

The Status of Customary Tenants in Relation to Land Held by Him: An Overview of Customary Law

Michael Takim Otu^{*1}, Joseph Edet²

^{1,2}Department of Private & Property Law, University of Calabar, Etta Agbo Rd, Calabar, Nigeria.

*michealtakim@unical.edu.ng

Received: 2023-February-16

Rev. Req: 2023-March-09

Accepted: 2023-April-10



10.5758/ijls.v2i1.2023.19

How to cite this paper: Otu, M.T. & Edet, J. (2023). The Status of Customary Tenants In Relation To Land Held By Him: An Overview Of Customary Law. *Journal of Law and Society (IJLS)*, 2(1), 1-18. <https://doi.org/10.5758/ijls.v2i1.2022.19>

This is an Open Access article distributed under the terms of the Creative Commons Attribution 4.0 International license (<https://creativecommons.org/licenses/by/4.0/>)

ABSTRACT: *The article seeks to examine the effects of the Land Use Act of 1978 on the customary system of land holding in Nigeria. Since the birth of the Act, the problem facing our courts, ordinary people and lawyers is determining the actual position of customary tenants under the system of property rights introduced by the Law. The empirical legal research method used in this study is a type of qualitative research. This method focuses on cases in the community using legal studies, while the scope of this research is the Land Use Act 1978 against the customary land tenure system in Nigeria. The results of the discussion made it clear that the Laws on Land Use and Customary Land Owners have much in common. As such, the controversies generated by these issues continue to defy consensus among our academic "egg heads" as well as learned judges in our courts. Indeed, many court decisions appear to indicate that the courts have not settled the controversy on this issue. As a result, the judicial confusion for Nigerian means of conveyance continues to this day.*

Artikel ini mencoba mengkaji dampak Undang-Undang Penggunaan Lahan tahun 1978 terhadap sistem kepemilikan lahan adat di Nigeria. Sejak lahirnya Undang-Undang tersebut, masalah yang dihadapi pengadilan kita, masyarakat awam, dan pengacara adalah penentuan posisi sebenarnya dari penyewa adat di bawah sistem hak hunian yang diperkenalkan oleh Undang-Undang. Metode penelitian hukum empiris digunakan pada penelitian ini termasuk jenis penelitian kualitatif. Metode ini menitik beratkan pada kasus-kasus di masyarakat dengan memakai kajian hukum, sedangkan ruang lingkup dalam penelitian ini adalah Undang-Undang Penggunaan Lahan tahun 1978 terhadap sistem kepemilikan lahan adat di Nigeria. Hasil diskusi menjelaskan bahwa undang-undang Penggunaan Tanah dan Pemilik Tanah Adat memiliki banyak kesamaan. Dengan demikian, kontroversi yang ditimbulkan oleh isu-isu ini terus menentang konsensus di antara "egg heads" akademisi kita serta hakim terpelajar di

pengadilan kita. Memang, banyak keputusan pengadilan tampaknya menunjukkan bahwa pengadilan belum menyelesaikan kontroversi tentang masalah ini. Akibatnya, kebingungan yudisial untuk alat angkut Nigeria berlanjut hingga hari ini.

Keywords: *Indigenous Residents, Customary Tenants, Land Ownership, Customary Law, Legal Review.*

I. INTRODUCTION

The phrase “Customary Tenant” can be understood by first understanding the meaning of the words “Customary” and “Tenant” (Ramos, 2020). Custom is a written law and is the mainspring of all the laws of a land (Otu & Nabiebu, 2022). Therefore, “Customary” is a word suggesting something that has to do with the law of the land. “Tenant” on the other hand, is one who holds land by any kind of title or right, whether permanently or temporary or one who leases premises from the land Lord (Goldberg, 1986).

In other words, “Customary Tenant” is a person or family (as a unit) who is granted occupation and use of a piece of land by the traditional owner on payment of rent or tribute. The rent payable must not be necessarily cash but money’s worth. Tribute is something given, done or said to show gratitude, honour or praise. Thus, the features of customary tenancy is, the relationship of the land held and tenant, payment of allegiance, tribute or loyalty of the tenant to the land- lord (Dore, 2013). Customary Tenancy arises where a customary landowner grants to another person at customary law; the right of occupation and use of the land in return for the grantee’s recognition of the title of the grantor and payment of tribute.

The legal nature of the interest of a customary tenant in the land granted to him has been described by Elias CJN (as he then as) in *Aghenghen & Ors V Waghoreghor & ors* as follows:

“In customary Land Law Parlance, the customary tenants are not gifted the land; they are not “borrowers” or “leseees”, they are grantees of land under customary tenure and hold as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behavior.” (Elias, 1977, p. 64).

Customary tenancy is the relationship between the family and third party, where the family or community land holders grant rights of occupation to third parties to occupy and farm on land under customary law. The rights enjoyed on land by the tenant is only occupational and not ownership.

Meaning and Nature of The Interest of a Customary Tenant

A customary tenant is a grantee of land under Customary Law, which (land) he holds in perpetuity determinable only upon proof of bad behavior against the grantor or his successors-in-title (Chigbo, 2013). In other words, the customary tenant holds a perpetual right of occupation and user over the land granted to him subject to good behavior (Burns, 1985).

This interest has in practice now been regarded by the courts as practically indefeasible once permanent buildings or other forms of improvements like extensive commercial farming and or occupation have been established thereon by the grantees (Oshio, 1990). Thus, a customary tenant right on the land is perpetual during good behavior.

