, shall indicate that the land is so subject, unless the continued operation of the encumbrance or interest would in the opinion of the Governor be inconsistent with the provision, or general intentment of this Act.

(5) Where on the commencement of this Act the land is undeveloped, then:

(a) one plot or portion of the land not exceeding half of one hectare in area shall subject to subsection (6) of this section, continue to be held by the person in whom the land was vested as if the holder of the land was the holder of a statutory right of occupancy granted by the Governor in respect of the plot or portion as aforesaid under this Act; and

(b) all the rights formerly vested in the holder in respect of the excess of the land shall on the commencement of this Act be extinguished and the excess of the land shall be taken over by the Governor and administered as provided in this Act.

(6) Paragraph (a) of subsection (5) of this section shall not apply in the case of any person who as on the commencement of this Act was also the holder of any undeveloped land elsewhere in any urban area in the State and in respect of such a person all his holdings of undeveloped land in any urban area in the State shall be considered together and out of the undeveloped land so considered together -



family interests under the Act. An interesting preliminary observation ought to be made at this point. In interpreting a statute such as the Act, the intention of the lawmaker must be discerned through the

-
- (a) one plot or portion not exceeding half of one hectare in area shall continue to be held by such a person as if a right of occupancy had been granted to him by the Governor in respect of that plot or portion; and
- (b) the remainder of the land (so considered together in excess of half of one hectare shall be taken over by the Governor and administered in accordance with this Act and the rights formerly vested in the holder in respect of such land shall be extinguished.
- (7) No land to which subsection (5) (a) or (6) of this section applies held by any person shall be further subdivided or laid out in plots and no such land shall be transferred to any person except with the prior consent in writing of the Governor.
- (8) Any instrument purporting to transfer any undeveloped 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 N5,000.00
- (9) In relation to land to which subsection (5) (a) or (6) (a) of this section applies there shall be issued by the Governor on application therefor in the prescribed form a certificate of occupancy if the Governor is satisfied that the land was immediately before the commencement of this Act vested in that person.
35. (1) Section 34 of this Act shall have effect notwithstanding that the land in question was held under a leasehold, whether customary or otherwise, and formed part of an estate laid out by any person, group or family in whom the leasehold interest or reversion in respect of the land was vested immediately before the commencement of this Act, so however that if there has been any improvements on the land effected by the person, group or family in whom the leasehold interest or reversion was vested as aforesaid the Governor shall, in respect of the improvements, pay to that person, group or family, compensation computed as specified in section 29 of this Act.
- (2) There shall be deducted from the compensation payable under subsection (1) of this section, any levy by way of development or similar charges paid in respect of group of family in whom the leasehold interest or reversion was vested and the amount to be deducted shall be determined by the Governor taking into consideration all the circumstances of the case.
36. (1) The following provisions of this section shall have effect in respect of land not in an urban area which was immediately before the commencement of this Act held or occupied by any person.
- (2) Any occupier or holder of such land, whether under customary rights 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 customary law of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil.
- (3) On the production to the Local Government by the occupier of such land, at his discretion, of a sketch of diagram or other sufficient description of the land in question and on application therefor in the prescribed form the Local Government shall, if satisfied that the occupier or holder was entitled to the possession of such land whether under customary rights or otherwise however, and that the land was being used for agricultural purposes at the commencement of the Act, register the holder or occupier as one to whom a customary right of occupancy had been issued in respect of the land in question.
- (4) 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 customary right of occupancy issued by the Local Government, and if the holder or occupier of such developed land so developed, the Local Government shall, if satisfied that that person immediately before the commencement of this Act has the land vested in him, register the holder or occupier as one in respect of whom a customary right of occupancy has been granted by the Local Government.
- (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 1 year.



words which he has unambiguously and unequivocally used⁵³. And such words as used by the lawmaker must be given their ordinary meaning⁵⁴.

Section 36 of the Act makes provisions for occupancy rights in the urban area which were immediately before the commencement of the Act held or occupied. Looking at the section, three questions may be asked:

- (1) Whether a community or family is “*a person*” within the meaning of the provisions?
- (2) Is land occupied and used in common by a community or family for agricultural purposes or residence?
- (3) Can a community or family properly be said *to hold* land of which before the Act, it was the alodial owner?’

A negative answer must be returned to all the above questions. In the first place, community or family is not a person in law. So much is clearly settled upon the authorities⁵⁵. Thus where an action was brought by a community in its own name rather than in that of its Chief or other representatives, it was held that the community was neither a natural person nor a legal person capable of suing or being sued in our court⁵⁶. In other words a community of family is a body or collection of individuals or individual persons that land is vested in. The interest of individual members are usually user- rights. No matter how liberal anyone may want to be in the interpretation of the word “*person*” the institution of communal tenure is simply a peculiarity of customary law which does not lend itself to any clarification in terms of tenure by “*a person*” even when defined to include body of individual persons⁵⁷.

53 See, *Ifezue V. Mbadugha* (1984) 1 S. C. N. L. R. 427; *Estate of Soule V. Johnson* (1974) 12 S. C. 121.

54 *Lawal V. G. B. Ollivant* (1972) 2. S. C. 124; *Anya V. Henshaw* (1972) 5 S. C. 87.

55 Per Hubbard F. J. in *Ekwuno V. Ifejika and Ors* (1960) 5 FSC 156.

56 *Military Governor Mid-Western State of Nigeria V. The Itshekiri Communal Lands Trustee*, suit no. W/55/68 of 10/10/69. See also, *Ekwuno V. Ifejika* (supra) where the court held that the Obosi are not a legal entity, they are large number of natural persons.

57 See, e.g. section 18(1) of the Interpretation Act 1964.



Furthermore as a unit for land tenure purposes, a community or family is in the words of the West African Court of Appeal, an entity defined and conceptually clear to the native mind⁵⁸. In consequence, it is submitted that the use of the word “*person*” in section 36 of the Act is not intended to refer or apply to any land owning community or family. Put differently, a community or a family cannot be a person within the meaning of the provisions of the Act. This proposition is amply supported by the fact that if “*a person*” was to include a community or family, it would not have been necessary for the law maker in section 35 of the Act to speak specifically of:

“An estate laid out by any person, group or family in whom the lease hold interest or reservation in respect of land was vested immediately before the commencement of the Act”.

