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REVOCATION OF RIGHTS UNDER THE PROPERTY LAW IN NIGERIA

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ABSTRACT

Since the enactment of the Land Use Act in 1978, proprietary rights have not received considerably less constitutional protection than those of personal liberty rights, such as freedom of speech and free exercise of religion, which receive preferential treatment through strict judicial scrutiny of restrictive governmental action. When regulations of property are challenged under the constitution, courts generally refer to legislatures, finding such compulsory expropriation of land as proper except where it could be established that such revocation power was injudiciously exercised. This article examines the exercise of the revocation power of Governor under the Land Use Act, 1978 which is the principal statute regulating land management in Nigeria.

Keywords: Land Rights, Coercive Powers, Expropriation, Nigeria.

1. INTRODUCTION

Title to land in Nigeria is presently governed by the Land Use Act, 1978.[1] Under the Act, the erstwhile radical title to land is automatically converted into a right of occupancy, a mere usufructuary right, and, at the same time, "all land comprised in the territory of each State in the Federation" is vested in the Governors of the respective States,[2] not beneficially though, but as trustee for all Nigerians.[3] The Act gives the Governors a whole range of administrative, managerial and other powers over land, including the power to grant a right of occupancy in respect of land to any person.[4] Very significantly for our present purpose, the Act also gives the Governor power to revoke rights of occupancy for diverse reasons and purposes.[5] The Land Use Act does not give the meaning of a right of occupancy. It however defines a customary right of occupancy as follows:

> "The right of a person or community lawfully using or occupying land in accordance with customary law and

[1] The Act was originally promulgated as a Decree by the military regime (i.e. Decree No. 6 of 1978) but was, upon the exit of the military regime and taking over of government by civilians re-designated Act, *vide* Section 1 of Adaptation of Laws (Re-designation of Decree Etc.) Order No. 13 of 1980. Now: Cap. L5 vol. 7, Laws of the Federation of Nigeria, 2010.
[2] Section 1
[3] *Ibid.*
[4] Section 5
[5] Section 28

> including a customary right of occupancy granted by a local government under the Act."[6]

The Act went further to define a Statutory Right of Occupancy as a right of occupancy granted by the Governor under the Act.[7] The above definitions do not give much meaning to the status and nature of a right of occupancy. In outline, however, it can be said that the right is concerned with the occupation and use of land rather than ownership of it.[8] Evidently it is not a right to own land. It is a right that is alienable with the consent of the government. In property law, the super imposition of the consent of the state as a crucial component of the right deprives it of any ownership character. In other words, the invalidity of alienation for lack of consent deprives the interest affected of any proprietary quality.

However one more point deserving attention here is that the vesting of ownership of land in the Governor creates a kind of 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 title or ownership and which is further clearly marked by such subordinating incidents as follows:

- The right cannot be transferred without consent of the state.[9]
- The Governor can enter upon the land for inspection without the consent of the holder or occupier of right of occupancy, free from any civil or criminal sanction.[10]
- The right is subject to the Governor's wide and uncertain power of revocation.[11]
- Upon revocation, compensation is not payable to the holder for the corporeal land per-se, but for the unexhausted improvements on the land.

While the whole thrust and purpose of the Act is to assert government's powers and rights over the land, it nevertheless, concedes some proprietary right in land to the individual in the form of right of occupancy. Under the Act, a right of occupancy is either statutory or customary. Section 5 makes it lawful for the Governor to grant statutory rights of occupancy to any person for all purposes in respect of any land whether or not in an urban area. Rental may[12] or may not[13] be attached to the grant. It must be granted for a definite term in accordance with section 8. Sub-section 2 of section 5 states that upon a grant of a statutory right of occupancy, all existing rights to the use and occupation of the land which is the statutory right of occupancy are extinguished.

Customary right of occupancy, like its statutory counterpart, may be expressly or impliedly acquired. A local government is empowered to grant a customary right of occupancy over any land which is not in an urban area to any person or organization for agricultural and such other purposes ancillary to agriculture.[14] However, a limit is placed on the extent of the area a single customary right of occupancy can partake. Thus subsection 2 of section 6 restricts a customary right of occupancy granted for agricultural and grazing purposes not to exceed 500 and 5000 hectares, respectively, unless with the consent of the Governor.