However, if he exhibits bad behavior, he may be denied perpetual enjoyment on the land by his overlord. Some of the factors that may amount to bad behavior on the part of the customary tenant to warrant denying him perpetual enjoyment of the land are:

1. Denial of the overlord's title.
2. Refusal to pay the traditional or customary tributes.
3. Alienation of the land without the consent of the overlord.
4. Giving evidence in favour of opponents of the overlord in a litigation involving land or testifying against the overlord in such circumstances (Ogilvie, 2005).
5. Bringing of bad medicine or juju or voodoo on the land which is subject to customary tenancy.

It is the considered view of the writer that as long as the customary tenant or his successor-in-title refrained from the above categories of bad behavior, he enjoyed a perpetual right in the land belonging to the overlord. We have two categories of cases which have upheld the rights of the customary tenant against his overlord and have given this right more recognition as against that of the overlord to wit:

1. Those which have asserted that the interest of the customary tenant cannot be over-reached by the overlord. This is a correct proposition of the law so long as land is subject to customary tenancy; the effect of transfer of such land by the overlord is to make the transferee take subject to the interest of the customary tenancy except where the transfer has been consented to by him. In fact, some of these cases have even asserted that the transferee never obtains from the overlord the right to forfeit the customary tenancy for mis behaviour.
2. Those cases, dealing with the apportionment of compensation payable on acquisition of land which is subject to customary tenancy as between the overlord and the customary tenant. In *Josiah Aghenghen & Ors. vs. Chief Maduka Waghoreghor*, the Supreme Court was faced with the problem of apportioning as between the overlord and his customary tenant, the compensation payable on the compulsory acquisition of land which is subject to customary tenancy. In awarding two-thirds of the compensation money to the customary tenant and one-third to the overlord, the Supreme Court first considered the nature of the interest of the customary tenant as follows:

... In customary land law parlance, the defendants, are not gifted the land; they are not 'borrowers' or 'lessees', they are grantees, of land under customary tenure and hold, as such, a determinable interest in the land which may be

enjoyed in perpetuity subject to good behaviour ... They enjoy something akin to emphyteusis, a perpetual right in the land of another (Salawu, 2022, p. 64).

Thus, it is settled law that the possessory right of a customary tenant goes on and on in perpetuity, unless and until the tenancy is forfeited. It is instructive or worthy of note to point out here, that the customary tenancy has no equivalent in English law. It is neither a lease hold interest nor a tenancy at will, or a yearly tenancy. The main incident of such tenure is the payment of tribute, not rent, by the customary tenant to the overlord. Undoubtedly, from the views expressed above, Nigeria Courts have taken the position that the interest of a customary tenant over the land in his possession is significant and equal if not superior to that of the overlord.

II. METHOD

The empirical legal research method used in this study is a type of qualitative research. This method focuses on cases in the community using legal studies, while the scope of this research is the Land Use Act 1978 against the customary land tenure system in Nigeria. The focus of the problem was whether citizens would continue to pay tribute. whether residents will continue to seek approval from customary authorities before making legal land transfers, whether community members are still under threat of having their interests confiscated after evidence of misconduct, whether customary tenants are entitled, as opposed to their landlords, to the right of occupancy and a certificate of occupancy to be issued as proof. The types of data used include primary data and secondary data. Primary data is data obtained directly by researchers through observing phenomena and conditions in the field and other parties concerned. Secondary data is data obtained by studying laws and regulations, books, journals, and research related to the focus of the study. The data were then analyzed with a qualitative descriptive analysis so that a conclusion could be drawn as a new scientific finding.

III. RESULT AND DISCUSSION

Nature of Customary Tenancy Before the Act

Before the Land Use Act of 1978, the nature of interest enjoyed over land by a customary tenant is absolutely indefeasible during good behaviour. Such interest is assured and secured under customary law. In *Josiah Aghenghen vs. Maduka Waghoreghor*, Elias, CJN., delivering the judgment of the Supreme Court described the nature of the interest of a tenant under customary law in the following vivid language:

“They enjoyed something akin to emphyteusis, a perpetual right in the land of another. A very important factor is that the grantor of the land once it has been given to the grantees as customary tenants, cannot thereafter grant it or any part of it to a third party without the consent and approval of the customary tenants. The grantor is not allowed to derogate from his grant.” (Elias, 1977, p. 42).

No doubt, it is evident from the view expressed by Supreme Court above, it is judicially settled that the interest of the tenant cannot be over reached by the over lord. In other

words, once the land is subject to customary tenancy, the Landlord is not entitled to and cannot lawfully take any step or steps that may be prejudicial to, or capable of diminishing the interest of the customary tenant. This invariably implies that the customary overlord cannot grant a lease, mortgage or effect an outright sale over the land which is subject to customary tenancy without the consent and/or approval of the tenant.

The customary tenant interest on the land is more substantial due to the fact that he is more accorded higher or equal portion of the land as compared to the overlord. In Chief Etim vs. Chief Eke, Martindale J. was emphatic and observed that:

“It is now settled law that once land is granted to a tenant in accordance with native law and custom whatever be the consideration, full rights of possession are conveyed to the grantee The only right remaining in the grantor is that of reversion, should the grantee deny title or abandon or attempt to alienate. The grantor cannot convey to strangers without the grantee’s permission of any rights in respect of the land.” (Olawoye, 1971, p. 44).

Thus, when a grant of tenancy under customary law is made, the tenant takes full rights of possession which in law is exclusive against all including the landlord. What therefore arises infavour of the landlord is a reversion which remains dormant until it crystalizes upon proof of bad behavior on the part of the tenant and that would mean the end of the tenancy (Hawley, 2019).