It is obvious from the above that there should not have been any reference to “*any person*”, *group* or family under section 35 of the Act if the word “*person*” was to embrace *group* (community) or family. In communal or family land, each member has his own allotment which he occupies and uses alone either for residential or agricultural purposes. Thus the occupation and use of land is an individual affair. And this was emphasised by the Privy Council in the following words:

*The ownership of land is vested in numerous families;... disputes as the possession are disputes between particular individuals*⁵⁹.

Another vital and incontrovertible indication that the Act has abolished communal and family interest in land is that neither *the family nor the community* can be said to hold land of which it was the allodial owner. That would be a contradiction in terms. In property law to hold land or property means to have a tenant. Consequently, the word “*held*” as used in section 36 of the Act must refer not to ownership but to possessory or occupancy rights which is held of the former owner or title holder whether community, family or individual.

The Act has thus taken justice to the individual citizen by making the individual the basic unit of land tenure in Nigeria. This is why occupancy right is recognised in the individual member occupying t the

58 *Adurumokumor V. Sillo* (1952) 14 W. A. C. A. 123.

59 *Umeh V Ezechi* (1964) 1. W.L. R. 701.



portions of family and communal land rather than the family or community as a corporate unit. This has in effect freed Nigerians from the anachronisms of what the colonial judges described as decadent family and communal land tenure system.

LAND IN URBAN AREA

Section 34 of the Act which saved the existing rights on land in the urban area is identical to section 36 of the Act. Consequently and without wasting time and space, what we have said here about the abolition of *communal* and *family* ownership rights and tenure; about the meaning of the word “*person*” and “*held*” and the non-applicability of the provision to community or family; and land previously owned by it; is also true in respect of land in the URBAN AREA. In other words the individual occupier of community or family which owned it is the person in whose favour a right of occupancy is recognised, protected and preserved.

The design under sections 34 and 36 is to replace the community and the family with the individual as a unit for land tenure. This is giving approval to the view of colonial judges who in their disdain or contempt for communal and family land tenures described them as decadent institutions unsuited for modern requirements and requested that they be swept away by legislation⁶⁰.

We have merely in outline tried to show that communal and family land holdings or tenures did not survive the Land Use Act. And in strict law a mortgagee would be grossly remiss in relying upon such security for credit. He would at the end of the day discover that his credit was unsecured or mounted on an empty shell.

We must pause here to point out that the question whether family or communal land survived the Act for purposes of mortgages as not raised in the above case⁶¹ or in any other case that we are aware of and so the courts have assumed without further reflection that they survived the Land Use Act.

⁶⁰ See, Speed C. J. in *Lewis V. Bankole* (1909) 1 N. L. R. 81; Tew J. in *Balogun V. Oshodi* (1929) 0 N. L. R. 36

⁶¹ *Union Bank of Nigeria Ltd. V. Alhaji Jimba* (2001) 12 NWLR pt. 727 p. 505.



STATUTORY RIGHT OF OCCUPANCY

There are two types of right of occupancy. They are statutory occupancy⁶² and customary right of occupancy⁶³.

In the context of the Act, a statutory right of occupancy is the right of occupancy granted by the Governor⁶⁴ or deemed granted by him⁶⁵. It is settled on the authorities that the validity of mortgage of statutory right of occupancy depends on whether at the time of its creation, the consent of the Governor was sought and obtained⁶⁶. The requirements of consent is indispensable to the validity of transactions or alienation under the statutory right of occupancy whether actually granted or deemed granted by the Governor⁶⁷.

Section 26 of the Act annuls any mortgage relative to statutory right of occupancy which was entered in disobedience to the consent requirement.

In respect of undeveloped plots of land covered under the statutory right of occupancy, the application of the half-hectare rule makes it a precarious security for credit transaction. This is because any person holding land in excess of half-hectare forfeits the remainder to the state. The person's entire holdings in the entire urban areas in the state are relevant for purposes of the half-hectare rule.

62 See, section 51(1) of the Land Use Act.

63 Ibid.

64 See Sections 5 and 51 (1)

65 Section 34

66 See, *Savannah Bank Ltd. V. Ajilo* (1989) I. N. W. L. R. (pt. 97) p. 305.

67 The only exception is the creation of a legal mortgage over 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, or the re-conveyance or release by the mortgagee to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged with the consent of the Governor.



(a) PROBLEMARISING HERE-IN FROM CONSENT REQUIREMENT

For the creation of a mortgage and other transactions relative to them the consent of the Governor must be first had and obtained. This much is settled on the authorities. In *Awojugbagbe light Industries Ltd. V. P. N. Chinukwe and another*⁶⁸ the Supreme Court speaking through Iguh J. S. C. Stated the principle thus:

*“The first point that must be made is that section 21(1) of the Land Use Act prohibits the holder of statutory right of occupancy from alienating his right of occupancy or any part thereof by assignment mortgage, transfer of possession, sublease or otherwise without the consent of the Governor first had and obtained. Section 26 of the Act expressly provides that any transaction which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of section 22(7) shall be null and void.”*⁶⁹

There is no doubt that section 22 of the Act⁷⁰ means what it says, namely that consent of the Governor must first be sought and obtained before the mortgage transaction is signed, executed, and perfected. We have argued elsewhere⁷¹, that because of the significant importance of mortgage transactions to the overall economic development of Nigeria, they ought to have been taken outside the requirement of consent under the Act⁷². This is because, the power of the Governor to give consent to the wishes of the parties to create a mortgage is not mandatory and it is free from judicial control⁷³.

The significant question here is whether the courts would be helpless in situations where the Governor is withholding consent say, to;

68 (1995) 4 N. W. L. R. (pt. 390). p. 379.