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[6] Section 5

[7] There are certain attempts at judicial definition of right of occupancy:- See e.g. Abernathy J. in *Director of Lands* v. *Sohan* [1952] ITLR 631; *Havingchsorft* v. *Dodd* (1960) IEA 327 at 335; *Majiyagbe* v. *A. G. Northern Region* (1957) NRNLR 158.

[8] E.g. Sections 21, 22, 24 and 26

[9] Section 11 and 14 of the Land Use Act

[10] Section 28 of the Land Use Act

[11] Section 29 of the Land Use Act

[12] See section 5 (1)(c) of the Act

[13] See section 17(1) of the Act

[14] See section 6(2) of the Act.

The right of an individual to own, access and enjoy property is an inviolable one and constitutionally guaranteed. Proprietary interest is expressly protected against governmental infringement under the two provisions of the constitution; the right to property and the payment of prompt compensation.[15] The classical doctrinal and philosophical foundation of proprietary right is the right of a landowner to enjoy and use his property absolutely to the exclusion of others. He enjoys a certain liberty to do as he wills with certain things, which he "owns", and a certain flow of benefits (utility, welfare or good). The practical boundaries of his liberty and the practical relationship between it and benefits derived are in part determined by the existing social order. *Strictu jure*, property confers exclusive benefits and utility on the owner. In such a case, one expects the direct users to be able to organize, calculate and bid for the opportunity to enjoy those benefits.

Government intervention and reallocation of land for socially desirable purposes such as housing, health and conservation purposes are therefore justifiable and impeccable. The purpose of governmental intervention is not only to permit a redistribution of land to achieve the most socially beneficial use, but also to put competing resource – users in a position of equality when each of them seeks to make use of land. Thus, if the government want to covert a private house into a post office or construct telecommunication facilities,[16] or run a new highway through a farm, or build a dam which will flood nearby land, or convert private land to school[17] or shopping complexes it may acquire such land by revoking, the existing interest on the land and compulsorily acquire such land for overall public interest; subject however, to the payment of compensation to the owner of the acquired land. In such cases, courts uniformly hold that property has been taken by the government thus bringing into operation the constitutional mandate that private property may not be taken for public use without "prompt compensation".

The question therefore, is whether the exercise of the revocation power of Governor under the Land Use Act falls within the land redistribution and transformation theory whereby proprietary interest in land is redistributed to meet the socially beneficial purpose of the society? Prima facie, given the objective of the Land use Act as stated in the preamble to the Act, one may hasten to conclude that the Act serves this purpose.

However, this has not been the position as private interests are being divested for other purposes other than the statutory permissible purpose. Constitutionally, private property can be acquired compulsorily provided "prompt compensation" is paid and the right to access to court to challenge the quantum of compensation payable is not denied.[18] The constitution does not define those circumstances when land may be compulsorily acquired but the statutory framework for the revocation of proprietary right in land is well articulated in the Land Use Act.[19] The Act provides for the revocation of existing proprietary interest in land for "overriding public interest" and for "public purpose". Such revocation must also comply with the statutory procedure for revocation.[20] The Act further classifies overriding public purpose depending on the nature of interest held by the landowner. Where the interest is covered by a statutory right of occupancy, overriding purposes include the requirement of land by all the tiers of government for public purpose, requirement for mining or oil pipeline and where the grantor alienates the land without consent of the Governor.[21]

[15] Section 43 and 44 of the 1999 Constitution of the Federal Republic of Nigeria; see also *Provost, College of Education v. Edun* (2004) 6 NWLR (Part 870) 476 at p. 509 para. G,

[16] *Ogunbiyi v. NITEL* (1992) 7 NWLR 43

[17] *A.G. Lagos State v. Sowande* (1992) 8 NWLR 589

[18] See section 44(1) of the 1999 Constitution of FRN

[19] Item 60 of the Exclusive Legislative List

[20] See section 28(6) of the Land Use Act.