From the foregoing, it therefore seems judicially settled that the interest of the customary tenant is practically indefeasible and that declaration of forfeiture of his interest would be a rarity.

Nature of Customary Tenancy Under the Land Use Act

In interpreting the Land Use Act, an understanding of its history, the preparatory works, and the mischief it sought to rectify must be of inextinguishable assistance. The issue therefore is in the matter of customary tenancy, what is the mischief which the Act sought to remedy? This question has been answered in the case of *Abioye vs. Yakubu*, where Nnaemeka Agu JSC observed thus:

“I must pause here to advise myself that an important process in the exercise of my interpretative function is to find out what the law was before the promulgation of the Act, what mischief the Act set out to combat and what result was intended by the Act. In other words, what was the relationship between the customary land owner and his customary tenant before the Act came into effect. What was the Act designed to correct in this respect?”

As earlier explained above, the customary tenancy is created where a land owner allows another person (tenant) the occupation of his land for specific purposes and either for a term (e.g. planting season) or normally in perpetuity subject to good behaviour of the tenant (Dorothy & Otu, 2012). The customary tenant only occupies the land and the title never passes to him. He is expected, to pay rent or tribute to the overlord, in the event of misbehavior, the tenancy is liable to forfeiture at the instance of the overlord.

Upon the coming into force of the Land Use Act 1978, the pertinent question that had agitated the minds of jurists and scholars had been what is the quantum of interest held by the customary tenant? Some authorities have ruled that the rights of the overlord have been swept away by the provisions of the Act especially Section 36(2). The Section provides as follows:

“Any occupier or holder of such land, whether under customary rights or otherwise howsoever, 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 section 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.” (Mabogunje, 2010, p. 63).

While subsection 3 went further to permit the appropriate local government to issue the customary right of occupancy to the occupier or holder who is in possession and that the land was being used for agricultural purposes (Oshio, 1990).

The crux of the issue here is who are the holders and the occupiers? Occupier was defined in Section 50 of the Land Use Act as:

“any person lawfully is occupying land under customary law and a person using or occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-lessee or sub-under-lessee of a holder.”

While the Holder is the person entitled to the right of occupancy, the Supreme Court seemed to have laid to rest the arguments on the proper relationship of the customary tenant and the overlord in view of the impact of the Act in the case of *Garuba Abioye and Others, vs. Sa’adu Yakubu and Others*. In this case, the main issue before the Supreme Court was whether having regard to the provisions of the Act, Customary overlords as against their customary tenants, were entitled to a declaration of right of occupancy or whether, put differently, the Act abolished the rights of customary owner’s vis-à-vis the customary tenants. In fact, the brief facts of this case is that the customary tenants of the Plaintiffs after about 60 years on the land as tenants, put up a sign post on the land that suggests that the land now belongs to them absolutely.

The plaintiffs sued for forfeiture of the customary tenancy and the tenants claimed the Act had converted their rights to that of customary right of occupancy under the Act, the High Court held inter alia that the Act did not convert the occupiers (tenants) into holders (owners) of the land. Upon appeal, the Court of Appeal held inter alia, that being occupiers of the land before the Land Use Act, the tenants are entitled to the customary right of occupancy, and that they now become the tenant of the Local Government. The plaintiffs appealed to the Supreme Court. The Supreme Court held as follows:

1. The relationship of Lessor and Lessee, mortgagor and mortgagee are continued by the Land Use Act. The Act never sought to disturb existing relationships.

2. The Act did not expressly divest or extinguish the customary rights of the owners of agricultural land in non-urban areas, as it did in respect of undeveloped land in excess of half hectare in urban areas. In deciding therefore the grant of the tenant of the deemed customary right of occupancy tantamount to the extinction and extinguishment of the customary right of the owner, the right to tributes, forfeiture and reversion, it is necessary to examine the quantum and content of the deemed customary right of occupancy granted to the occupier in the light of the rules of interpretation of expropriatory statutes.
3. Section 1 has not taken away the right of the customary owners of enjoyment of the tributes rather it left it untouched.
4. The occupier is the customary tenant while holder is the customary owner.
5. Where a certificate of occupancy is granted to a tenant who is subject to customary tenancy, the overlord retains his right as a reversionary in case the certificate of occupancy is revoked for any reason and the overlord may apply for a grant of certificate of occupancy to him.

Furthermore, Bello, CJN who read the far-reaching judgment of the Supreme Court was impressively emphatic that:

“A customary tenant has acquired the right to occupy and use land from its customary owner’s on terms under customary law which includes the owner’s right to tributes, the continued recognition by the customary tenant of the reversionary right of the owner and the right to forfeiture. Consequently in the absence of express provision in the Act divesting the customary owner of his rights or extinguishing the same, Section 36 ought to be strictly construed so as to preserve the rights of the customary owners.” (Adefi, 2011, P. 142).

Thus, Bello CJN, who read the judgment of the Supreme Court, felt that the customary tenant should pay the customary tribute to the overlord. According to him:

“In the absence of express provision in the Act divesting the customary owner of his rights or extinguishing the same, Section 36 ought to be strictly construed so as to preserve the customary owner.” (Fekumo, 2002, p. 424).