69 Ibid at p. 435

70 Section 22 of the Act provided that “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 has and obtained.

71 See, I. A. Umezulike, “The Supreme Court’s Decision in *Awojugbagbe V. Chunukwe*: Another Road to Damascus” 1997 Nigerian Bi - Annual Law Journal p. 203 - 240.

72 See, generally, I. A. Umezulike, Contemporary issues in Nigeria Land Law (19960 Fourth Dimension Publishing Co. (Enugu) p. 260.

73 *Exparte Bank of the North Ltd.*(1963) N.M. L. R. 58; *Are V. Adisa*(1967) N. W. L. R. 304 at 309.



- (1) The execution of a mortgage by the political opponents of the Governor; or,
- (2) The exercise of the mortgagees' power of sale (upon default debt) over property to which the Governor or the Governor's wife or mother holds a right of occupancy.

It has however been judicially declared in *Moses Ola Sons V. B. O. N. Ltd*⁷⁴, that there was nothing in the provisions of the Land Use Act that made it mandatory for a mortgagee to seek the consent or permission from the governor before exercising his or its power of sale or foreclosure⁷⁵.

We must respectfully however point out that the exercise of power of sale by the mortgagee is clearly a transfer of interest requiring the consent of the Governor for its validity and exercise. The phrase under section 22 of the Act– to wit – “*alienate by mortgage or otherwise howsoever*”, must be given some reflection. If that is done, the conclusion becomes inescapable that it includes a transfer of property by the mortgagee's exercise of power of sale. It is submitted that it is only in cases of trust-for-sale⁷⁶ that it could be safely argued that there is no transfer being effected and therefore no consent is desired.

The plenipotentiary powers allocated to the Governor of State under the Act in relation to transactions on land in the state and free from any judicial or legislative control showed that the makers of the Land Use Act assumed that the Governor must be a good man and a man who is incapable of thinking wrong or of doing wrong.

Another problem which arises from the question of consent is the type of perfidy which the court was faced in *Ajilo*⁷⁷ and in *Adedeji*⁷⁸ type of cases. The two cases involved loan advanced and secured by mortgage of property in Lagos but executed without the consent of the Governor of Lagos State. The

74 (1992) 3 N. W. L. R. pt. 229 p. 377

75 Ibid at p. 391

76 A trust for sale is a very technical Conveyancing device where in property or the legal estate in property vests not in any of the named devisees but rather in the testators personal representatives who therefore become the trustees - for - sale since they automatically hold the deceased property upon trust to give effect to the will, no transfer of the property is evinced and no consent of the Governor is necessary at this stage.

77 (Supra) or note (65) ante

78 Supra



mortgagors in the two separate cases defaulted in the repayment of the mortgage loan. When the mortgagees sought to enforce their credit by exercising their power-of-sale, the two defaulting mortgagors in separate actions in court sought a declaration that the entire mortgage transactions were null and void for lack of the consent of the Governor of Lagos State.

The courts agreed that the consent of the Governor was a necessary component of the transaction of mortgage but felt that it would not declare the transaction void at the suit of the mortgagor/plaintiff whose responsibility it was to seek and obtain the consent of the Governor.

Our courts are now bespated with cases where, say, the banks advance credit to individuals and companies and upon default in the payment of the mortgage debt, while the bank takes steps to realise the mortgage in court, the mortgagor will be urging upon the court to declare the mortgage a nullity for lack of the consent of the Governor.

CUSTOMARY RIGHT OF OCCUPANCY

A customary right of occupancy is 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 the Act⁷⁹.

The above definition provided under the Act is absolutely a misnomer. In the first place, it gives the impression that a customary right of occupancy owes its origin and existence entirely to customary law⁸⁰. This is wrong. The customary right of occupancy is a creation of the Land Use Act. The involvement of the Local Government Council which is a statutory body in its dispensation and management is evidence that the right does not owe its existence and status to customary law. Its existence must therefore be defined by reference to the Act. It is also inappropriate and confusing to define a customary right of occupancy under the Act as:

⁷⁹ See, Section 51, Land Use Act

⁸⁰ Ibid



*A right of a person or community lawfully using or occupying land in accordance with customary law*⁸¹.

This is because under no known customary law in Nigeria does a community use and occupy land in common for farming or residential purposes. The reality is that each individual member of the community has his own allotment which he occupies or farms on his own. In fact to contend that the customary right of occupancy is regulated by customary law prevailing in the area is to say that it is exempted from all statutory controls under the Act. That would be startling.

However a holder or occupier of land which is in the rural or non-urban area of the state is the person entitled to the Customary Right of Occupancy, if such land, however is being used for agricultural purposes and is developed⁸². And it is also clearly provided that such land in the rural or non-urban area shall not in plots and no such land shall be sold or transferred to any other person⁸³.

The legal headache here is whether in view of the seemingly total ban on alienation under section 36 subsection 5 of the Act, such land under customary right of occupancy could still be validly mortgaged. In other words, can there be a valid mortgage of customary right of occupancy?

On this question, there are double perspectives. It is contended on the one hand that in so far as section 21 of the Act permitted a transfer of such land with the consent of the Governor⁸⁴, then of course, section 36 subsection (5) must be given a limited meaning so as to avoid any inconsistency with the express provision of the said section 21 of the Act⁸⁵. It is also argued that the ban under section 36-subsection (5) of the Act could be circumvented or avoided if the land to be alienated under

81 See, note (78) ante

82 Section 36

83 Section 36 subsection 5.

84 Section 21 of the Act enacts as follows:

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 (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 provision of the applicable sheriffs and Civil Process Law or (b) in other cases without the approval of the appropriate Local Government.

85 See, the argument of Chief F. R. A. Williams in a paper entitled, “Survival of Orthodox Conveyancing” (being paper presented at the Land Use Act at the University of Lagos, Faculty of Law (1982).



customary right of occupancy is not sub-divided or parceled into plots. In other words an alienation of the entire estate or parcel of land would not offend the prohibition under section 36-subsection (5) of the Act⁸⁶.