[21] See section 28 of the Land Use Act.

He may also revoke a statutory right of occupancy on the ground of a breach of any of the provisions implied in a certificate of occupancy or any term contained in the certificate or any special contract made under section 8 of the Act. The Land Use Act provides for two modes of revoking a right of occupancy. The express mode is set out in section 28 and the implied mode is set out in section 5(2) of the Act. The latter provision states that upon the grant of a statutory right of occupancy under the hand of the Governor in Section 5(1), all existing rights to the use and occupation of the land shall be extinguished. Section 5(2) of the Act is contrary to the Nigerian Supreme Court's unflagging holding that the Act has not and a Governor cannot, abolish existing titles and rights to possession of land without a religious compliance with the revocation provisions of the Act. It was surprising that the same Supreme Court in *Dapus v. Kolo*[22] stuck to a literal interpretation of Section 5(2) of the Act. In that case, Jos Local Government Council granted a statutory right of occupancy over a parcel of land to the appellant. Subsequently the Governor granted a statutory right of occupancy over the land, which adjoins the land subject of the earlier grant. There was overlap in the land given to both parties and the parties were unable to establish the identity of the land stated in their respective certificates of occupancy. Their claims and countercharges were thus dismissed. All the same, the Supreme Court, Obiter, stated that section 5(2) of the Act, was plain and should be so construed. Ogundare, J S C emphatically stated as follows: "A grant of a statutory right of occupancy extinguishes all rights existing on the land at the time of the grant. The subsection is clear and unambiguous. In my respectful view, that is the only reasonable interpretation that can be given to it."[23] Similarly, in *Lang v. Mohammed*,[24] it was evident that the respondent was the customary owner of the disputed land. The Governor granted a statutory right of occupancy over the land to the respondent. The appellant claimed damages for trespass and nullification of the respondent's right of occupancy. The trial judge refused to grant the claims, but awarded him ₦10, 000.00 (Ten thousand Naira) as compensation for the land. The court of Appeal upheld the decision; it held that section 5(2) has the potency of a statutory revocation of all existing rights on any land over which a governor grants a right of occupancy.

Section 28(6) of the Act provides that revocation shall be signified under the hand of a public officer duly authorized in that behalf by the Governor.[25] The Officer who signs a revocation notice must show that the governor duly authorized him to do so. It cannot be presumed that the commissioner in charge of land matters, for example is the authorized officer. Nor is there a place for ratification after an unauthorized revocation. In *Majiyagbe v. A.G.*[26] a case decided under a provision similar in verbiage in the Land Tenure Law, the governor endorsed "revocation approved" on a note that was filed away in his office. Subsequently, an officer who could not prove his authority wrote to the right holder that his right of occupancy had been revoked. The revocation was annulled. Bairemian, SPJ said, reliance could not be placed on the endorsement made by the Governor since that did not constitute notice.

However, it may be that a revocation effected by a Governor himself is valid. There is nothing in the Act that excludes the Common Law rule that a person can do that which he can authorize his servant to do. *Qui per alium facit per seipsum facere videtur* (he who does an action through another is deemed in law to do it himself).[27] Indeed in *Are v. Adisa*,[28] the

[22] (1993) 9 NWLR (Part 317) 24. The Supreme Court followed its earlier decisions in *Titiloye v. Olupo* (1991) 7 NWLR (Part 205) 519; *Saude v. Abdullahi* (1989) 4 NWLR (Part 116) 387

[23] Ibid at p. 279.

[24] (2000) 3 NWLR (Part 700) 389

[25] Section 6(3) (5) empowers a local government to revoke a customary right of occupancy for public purposes.

[26] (1957) NRNLR 158

[27] *Okeowo v. Migliore* (1979)12 NSLC 210

[28] (1967) NMLR 304, 309

Supreme Court held that statutory delegation of governor's authority to his officials does not deprive him of the exercise of such power.