Classification of Customary Tenancy

1. *Classification According to the Length of Tenancy*

There are two main types, under this class. Those granted for a specific or definite period, usually a farming season, and those granted for a long indefinite or indeterminable period. The difference between the two types lies in the fact that whereas a “term”, more or less certain, is set upon the one granted for a specific period, beyond which it cannot extend, the one granted for a long indefinite period has no specific period set upon it and goes on for as long as the parties wish, often forever; its maximum duration depends on what the parties intended the grant to be. It is important to note that if the overlord intends the grant of the land as a permanent residence for the grantee, then the grant is a perpetual one, but if it is understood between the parties

that the grantee, although desiring to settle and work on the land, would eventually give up the use of the land and return back to status quo ante, that is, by going back to his home, then the tenancy has a limited or finite duration and may be determined by the grantor at any time by notice (Turan,2019).

The difference in duration between the two types of tenancy naturally affects not only the purpose for which the tenancy is granted but also the character of the grantee. Tenancies for a short period are generally made for the purpose of farming, fishing and exploitation of crops on the land. In some cases, though, the exploitation of crops or farming may in fact be in perpetuity, and the tenant is not permitted to change the purpose for which the land was granted except with the permission of the overlord. While indefinite long tenancies are granted for purposes of residence or for residence and farming. Where, the land was given to the tenant to build his house and for farming thereon, the presumption is that the term is indeterminate. In the case of Ochonma V. Unosi where land was granted for the purpose of establishing an oil pressing machine, the grantee later dismantled the machine and laid it out into plots, the court held that the tenancy is determined upon the change of user (Otu, 2018 Oshio,2018).

It has been suggested that a third type of tenancy based on duration also exists in the form of a periodic tenancy. Nwabueze has doubted such possibility of existence and rather states that the suggestion seems to be based upon confusion between periodic tenancy strictly so called and a tenancy for a specific period, renewable at the end of each completed period. A periodic tenancy implies a continuing grant, that is to say, although the tenancy is for a term of one year, or month or quarter, it continues indefinitely, without interruption from year to year or month to month, as the case may be, until determined by either party giving to the other appropriate notice. In the case of a tenancy for a specific period, on the other hand, the tenancy comes to an end when its purpose has been accomplished e.g. when the crops have been harvested, though the grantee is usually allowed an option of renewal during the next farming season. It is however worthy of note to point out that the difference between periodic and specific tenancies appears subtle but at the same time it is significant.

2. Classification According to the Consideration Given by the Grantee to the Grantor

The consideration given to the grantor or overlord is an important classification of the nature of customary tenancy created. The consideration may be in form of tribute or (Ishakole in Yoruba Customary Law) or rent negotiated and agreed by the parties. The difference between tribute and rent consists in the fact that whereas rent, whether payable in cash, depends upon agreement between the parties, tribute on the other hand arises by operation of law independently of agreement, both the form of the tribute and its amount being determined by customary law (Park, 2014).

In Mgbelekeke Family V. Iyaji, where a tenant under a grant made in return for tribute sub-let the land at an economic rent to a European firm, a claim by the grantors to a share of the rent reserved by the lease was dismissed, on the ground that there was no custom entitling them to such share. It was held further that, by the customary law of the area where the land was situated (Onitsha), all the grantors were entitled to a customary payment in Kola and/or drinks. And that the right to a share of the cash rent

could only be claimed if there had been agreement between the parties to that effect. It is important to note that tribute is determined by customary law of the area and that of the family granting the tenancy. It may be in form of Kola nuts, drinks or the part of the cannell harvest from the land.

Tribute differs also from rent both in its form and purpose; whilst tribute invariably consists of kola, drink and/or farm produce and bears in amount no economic relation to the value of the land, being intended simply as an acknowledgement of the grantor's title, rent, on the other hand, is paid in cash or in kind, more usually in cash and provides not only an acknowledgement of the grantor's title but also an economic return on the land (Rigi & Prey, 2015). Upon the initial payment of tribute, the tenant is enjoined to bring an annual payment in form of crop yields and part of the harvest from the land to show appreciation for the grant and as acknowledgement of his status. Despite the token nature of the tribute, if the tenant fails to bring the tribute, it does not necessarily lead to termination of his right on the land.

In the case of rent, which was alleged to be foreign to a customary tenancy, and that its incidence in customary tenancy today was a current innovation due to increase in civilization and economic activities, the tribute is converted to monetary consideration. In this case however, it bears relevance to the value of the land. While tribute may not be definite in nature, the rent is more specific and precise in nature and its payment has a greater obligatory force. It may be argued that rent is foreign to customary law, but Nwabueze in his book pointed out the fact that there has never been any custom prohibiting parties to a customary tenancy from adopting a form of payment different from the normal customary tributes, and the predominance of tribute in the olden days should not obscure this fact.

Rent is generally recognized as a form of Ishokole in modern terms. In the case of Ife Overlords V Modakekes the plaintiffs claimed from the defendants 6 cwt. 1 qr. of cocoa or its equivalent in this case. Calculated at (£18 25.6d) representing the Ishakole due from the latter to the plaintiffs in respect of the year ended December 31, 1947. The plaintiffs alleged that under an agreement of 1886 the defendants through their predecessors undertook to pay yams and kola-nuts as Ishakole to the plaintiffs' predecessors until the cocoa to be grown on their allotments should, begin to bear fruits when each grantee of land must pay 1 cwt of cocoa or its money equivalent to the grantors.

This agreement was not enforced until 1903 but it appeared that the defendants who had been granted their lands some eighteen years previously had paid Ishakole of yams and kola-nuts for some eight years and that thereafter when their cocoa trees began to yield, quantities of cocoa up to and including December 31, 1946. They then decided not to pay any more Ishakole, which had now come to be looked upon merely as a voluntary but burdensome tribute. It was held by Hallinan J. in the Supreme Court of Ife, confirming the finding of the magistrate's court, that Ishakole although usually paid in kind in the past, was in the nature of rent, the obligation to pay which arose, not from customary law as in the case of tribute, but from agreement between the grantors and

grantees, and that the defendants were bound to pay the amount which under agreement they had agreed to pay.