The above arguments are not sustainable for the reasons that:

- (1) It is elementary law that where in a statute, there are two inconsistent provisions, the latter provision would prevail. Consequently the total ban provided under section 36 must prevail over the provision of section 21.
- (2) Being also a part of the 1999 Constitution, the provisions of the Act must be given liberal interpretation⁸⁷ rather than the limited meaning being advocated.
- (3) It is instructive to note that section 36 subsection 5 enacts as follows:

No land to which the section applies shall be subdivided 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.

To fully appreciate the meaning of the above section of the Act our interpretation must be systematic. In the first place, the phrase:

No land to which this section applies,

Means no more than “*No land in the Rural or non – urban area*”. Secondly, the words:

No such land shall be transferred to any person

Obviously means that:

No land in the rural area or non urban area shall be transferred to any person”

On the whole therefore, the plausible meaning to be given to section 36-subsection (5) of the Act is as follows:

86 See, Professor J. A. Omotola, *Essays on the Land Use Act*, (1984) University of Lagos Press.

87 This is the view of the Supreme Court, per, Udo Udoma J. S.C. in *Nafiu Rabui V. The State* (1980) 8 - 11 S. C. 130



No land in the rural area of the state shall be sub-divided or land out in plots; and no such land in the rural area shall be transferred to any person.

If the above literal interpretation is correct, it would therefore follow that the ban on alienation of land by way of mortgage of land in the rural areas of a state is total and cannot be circumvented. And any instrument or deed purporting to create a mortgage between the parties over such land is null and void and of no effect whatsoever. The parties to the mortgage transaction shall be guilty of an offence sanctioned by one-year imprisonment or N5, 000 as fine⁸⁸.

It is submitted therefore that it is an offence to execute a mortgage in respect of land in the non-urban or rural area of Nigeria. Consequently banks, persons and other institutions embarking on mortgage transactions over land in the rural areas of a state in Nigeria may end up burning their fingers in the process of plucking nuts out of fire for others. In any case, the mortgage deed in their hand is not in law worth more than a love-letter.

MORTGAGEE'S FINAL REMEDIES

The basic attraction in mortgage transaction is that the borrower/mortgagor gets the funds requested or demanded, and upon his default to pay up the mortgage debt, the mortgagee shall realise the mortgage without any legal headache. The potent means by which a mortgagee could realise his security upon the mortgagor's default to pay the mortgage debt is essentially through the mortgagee's power of sale and foreclosure. These are regarded as the mortgagee's most potent final remedies.

Foreclosure is a process whereby the court orders, at the suit of the mortgagee or his successor-in-title that the borrower/mortgagor shall convey the land or security to the mortgagee unconditionally and free from any right to redeem⁸⁹.

Under the mortgagee's power of sale, the mortgage property is sold free from the equity of redemption.

88 Section 36 subsection 6

89 *James V. James* (18730 L. R. 16 Exq. 153)



This power is exercisable where the mortgage was made by deed and the mortgagor has defaulted in the payment of the mortgage debt⁹⁰.

Of note, of course, is that whether the mortgagee proceeds through foreclosure or sale of the mortgaged property, the end result is that the property is being transferred from the defaulting mortgagor to the mortgagee. And that is an alienation which requires the consent of the Governor of the state under section 22 of the Act. And we have noted in the preceding passages the practical impossibility of the Governor lending his consent where the foreclosure or sale relates to the property, his parents, his friends, political allies or godfathers and so on. And he cannot be judicially compelled to give his consent in the circumstance. And that would be the end of the journey for the mortgagee. We have also canvassed the idea of the mortgage transaction being removed outside the transactions requiring the consent of the Governor. We say so because a good security must be easily realisable or transferable to the mortgagee upon the mortgagor's default without undue cost and trouble; with minimum delay and without incurring residual obligations and liabilities to third parties in the process.

However the contentious and obviously unresolved legal headache is whether these final remedies of the mortgagee survive the Land Use Act. In other words upon default by the mortgagor, can the mortgagee exercise his power of sale or foreclosure⁹¹ as a means of calling in the mortgage? In our hurried research for this presentation we have been unable to place our finger on any judicial authority

90 *Payne V. Cardiff D. C. (1932) i. K. B. 241*; in exercising the power of sale, the mortgaged can validly sell to himself. *Nigerian Loans and Mortgage Co. Ltd. V. Ajetumobi* cited by Professor P. A. Oluiojode op. cit. p. 176; And as long as the mortgagee sells in good faith and using all necessary endeavour to realise his security, he could hardly be held guilty of any breach of duty toward the mortgagor. See, *Temco Engineering and Co. Ltd. v. S. B. N. Ltd. (1995) 5 N. W. L. R. (pt. 397) p. 607 at 629*. In view of the provisions of the Act, all the above propositions now seem historical.

91 There are however other remedies open to the mortgagee. But they are less efficacious and more onerous. For example a legal mortgagee has a right to enter upon and take possession of the mortgage property until the loan and interest are recovered. But common law places an onerous burden on the mortgagee in possession not only to account strictly for the rents and profits actually received but also for those he ought to have received if he applied prudence during the period of physical possession. See *Harlock V. Smith (1842) 6 Jur. 478*; *Neales V. Murrey (1856) 23 Bear 401*; The mortgagee has a right a well to appoint a receiver of rents and profits from the mortgaged property see Plot P. A. Oluoyede, op. cit. 171; and T. O. Elias op. cit. 310.

However in *Awojugbogbe Light Industries Ltd. V. Chinukwe (1995) 4 N. W. L. R. pt. 90 p. 379 at p. 410 A. b.*, the Supreme Court added that a mortgagee, like a land lord exercising his right to possess after the expiry of the his tenants lease or his agents who entered and took possession of the mortgaged property is not liable for damages for forcible entry because the right to repossess had become vested in the mortgagee and his agent. See *Beddal V. Maitland (1881) 17 Ch. D. 174*; *Aglionby V. Cohen (1955) I. Q. B. 558* *Hemmings V. Stokes Pages (1920) I. K. B. 720*.



one way or another. But the heavy weight of superior authorities⁹², merely assumed without any minimum reflection on the provision of the Act that the mortgagee could still foreclose or sell.