Payment of rent or tribute is a clear evidence of the existence of customary tenancy. However, the fact that tribute was not paid annually is not also evidence that the relationship is not that of customary tenancy. In the case of Okuojevov V Sagay, the court observed as follows: "It has... been held by the courts in many cases that non-payment of rent or tribute by the occupier is not itself conclusive as to his ownership of land held under customary tenure".

Nowadays, rent is almost always paid in cash, for cash is today the basis upon which most customary transactions are carried on. The court no doubt, may order tribute to be paid in cases where it is found that the relationship is that of customary tenancy (Out & Enyia, 2015). Tribute may consist of a single payment in kola and drinks made at the time of the grant or it may couple such initial payment with an annual payment in kola, drinks and/or farm produce. Payment of tribute may be appropriate in order to remove bitter controversy. On the payment of yearly rent and its significance on the nature of the tenure, Obaseki, J.S.C observed in the case of OjomorAjao, thus:

He did not get a freehold title but a customary title to remain on the land provided he pays his yearly rent.... The grant has been loosely described as a 'lease' but it is not a lease in the strict legal sense of the word (Godden & Tehan, 2010, p. 146).

And on the distinction between rent and tribute, His Lordship was very forthcoming, as he said that one of the obligations of a customary tenant is to pay his rents into which tributes formerly paid in olden times have been converted. The above extracts from the Ojomo case have blurred the distinction between rent and tribute as a determinant of customary tenancy. It is submitted that the distinction is not necessary. Customary tenancy and a customary lease, mean one and the same thing, hence, we agree with Aniagola J.S.C that the practical effect is the same. The most relevant incident is the perpetuity of tenure and not whether the consideration is rent or tribute.

The foregoing opinion has support from the recent decision of the Supreme Court in the case of Audu Makinde V. Dawuda Akinwale where it was held that there can be customary tenancy without the payment of tribute. As Uwaifo, J.S.C observed.

.... It is not unknown that there can be customary tenancy without the payment of tribute..... As long as the land owners accept or permit the use and occupation or possession of their land not upon absolute grant although without spelling out the terms of the tribute, not for a temporary use as licensees, a customary tenancy is liable to forfeiture when the tenant commits any offence that can lead to forfeiture or that is incompatible with the customary tenancy such as the denial of the over lordship of the land owners (Mwalimu, 2005, p. 209).

Today, the interest of the customary tenant or lessee has in practice now been regarded by the courts as practically indefeasible once permanent buildings or other forms of improvements like extensive commercial farming and/or occupation have been established thereon by the grantees. Any proved mis behaviour is usually now punished by a fine. They enjoy something akin to emphyteusis.

The Customary Tenant and the Transfer of Land in Nigeria: The Judicial Dilemma for the Conveyancers' today

As early as 1954, it had been judicially recognized that the tenure of customary tenancy was irksome. Consequently, two decades after an eminent authority in property law in Nigeria, suggested its abolition because of the constant friction it produced between the tenants and the overlords. In his profound and prophetic words, the erudite scholar stated thus:

“Suggestion for reform of the ancient rule of customary law will here be based on the view which has been taken that the customary tenant’s interest in any land which is subject to customary tenancy is equal if not larger than the interest of his overlords. In view however of the Courts approach in Asani Taiwo’s case, it is clear that a change in the present rule cannot come from the court. The courts having therefore refused to come to our aid, one can only hope for a Legislation that would restore certainty to this branch of our law.” (Omotola, 1975, p. 44).

He proceeded to suggest a legislative reform in the nature of the moribund Epetedo Lands ordinance (Cap. 60) which would invest a customary tenant with absolute title free from any customary incident. This, it is submitted is exactly what the Land Use Act, 1978 has sought to achieve, hence, the submission that the above writer was prophetic.

The case of Asani Taiwo v. Adamo Akinwunmi & Ors will remain for a long time, the most important decision of the Supreme Court of Nigeria on Customary Land Law. It will also remain for a long time the greatest dilemma for the conveyancers in Nigeria. For in this case, the Supreme Court gave a decision which many would see as an unfortunate reversal of the desirable trend in this branch of our real property law. In fact, the Supreme Court, per Fatayi William JSC put the matter beyond doubt thus:

“Where a tenant, whether he is a customary tenant or not commits an act which could incur a forfeiture of the tenancy and a claim for forfeiture is brought against him in the High Court, the proper procedure is not just asking for relief in the pleading as it has been done in the application for amendment. The procedure to be followed and which are recommended for future use is described in Atkins Court forms, 2nd Edition, Volume 24 at page 30 as follows: ‘A claim for relief from forfeiture for non-payment of rent may be made in a number of ways. If the landlord has not begun any proceedings the tenants or subtenant may initiate a claim for relief by writ or originating summons. Alternatively, the tenant may counter-claim for relief in the lessor’s action or simply apply by summons in that action. If the application is made after judgment, it is usually by summons.’” (Omotola, 1975, p. 171).

The reason for the above elaborate procedure is to enable the tenant set out in detail the facts upon which he relies such as the circumstances leading to the breach. This would also provide the landlord the opportunity to reply to the facts on which the tenant is relying. Issues as to whether to grant relief or not would therefore be joined and neither party will be taken by surprise and the court after hearing evidence from both sides will be in a better position to come to a conclusion one way or the other. To the

conveyancer, perhaps the most intriguing question today is the exact status of the customary tenant in relation to land held by him under customary law? This question often brings with it the other problem as to validity of a conveyance of land which is subject to customary tenancy.

Thus, in Nigeria today, there seems to be some certainty in expressing the rule which governs the alienation of family land, no one, however, has bothered to state any rule for the conveyance of land which is subject to customary tenancy except in the negative sense which is found in the rule which prohibits a customary tenant from alienating the land and also bars the overlord from doing the same without the consent of his tenant. The issue then is, who is really the true owner, if both parties are seeking consent one way or the other? The truth remains that the position of the customary tenants under customary law remain unchanged even after the promulgation of the Land Use Act, for he never had ownership but only possession.

In any case, it is safe to conclude that the Act has customary tenure in mind but fails to give it adequate recognition and this omission, it is submitted, will provide one of the causes of conflict or confusion for the conveyancers in Nigeria today. For instance, Section 24(a) of the Land Use Act 1978 preserves the customary law rules regarding devolution of property and Section 25 of the same Act prohibit partitioning of land expressly, exempts cases which are regulated by customary law. A disposition of family property must be in accordance with customary law and this law requires that it must enjoy the consent of the family as a whole which has now been taken to mean the consent of the head of the family and the principal members.

It should be noted that under Customary Law, a customary tenant holds his land in perpetuity subject to good behavior. It appears that his position remains the same even if the land is in non-urban area. Section 36 of the Land Use Act which enables him to continue in possession does not fix any duration for his possession and it can therefore be implied that he is to hold in perpetuity subject of course to the provisions contained in Section 28 regarding revocation. Section 36 subsection 2 enacts:

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...

Furthermore, Section 36 subsection 3 enacts:

On the production to the Local Government by the occupier of such land at his discretion of a sketch or diagram or other sufficient description of the land in question and on application thereof 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.

Finally, Section 36 subsection 4 enacts:

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 the Act as if the holder of the land was the holder of a customary right of occupancy issued by the Local Government...”

It is obvious from the foregoing that the customary tenant is the person entitled to customary right of occupancy. This follows from the undoubted fact that he is the occupier of the land and also the person usually using the land for agricultural purposes. The land under customary tenancy cannot lawfully be under the possession and use of the customary overlord. Such phenomenon is unknown to customary law. Undoubtedly, based on the foregoing arguments, the customary tenant satisfied the provisions of Section 36(2) of the Act. In respect of Section 36(4) of the Act, suffice it to state that the customary tenant is the person who has developed the land and held it at the commencement of the Act.

Thus the Act clearly recognizes customary right of occupancy in the customary tenant who at the commencement of the Act has developed the land, or is using it for agricultural purposes. Umezulike (2013) has stated emphatically that “the use of the word holder in several places under Section 36(4) of the Act does not in any way diminish the force of our above conclusion”. It is no more than an anomaly or misnomer in draftsmanship. Furthermore, the reference to “holder” in the later part of Section 36 subsection 3 is evidence of confused drafting. Obviously, it would be anomalous to register the holder or overlord upon an application and survey plan or sketch presented or submitted by the tenant – occupier who at his own expense produced the sketch, plan or diagram of the land. This scenario is not practical and commonsensical.

The view that a customary tenant is entitled to the right of occupancy is reinforced by the provision of Section 9(1)(b) of the Act under which only a “person in occupation of land under customary right” may apply and be issued with a certificate of occupancy. Thus, the customary tenant’s philosopher’s stone is the certificate of occupancy which once it is issued to him establishes a direct tenurial relationship between himself and the State and ipso facto discharges all the burdens and bondages of the tenant and thereby giving him freedom from the pre-Act Landlord. Nnaemeka-Agu JSC in *Abioye v. Yakubu* finally said:

It will be injustice to the holder who was the owner of the land before the commencement of the Act and who gave his erstwhile customary tenant a status and a right to which he was not entitled before the Act – a typical illustration of the appropriate metaphor to rob Peter to pay Paul... (Igwe, 2022, p. 111).

However, the writer of this article submits here that, it is not a case of “robbing Peter to pay Paul”, but a void declaration of national policy and social objective. It has been of course, judicially settled that in considering questions of entitlement of right of occupancy under the Act, the interests of the pre-Act fee-simple owners could in certain circumstances be subsumed under those having only possessory rights such as customary tenants (Otu & Mohammed, 2009).

However, where the land is not being used for agricultural purposes and has not been developed by the tenant-occupier, then it would seem that the overlord would be entitled to the customary right of occupancy over such portions of land by operation of law. Thus, it is evidently inconceivable to find such seemingly “vacant land” in places held under customary tenant in view of the libel definition of “developed land”, “agricultural purposes”, and “grazing purposes” under Section 51 of the Act.

The customary tenant pays tribute to his overlord, he may be required to pay rent to the Governor or the Local Government. Again his right may be affected specially if the land is in urban area, he may not be able to retain more than half hectare unless the same is developed. Where his land is in non-urban, he enjoys greater freedom sincere there is no real limit to the land he can hold under section 36 of the Act. His possession, however, is no longer exclusive since it is now subject to the right of the Governor in the case of land in urban area, and where the land is in non-urban area, the Local Government has exclusive possession of the land.