We shall give a few examples. In *Yakessi V. Tropical Commercial Bank Plc*⁹³, the Court of Appeal merely said through Mohammed J. C. A. That:

*It is trite law that the only obligation incumbent on the respondent bank as mortgagee exercising its power of sale under a mortgage deed is that it should act in good faith*⁹⁴.

In *Jacobson Engineering Ltd. v. U. B. A. Ltd*⁹⁵, the Court of Appeal, again, speaking through Gulu-Gambia J. C. A. Stated:

The provision of this Act is very clear and it has been decided in the case of Savannah bank Nigeria Ltd. V Ajilo (1989) 1 N. W. L. R. Pt. 97 p. 305 that the bank cannot sell the property of its debtor without first obtaining the consent of the Minister. After the that

92 In *Moses Ola and Sons V. B. O. N. Ltd.* (1992) N. W. L. R. pt. 229 it was held that an owner of land who without the consent of the appropriate authority alienates the land by mortgage or otherwise cannot rely upon his wrongful act of not obtaining consent to allege that the transaction was void. (*Solake V. Abed* (1962) I. S. N. L. R. 371); In *Taiwo V. Adegboro* (1997) II N. W. L. R. pt. 528 p. 24, the Court of Appeal thereby held among others that where a mortgagee sells the mortgaged property at an under valued price, the court will interfere to set aside the sale as this constitutes evidence of bad faith in the exercise of the power of sale. In *Group Captian A. G. Gbadamosi and Mother V. Kabo Travels Ltd. and 4 others* (supra), there it was clearly stated, that sale of mortgaged property was not vitiated, merely on the ground that no case has arisen to authorise the sale or that power was improperly exercise if it is shown that: (a) the mortgagor did in fact mortgage (b) the loan or any instalment thereof has become payable (c) the power of sale under the mortgage agreement has arisen and (d) the power of sale was in fact exercise and that the title in the property passed to the purchase; A similar issue in *Okonkwo V. C. C. B. Nig. Plc* (1997) 6. N. W. L. R. pt. 507 p. 48. The Court here holds that the mortgagee's power of sale or foreclosure cannot be affected merely because the amount due under the mortgage agreement is in dispute. It was also held that although sections 22 and 26 of the Land Use Act prohibit alienation of land without of prior consent of the Governor, a holder a statutory right of occupancy is not prohibited from entering into some firm of negotiations which may and with a written agreement to be presented to the Governor; In *Okwunakwe V. Opara* (2000) 14 N. W. L. R. pt. 687 p. 334 it was held that by reason of sale of the mortgaged property, a purchase acquires title and right of possession, superior to the adverse possession of the mortgagor he cannot be sued in trespass. See also; *Sabbagh V. The Bank of West Africa* 1962, 2 All NLR, 225; *N. H. D. S. V. Mumuni* (1977) 2 S.C. 57; *Iragumina V. Uchendu* (196) 2 N.W. L. R. Pt. 428 p. 30; *Agboola V. Abimbola* (19690 I AUNLR 287; *U. B. N. Plc. V. Ayo Dare and Sons Nig. Ltd.* (2000) II NWLR pt. 679 644; *Savannah Bank Ltd. V. Ajilo* (1989) I N. W. L. R. pt. 97 p. 305; *Ugochukwu V. C. C. B. Ltd.* (1996) 6 NWLR pt. 456 p. 524; *F. M. B. N. V. Babatunde* (1999) 12 N. W. L. R. pt. 632, p. 683; *Adetuyi V. Agbojo* (1997) I NWLR pt. 484 p. 705.

93 (1997) 10. N. W.L. R. (pt. 526) p. 694

94 *Ibid* at pp. 698 – 699. See also *Raji V. Williams* (1941) 16 N. L. R. 14; *Ekaete V. Nigerian Housing Development Society Ltd.* (1973) 6 S. C. 183.

95 (1993)3. N. W. L. R. pt.283 p. 586



commencement of the land Use Decree, whatever is created upon delivery of the Title-Deed, whether, equitable or legal mortgage, the law is the same and that is to the effect that the bank cannot sell nor order made that the bank should sell without the consent of the Governor first had and obtained”⁹⁶.

Again in *Nigerian Advertising Service Ltd. Vs. United Bank for Africa Plc.*⁹⁷, the Court of Appeal speaking through Adereni J. C. A. Said:

A mortgagee's power of sale becomes exercisable if it has arisen and once it has arisen, the title of a subsequent purchaser will not be affected by its improper or irregular exercise and sale will be regarded as valid”⁹⁸.

In *Gbadamosi V. Kabo Travels Ltd.*⁹⁹, the Court of Appeal per Salami J. C. A. held after reviewing so many authorities that once a mortgage debt has fallen due, even if the stipulated notice to sell the mortgaged property has not been given by the mortgagee to the mortgagor, a purchaser buying from the mortgagee will acquire an unimpeachable title¹⁰⁰.

As we can see from the above decided cases, it was merely assumed rather than decided that a mortgagee can still exercise his final remedies upon default by the mortgagor to pay the mortgage debt. We say so because upon the pleadings, evidence in court the question did not arise, namely whether a mortgagee could still under the Act exercise his rights of sale and foreclosure.

In this lacuna, we find ourselves, compelled to venture an opinion. The fact which is frequently ignored is this. Under section 51-subsection (1) of the Act, a “holder” in relation to a right of occupancy, which is

96 Ibid at pp 600 – 601; See also *Moses Ola & sons V. B. O. N. Ltd* (1992) 3 N. W. L. R. pt. 229 p. 377.

97 (1999) 8 N. W.L.R. pt. 616 p. 546.

98 Ibid at pp 555 – 556; See, *Majokodunmi and Ors V. Cooperative Bank Ltd.* (1997) 10 NWLR pt. 524 p. 198

99 (2000) 8 N. W. L. R. pt. 668 p. 243.

100 Ibid at pp. 224 – 275. See also *Oguchi V. Federal Mortgage Bank of Nigeria* (1990) 6. N. W. L. R. pt. 156 p. 330; *Bank of the North V. Muri* (1998) 2 N. W.L. R. pt. 536p. 153 at 175.



the interest mortgaged, is vividly defined as not including a mortgagee¹⁰¹. This is a disturbing provision to mortgagees who have granted enormous credits hoping to realise the mortgage upon default by the mortgagor to pay the mortgage debt. By definition also, a mortgagee cannot be an occupier of right of occupancy. We say so because an “*occupier*” under the Act is any person lawfully occupying land under Customary Law¹⁰². A mortgage is not only alien to customary law on property but so are all the incident¹⁰³ of a mortgage transaction inconsistent with customary law notions of pledge.

So by and large a mortgagee is neither “*a holder*” nor “*an occupier*” of the right of occupancy created under the Land use Act. It is submitted therefore that until the Land Use Act is amended to confer the status of holder or occupier on the mortgagee there is no platform upon which he can either exercise his right of sale or foreclosure of the mortgaged property all of which amounts to a transfer. Of great importance is that the power or right to alienate, transfer, sell or foreclose property is also reserved by the Act to holders of right of occupancy¹⁰⁴. And the Act specifically stipulates that a Mortgagee is not a holder or occupier of a right of occupancy. Thus in strict law, he cannot exercise the power of sale or foreclosure of the mortgaged property upon default by the mortgagee. So relative to exercise of his potent final remedies, the mortgagee would find himself facing a brick – wall.

Upon this principle as well, when the property, the subject of mortgage is revoked by the state or Governor, the Compensation payable goes to the mortgagor/borrower rather than the mortgagee¹⁰⁵. This is because under Section 29 of the Act Compensation upon revocation is payable to the holder and, or the occupier of the affected right of occupancy. It does seem that in all directions the mortgagee is worsted. Except perhaps that he may proceed against the mortgagor on a personal action for money had and received which was not utilized for the purpose it was given. This in our view is not worth the trouble.

101 In fact Section 51 subsection (1) defines a holder as follows: “ a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of a holder but does not include _____ a mortgagee, sublessee or sub - underlessee.

102 See section 51 subsection (1) of the Act.

103 The requirement that it be by deed and executed with the consent of the Governor; the mortgagee's right to call in the mortgage immediately the mortgagor has defaulted in the payment of the mortgaged debt.

104 See, sections 22 and 34

105 See, *Manyera Estates Ltd. V. N. D. C. A.* (1970) E. A. R. 177.



VINDICATING LIQUIDITY IN SUBSTITUTED ASSETS

As we have seen, the superior courts in Nigeria have touched the question of the mortgagee's right to his final remedies but did not resolve the all important questions relating to whether those mortgagee's powers survive the Land use Act. We have shown how those powers were extinguished under the Act.

However property, law has developed a theory of unrestricted election to assert either a lien or beneficial share in the mortgaged property or in the proceeds if the mortgagor has sold the property to a third party¹⁰⁶. In other words, generally, under the doctrine of tracing¹⁰⁷, when the credit advanced by the mortgagee has been used in the building of a house which was subsequently, sold by the mortgagor and paid into his (mortgagor's) bank account, the mortgagee could assert his lien or beneficial interest over the funds standing in the mortgagor's account. The mortgagee could also trace his credit to any mixed assets or substitute and his restitutionary remedy vindicated there on¹⁰⁸. Property law could therefore scarcely recognise any interest arising to strip a mortgagee of the proceeds of such actionable wrong in the security or mortgage property. These are however conclusions of law, valid at common law.

But under the Land Use Act, it is clear that, at the moment of substitution or sale by the mortgagor, the interest of the mortgagee remains essentially not vested. You can only deal lawfully with property when it is vested in you. The mortgagee not being an *occupier* or *holder* of right of occupancy which is the only right existing on Nigerian land today, we find ourselves returning full-circle to square one, where we see again a situation of helplessness or hopelessness foisted on the mortgagee. His interest or title under the act to the substitutes, mixed assets or mortgagor's liquidity would remain uncrystallised¹⁰⁹.

Finally, the process of vindicating liquidity in substituted assets is an equitable right of a kind¹¹⁰. Consequently the mortgagee's right thereto, could be defeated if the substitute or substituted assets

106 See, inferentially the principle set forth of the House of Lords in England in *Foskett V. McKeon* (2000) 2. W. L. R. 1299; per Lord Browne Wilkinson at page 1306. Per Lord Hoffman at page 1311; Lord Hope at p. 1313 and per Lord Millet at p. 1327.

107 Per George Jessel M. R. in *Re-Hallets Estate* (1880) 13 Ch. D. 696 at 709.

108 Ibid. See also *Cave V. Cave* (1880) 15 Ch D. 639.

109 *Re French Estate* (1887) 21 I. R. (Ir.) 283.

110 See, per Lord Westbury L. C. in *Phillips V. Phillips* (1961) 45 E. R. 685.



were transferred to a person taking a legal interest in it as a bona fide purchaser for value. Wherefor on this equitable remedy we find that the mortgagee again staggers and falls.

SUNDRY IMPLICATIONS

From the foregoing exposition we have seen how in strict law¹¹¹ a mortgage deed under the Land Use Act is not worth more than a love-letter¹¹². We have also shown the invalidity of the mortgage transaction over a statutory right of occupancy without the consent of the governor first had and obtained¹¹³. And there is no compulsion on the Governor to give his consent. Again, we have directed attention to the total ban on mortgage of land or property in the rural areas of the state¹¹⁴. Even as respects, statutory right of occupancy where a mortgage transaction is permitted, the mortgagee's power to exercise his power of sale or foreclosure had been extinguished under the Act. And as we have hinted earlier a security for credit is valueless from the mortgagee's perspective if it cannot be realised without difficulty when the need arises, with minimum trouble and unencumbered ability to obtain safe and indefeasible title without delay.