There is a fundamental question to determine under the Act, suppose a piece of land was prior to the Act, subject to customary tenancy. Then the Act came and provides under Sections 34 and 36 that the land is to continue to be held by the person in whom the same was vested immediately before its commencement. No doubt, under customary law both the overlord and his customary tenant have vested interests in land that is subject to customary tenancy. For instance, suppose the absolute owner of a piece of land was vested in Otu family which granted farming rights to Bikom family. Then you have Section 34 or 36 which provides that the land is to be held by the person in whom it was vested before the Act came into effect. How will this problem be resolved? Who will be entitled to a right of occupancy over the land? Would both families now be so entitled? It seems that the answer to these questions are not as obvious as it might seem, since there is no provision in the Act for revoking in an existing right except as contained in Section 28. The problem appears to have resulted from the use of the word “person” in Section 34.

This word is not defined in the Act and the question is whether “person” as used there will include the overlord, the customary tenant, the family or indeed the community as known to customary law. This point is also important in interpreting section 36, where the same word is used. If the overlord, the customary tenant, the family or the community comes within the word, as indeed it must do if an absurd result is to be averted, then there is the further problem of the unit of land holding. For instance, when the Act provides for the maximum size of undeveloped land in urban area which can be held by any person within anyone state, there may be the problem of deciding who is the “person” for this purpose. Is it the family in the case of family land or the individual member of family who is referred to in the Act? Suppose prior to the Act a family was under customary law entitled to one thousand hectare of land in what has now become urban area of a state. Do you cut this to half an hectare or do you line up all the members of the family and give each half a hectare? This difficulty will also arise in the case of land held by customary tenants and communities prior to the Act. Omotola has suggested that these problems may be resolved by the High Court on application to it under section 39 or by the Customary Court or Area Court under Section 41 of the Land Use Act.

It is an established rule of law that a man who has no title, can pass none to another (nemo da quod non habet). It would be noted that while in Section 34 of the Act, the word “vested” is used, Section 36(2) prefers the expression “being used”. Under Section 34 therefore the person who is to be entitled to hold a right of occupancy in the land as if the same is granted by the Governor appears to be the person in whom the land was “vested” immediately before the commencement of the Act. Under Section 36(2) however, the person who shall be entitled to possession of the land as if he held a customary right of occupancy granted by the Local Government shall be the person by whom the land was being used for agricultural purposes. This lack of clarity has given rise to some misconceptions resulting in feuds among people since the Act came into effect.

Again, the Act in Section 50 defines a customary right of occupation as: “the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by Local Government under this Act”. Yet Section 6 permits this right to be granted by the Local Government having converted in Section 36 all rights held in land in non-urban area to customary right of occupancy. It is clearly inconsistent to say that a right is held and enjoyed in accordance with customary law yet permit such right to be granted by Local Government which is a statutory body. The same view was held by Lord Lugard in his dual mandate where he said that land in the Northern Region of Nigeria could not properly be described as “native lands”. Where the Governor’s consent was necessary to the validity of the native occupier’s title, the Governor had the right to demand rents, to nullify all alienations without his approval and above all to revoke the right at will (Elias, 1971). The solution perhaps lies in removing the Local Government from the scheme and accept that this type of right is to continue to be dealt with by the Obas, Obis, Chiefs and Heads of family as before the Act. This is so because, if customary right of occupancy is one that is enjoyed in accordance with customary law, then the customary law rule may continue to apply to such right which means that the right cannot be validly transferred without the consent of the Obas, Obis, Chiefs and Heads of family as the case may be.

The problem created by Sections 34 and 36 of the Act is more pronounced in the relationship of the overlord and the customary tenant. Both, according to these sections, have vested interest in the land which is subject to customary tenancy. This position is further strengthened by the rule that neither of them could alienate the land without the consent of the other. These provisions which simply provide that land is to continue to be held by the person in whom it was vested is not only ambiguous in the sense that it does not tell us who of these persons under the customary land shall be entitled to the right of occupancy in the land, but is also dangerous since it has led to a lot of misconceptions and resultant warfare.

IV. CONCLUSION

The Land Use Act and Customary Land owner have a lot in common. They are complimentary to each other. Nothing has changed except that the Land Use Act fortified the customary tenure for better. In the Southern States the delays in the grant of certificate of occupancy and consent are the noticeable changes. The Act no doubt is

inelegantly drafted. The Act is silent on the question of consent with respect to the holder of deemed statutory right of occupancy under Section 34. It took the intervention of the Supreme Court applying the policy and object of the Act to hold that Section 22 applies to holders of right of occupancy expressly granted by the governor as well as to those deemed granted under the transition provision.

Suffice it to say that the Act is about, the most controversial piece of legislation in the country today. For it cannot be doubted that the Land Use Act attempts a reversal of the culture of the people who are subject to customary law. The Act seeks to undermine the position of the head of family, the obas, obis and others who from time immemorial have enjoyed a special position in relation to their people and are seen by their customs as trustees, in relation to them as regards the issue of land. If the Act is to be given the full effect, it may mean the end of the concept of family ownership, customary tenancy, pledge and the like. A property legislation need not wipe away the culture of the people overnight in order to achieve social goals.

From what we have seen so far, an immediate review of the Act is the only answer. To this effect, the Act should be treated as a draft legislation on property law. The following matters must be urgently looked into with the intention to review and amend the Act.

1. The relationship of the overlord and the customary tenant in relation to land subject to customary tenancy.
2. Clarification of the provisions in Section 36 of the Land Use Act relating to the Land in non-urban area.
3. The half-hectare rule in so far as it affects communal land and family property.
4. Consent provisions in the Act must be reviewed.
5. Section 5(2) must be reviewed because it can lead to absurdity especially in view of the revocation power contained in the Act.
6. Section 36(6) should be removed immediately since it negates the principle of communal ownership or family ownership by providing that a customary right of occupancy arising under the section cannot be transferred at all or even partitioned. Although, we all know that where such right, if held by the community or family, a fact which the Act itself accepts, the only way a member of the community or family can claim a distinct interest in the right of occupancy is through partition of the right, gifts or sale under customary law.