In *Ajilo's case*¹¹⁵ the Supreme Court of Nigeria recognised the status and usefulness of mortgage transaction to economic development in Nigeria. It said:

*Almost all corporations, persons (legal and natural) and organisations that embark on every expensive projects go to the banks and other financial institutions for loan. These loans are usually secured by some manner of collateral agreement mostly a mortgage of one property or the other by the borrower to the lender. Any mortgage of real property in any part of Nigeria required the consent of the Governor of the State in which the requisite property is situated.*¹¹⁶

111 We use the phrase “strict law” to show that we are in this exposition concerned with the statement of the law as it is rather than what is obtainable in practice in breach of the provision of the Land Use Act.

112 See, I. A. Umezulike, *Does The Land Use Act Expropriate: Another View* (1986) I J. P. I. 61. The point being made here is that the content of a love letter is incapable of enforcement and remains absolutely a pious expression of emotions.

113 See, Section 22

114 See, Section 36 subsection (50).

115 (Supra)

116 *Ibid.*, at page 42.



It is evident that there is no economic sector in Nigeria that is not lubricated or nurtured by mortgage financing and or allocation of bank credit. These sectors include but by no means exhaust the following:

- (1) Agriculture
- (2) Mining and quarrying
- (3) Manufacturing
- (4) Electricity and water supply
- (5) Housing, building and construction
- (6) Distribution
- (7) Transport and communications
- (8) Education
- (9) Health among others

Rapid and meaningful developments in the above identified sectors are made possible through mortgage financing and inter-bank placements. There is no doubt that development plan preparation and plan implementation in the private sector, federal, state and local government levels are dependent on availability of funds. And these funds are usually sourced through mortgage – finance. It was therefore not surprising that at the change of baton at the Local Government Councils a few months ago, the caretaker chairmen in many Local Government Councils have decried the high level of bank loans bequeathed to them by the former local government chairmen.

One may however contend as a layman in the field of development economics that the country's national development plans and Vision 2010 are built essentially on a tripod of philosophical objectives, namely,

- (1) To build a strong and self reliant nation;
- (2) To establish a great resilient dynamic economy; and
- (3) To build a nation that will be full of bright opportunities to all her citizens.



But with the systematic destruction of mortgage transactions under the Land Use Act and its negative bearing upon the above economic sectors, it would seem that the objectives embodied in these development plans may ever remain illusory.

For example, there is no doubt that the outright prohibition or ban of mortgage transaction in respect of all land in the rural areas of Nigeria is not only subversive or destructive of the touted agricultural policy of federal and state governments, but also inimical to agricultural sector development. Thus harm is inflicted by the prohibition of mortgages of farm land for agricultural finance. It also contradicts and makes nonsense of the ubiquitous Government's call for financial institutions to assist in financing agricultural development schemes. It also clearly negatives the objectives of Rural Banking schemes and operation return to land of the federal and state governments.

One may as well observe, though obvious it may seem, that regular and sustainable energy supply is a necessity or crucial component of rural development any where in the world. This has prompted massive re-organisation and rehabilitation of the energy sector in order to ensure regular power supply throughout the country¹¹⁷. To this end, government has also called for assistance from the *Independent Power Providers (IPPs)* to revitalise the power supply in the country which is still about 40% below or short of current demand¹¹⁸.

But with the castration of mortgage transactions in Nigeria, the independent power providers may find it difficult to raise necessary funds to go into this capital intensive venture. And so, many medium and small scale industries which cannot afford generators would permanently go under.

Furthermore by making mortgage of farm land in the rural areas absolutely unattractive, the banks are likely to turn their backs on agric financing.

This would result in stunted agricultural development and low quality of life in the rural areas. Government and private sector initiatives in the urbanisation of the rural areas will obviously fall to the

117 In 1999 the power situation in Nigeria has completely fallen to the ground. The present government has tried to raise power supply from 2000 MW to over 4,000 M.W. in less than three years that it has been in power. But a lot still remains to be done to meet the present demand.

118 The manufacturing sector in Nigeria is worse hit by the unstable energy supplies with most factories running 100% on generator. And many medium and small scale industries which could not afford generators simply went under.



ground. Thus the rural areas would continue to lack basic social infrastructures and social support services like good roads, housing estates, electricity, water supply, hospitals, health centres, relaxation centres and so on.

Wherefore the drift from the rural area to the urban areas by our young healthy men and women in search of white collar jobs and good life would accelerate. This would lead to a situation where rural farming or agriculture is eventually left in the hands of weak old men and women with the spectre of very low agricultural output and famine not out of sight. It would adversely affect our agricultural-export potential with negative multiplier effect on the general quality and standard of life in Nigeria.

The destruction of the efficacy of mortgage transaction would obviously adversely affect economic relations and impair federal government policy on real sector financing through the Bank of Industry. The bank is expected through *loans* and *advances* to fund real sector activities. The government may soon realise that the ₦50 Billion capitalisation to be advanced to the bank may soon disappear on unrealisable securities and thus making its days evidently numbered.

CONCLUDING REMARK

From the foregoing exposition the following conclusions of law and fact could be drawn;

- (1) Land, the common subject of mortgage has been nationalised. And by section 1 of the Act, the ownership thereof is vested in the Governor of the state. Hence while land as a corporeal thing can no longer be mortgaged, an incorporeal interest on it i.e. the right of occupancy can be mortgaged. This may well explain why a mortgagee who has taken an incorporeity on the land has been denied the status of a holder of right of occupancy under the Act.
- (2) All transactions relative to mortgage of statutory right of occupancy must receive the consent of the Governor of the State¹¹⁹. And the Governor's refusal to give his consent to the transaction for whatever reason or for no reason at all is free from judicial control or sanction.

119 This necessity for consent also applies to UPSTAMPING which is the stamping to meet the further charges created on the mortgaged property by the advance of further sums of money or additional credit on the mortgaged property But in *Moses Ola V. Bank of North Ltd.* (supra) the Supreme Court treated it as an ad valorem assessment of the additional credit rather than as a further transfer requiring the appropriate consent of the Governor.



- (3) There is a total ban of mortgage of land in the rural or non-urban areas covered under a customary right of occupancy.
- (4) The mortgagee's final remedies or most efficacious means of realising his mortgage, namely sale and foreclosure have been extinguished under the Act.
- (5) Even where the mortgaged property is sold to a third party and the money realised paid into the mortgagor's bank account, the mortgagee's credit cannot be vindicated in the transmuted security or liquidity.

Exasperated by the long drawn legal battles and the mortgagee's utter helplessness in the face of the mortgagor's default to pay up the mortgage debt, mortgagees have resorted to self help as a means of realising their security. They forcibly intercept the defaulting mortgagors on the streets and highways or enter their premises to distrain goods and chattels, cars and cash, all in their anxious bid to realise the mortgage debt. It is submitted that the mortgagor's property, goods and chattels other than the specific security for the mortgage are all privileged against distress¹²⁰.

Evidently having regard to the immense economic importance of mortgage as a major contributor to national economic development there does not seem to be the slighted foundation and reason for its sterilisation or castration under the Act. The provisions of the Act which subjected the transactions to consent of the Governor¹²¹, banned mortgage of land in the rural areas¹²², and denied the mortgagee the status of holder of right of occupancy¹²³ could all be expunged without any damage to the general tenor and social justice objectives of the Act¹²⁴.

120 See *Ozobu V C. C B Plc.* unreported Suit No. E/246/95 where Enugu High Court deprecated the self - help approach of the banks/mortgagees. *C. C. B (Nig.) Plc. Ozobu (1998) 3 NWLR*. The Court of Appeal in that case cautioned that once parties have turned their dispute over to the courts for determination, the right to resort to self help ends. So it is not permissible for one of the parties to take any step during the pendency of the suit which may have the effect of foisting upon the court a situation of complete helplessness.

121 Sections 21, 22, 24, 26

122 Section 36 subsection 5

123 Section 51 (1) of the Land Use Act Cap 202 LFN

124 See, generally for more detailed exposition on the social justice objectives of the Act in I. A. Umezuluike, "A Guide To Instruments Registration And Land Registry Practice in Nigeria, (1992) Oladele Law Publishers (Lagos) p. 221 - 227.



The impression is created that the law makers of the Act were mortgagors trying to escape from the auctioneer's hammer. And this is contrary to the numerous social justice underpinnings of the Act, one of which is to extirpate the inequities in the land rights distribution pattern in Nigeria. It was also warranted by the trenchant public concern over the decadent land tenure existing in Nigeria and the high cost of land. Hence there was unprecedented exhilaration¹²⁵, and favourable public opinion survey¹²⁶ at the promulgation of the Act.

Alternatively a legislation specifically targeted to regulate mortgage transaction in Nigeria and make utilisation of its process for economic development free, independent of state control, speedy, certain and just is needed urgently in Nigeria. This is however without prejudice to the recent indication of the Federal Government to float a MORTGAGE FINANCING SCHEME from where states and private companies could borrow to develop housing estates and package investments in capital market.

Obviously the recent Federal Government's Policy on agricultural, urban and peri-urban housing development presents an immediate need to modify the provisions of the Land Use Act relative to mortgages or inaugurate a specific legislation on the subject that would enhance its utilisation for economic development. Happily, Last week, the President of Nigeria Chief Obasanjo whilst addressing a delegation of Real Estate Developers Association of Nigeria (REDAN) stated that the

125 Both Government and Independent Newspapers in Nigeria were unanimous in both their commentaries and front-page captions that the promulgation of the Act was one of the best things happening to the Country. For example: (a) Land to the masses, Radical change in the system (Daily Times, 30th March, 1978). (b) States to hold land in trust (new Nigerian, 30th March, 1978). (c) Land for the people (Daily Sketch, 30th March, 1978). (d) Be with the masses, charge to Traditional Rulers (Daily Sketch, April 8th 1978). (e) Olubadan backs Land Decree - (Observer 8th April, 1978). (g) The Daily times in Nigeria on the 5th of April, 1978 in its editorial comment heralded the Land Use Act as a landmark in the history of Nigeria's social and economic development and noted that it would immediately put an end to speculation of land in Nigeria. It opined that the Act had remedied the outrageous inequities in Nigeria regarding ownership of land. It urged all Nigerians to rise above parochial interest and give the Act their full support in the interest of the nation. (h) The new Nigerian editorial entitled "Fair and Just" on the 4th April, 1978 gave full support to the Act. The Act according to the paper has complied with African concept of land ownership. (i) Punch in its editorial of 10th May, 1978 described the Act as popular. The paper warned that it would be political suicide for any future government in Nigeria to try to abrogate the Act "which is popular with the masses of our people". (j) The Daily sketch in its editorial of 14th April, 1978 outlined the food social and economic seasons why all Nigerians must support the decrees. Some of the reasons are:

- (i) That the decree would facilitate land acquisition for development by government and individuals.
- (ii) It would check the activities of land speculators who without any effort make thousands of Naira solely on their ability to manipulate and take undue advantage in land matters.
- (iii) It would eradicate for good the situation in which few families and



Land Use Act will soon be amended to ensure unfettered property development in Nigeria. This is an interesting reawakening from the top.

Until this is done, the mortgagee in every mortgage transaction would always end up building a palace of *paper and cards* instead of a house of *bricks and stone*. And that is bad augury to this significant expression of and major contributor to national economic development.

Once more I thank the ENUGU FORUM for this opportunity.

Hon. Justice I.A. Umezulike (OFR) is currently the Chief Judge of Enugu State.