V. REFERENCES

- [1] Adefi, O. M. (2011). Modern Corporate Responsibility and the Doctrine of Lifting the Veil-A Desideratum. Nigerian LJ, 15, 114.
- [2] Burns, R. P. (1985). Blackstone's Theory of the Absolute Rights of Property. U. Cin. L. Rev., 54, 67.
- [3] Chigbo, C. C. (2013). The nature of land ownership and the protection of the purchaser. Journal of Sustainable Development Law and Policy (The), 1(1), 1-20.

- [4] Dore, R. (2013). Land reform in Japan. A&C Black.
- [5] Dorothy, N., & Otu, M. T. (2012). Guarantee as a Secured Credit Instrument in Contemporary Business Climate. *UNIUYO Journal of Commercial and Property Law*, 3(1), 191-204
- [6] Elias, T. O. (1971). Nigerian land law. Sweet & Maxwell.
- [7] Elias, T. O. (1977). The judicial process in commonwealth Africa. University of Ghana, Legon.
- [8] Fekumo, J. F. (2002). Principles of Nigerian customary land law. F & F Publishers.
- [9] Godden, L., & Tehan, M. (Eds.). (2010). Comparative perspectives on communal lands and individual ownership: sustainable futures. Routledge.
- [10] Goldberg, V. P., Merrill, T. W., & Unumb, D. (1986). Bargaining in the shadow of eminent domain: Valuing and apportioning condemnation awards between landlord and tenant. *Ucla L. Rev.*, 34, 1083.
- [11] Hawley, J. (2019). One Bad Board Away from Bankruptcy: Housing Co-operatives, Self-management, and the Landlord-tenant Relationship (Doctoral dissertation, Queen's University (Canada)).
- [12] Igwe, O. (2022). Use of Right of Occupancy as a Security for Advances and Its Role in Land Development in Nigeria. *IJOCLLEP*, 4, 111.
- [13] Mabogunje, A. L. (2010, April). Land reform in Nigeria: progress, problems and prospects. In Annual conference on land policy and administration, World Bank.
- [14] Mwalimu, C. (2005). The Nigerian legal system (Vol. 2). Peter Lang Pub Incorporated.
- [15] Ogilvie, S. (2005). Communities and the 'second serfdom' in early modern bohemia. *Past & Present*, (187), 69-119.
- [16] Olawoye, C. O. (1971). Evidence in Land Suits. *Nigerian LJ*, 5, 104.
- [17] Omotola, J. A. (1975). Customary Tenant and the Transfer of Land in Nigeria. *Nig. J. Contemporary Law*, 6(1&2) p. 44.
- [18] Oshio, P. E. (1990). Indigenous Land Tenure and Nationalisation of Land in Nigeria. *Journal of Land Use & Environmental Law*, 5(2), 685-701.
- [19] Oshio, P. E. (1990). The indigenous land tenure and nationalization of land in Nigeria. *BC Third World LJ*, 10, 43.
- [20] Oshio, P. E. (2018). Indigenous Land Tenure and Nationalisation of Land in Nigeria. *Florida State University Journal of Land Use and Environmental Law*, 5(2), 6.
- [21] Otu, M. T. (2018). Ownership of Oil and Gas: International and National Regimes. *University of Port Harcourt Journal of Private Law*, 3, 136-155.
- [22] Otu, M. T., & Enyia, J. O. (2015). Documentary Credit: An Assessment of its Autonomous Character in Modern day commercial Transactions. *Calabar Law Journal*, 16(1), 295-307

- [23] Otu, M. T., & Mohammed, M. A. (2009). The Issue of Compensation on Revocation of Rights of Occupancy under the Land Use Act: Problems and Prospects. *Calabar Law Journal*, 13(1), 316 – 326.
- [24] Otu, M. T., & Nabiebu, M. (2022). The Legal Effect of Appointment and Possession of a Receiver Over the Property of a Company. *Tamaddun*, 21(2), 198-211.
- [25] Park, J. (2014). Land rent theory revisited. *Science & Society*, 78(1), 88-109.
- [26] Ramos, B. S. (2020). Understanding the essential principles of landlord and tenant laws in Nigeria through judicial decisions. *Commonwealth Law Bulletin*, 46(1), 151-173.
- [27] Rigi, J., & Prey, R. (2015). Value, rent, and the political economy of social media. *The Information Society*, 31(5), 392-406.
- [28] Salawu, B. M., Salawudeen, M. O., & Salawudeen, M. D. (2022). Customary Tenancy and Sustainable Post COVID-19 Agricultural Development in Nigeria. In *Entrepreneurship and Post-Pandemic Future*. Emerald Publishing Limited.
- [29] Sholanke, O. O. (1992). *Garuba Abioye v. Saadu Yakubu*. *Journal of African Law*, 36(1), 93-98.
- [30] Turan, Ö. (2019). Return to the status quo ante: Reloading militarism before and after 15 July coup attempt. *The Dubious Case of a Failed Coup: Militarism, Masculinities, and 15 July in Turkey*, 189-241.
- [31] Umezulike, I. A. (2013). *ABC of Contemporary Land Law in Nigeria*. Snaap Press Nigeria Limited.