1.1 CONCEPTUAL FRAMEWORK

(a) Property

Property is seen as anything that is owned by a person or entity. Thus to the person on the street, a property is anything he owns whether such property is of any economic value or the thing has no economic value at all. However, this is not usually the concern of property law. In property law, the word 'property' is used to encompass a wide range of rights. Property is the right and interest which a man has in lands and chattels to the exclusion of others. It is the right to enjoy and to dispose of certain things in the most absolute manner as he pleases, provided he makes no use of them as prohibited by law. Rights in land are of paramount interest to property law**.**

Property is divided into two major types: Real Property and Personal Property. Real property refers to any interest in land, real estate, growing plants or the improvements on the land. Personal property is also referred to as personalty, and this covers everything else which may not have to do with land. Property in personal goods may be absolute or qualified without any relation to the nature of the subject-matter, but simply because more persons than one have an interest in it, or because the right of property is separated from the possession. A bailee of goods, though not the owner, has a qualified property in them; while the owner has the absolute property. Personal property is further divided into property in possession, and property or choses in action. Property is again divided into corporeal and incorporeal. Corporeal property deals with such property that is perceptible to the senses, meaning they can be seen and touched. Such property includes lands, houses, goods, merchandise and the like. Incorporeal property on the other hand consists of property in legal rights, such as choses in action, easements, and the like.

(b) Real Property

Real property which is also called realty is described as land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Such real property can either be corporeal, made up of things like the soil or buildings, or incorporeal, made up of easements and such other rights.

Since land provides the physical substratum for all social and economic interaction, land law (law regulating land use) is inevitably an expression of social status and an instrument of social engineering. Everyone, even the truly homeless lives somewhere, and each therefore stands in some relation to the land as occupier, holder, tenant, licensee, squatter, pledgee, chargee or mortgagee. Every person requires land for his support, preservation and self-actualization within the general ideals of the society. Land is the foundation of shelter, food and employment. In this way, land law impinges upon a vast area of social orderings and expectations, exerting a fundamental influence on the life style of even the ordinary people.[29] Quite apart from the residential dimensions, land has a huge economic significance in terms of providing security for capital, investment, business and agriculture. It is in view of the incalculable significance of land as a real estate that the need for property management arises.

[29] Essien, E. ''Land Use Act and Security in Real Estate in Nigeria'' in Smith, I. O. (ed) The Land Use Act- Twenty Five years After (Lagos: University of Lagos, 2003) p.279

(c) Land

It is generally agreed that land does not just mean the ground and its subsoil, it also includes all other objects attached to the earth surface, this includes trees, rocks, buildings, and other structures whether naturally attached or constructed by man. However, land in law even extends more than this, and it includes further abstract, rights and interests like incorporeal hereditaments, right of way, easements and profits enjoyed by persons over the property or ground belonging to other persons. Where the transaction is regulated by a statute or law, the definition used in the statute will govern the transaction, but where there is no such definition, then the definition in the Interpretation Act[30] is applicable.

Land has been defined in the interpretation Act as "including, any building and any other thing attached to the earth or permanently fastened to anything so attached, but does not include minerals". The definition seems to be incomplete. Because, it starts by stating that it merely includes, the others not stated in the definition is not stated, and therefore affords as many inclusion as possible. This may therefore permit addition of incorporeal hereditaments like profits, rents and easements. Temporary structures may not qualify as land, but permanent Trees may be regarded as part of land. The statutory definition that has adopted the common definition of land and seems to be extensive and all inclusive is the one in the Property and Conveyancing Law.[31] Section 2 of the law defines land to include; the earth surface and….everything attached to the earth otherwise known as fixtures and all chattels real. It also includes incorporeal rights like a right of way and other easements as well as profits enjoyed by one person over the ground and buildings belonging to another.[32]

It follows therefore that while a crop or tree is planted it forms part of land, and is regarded as land, but as soon as it is cut and removed it ceases to be land. In the same vein, where a building is standing it forms part of land, but where the building is demolished it ceases to be land. However, the fixture must be permanently attached to the land to be regarded as forming part of the land; where the fixture is not of a permanent nature, then it is not land, and can be disposed without affecting land.

From the foregoing definition of land, natural and artificial contents of land can be distinguished. Land in its natural sense includes the developments like buildings and other structures including trees. The pertinent question had always been the ownership of the developments on land where the development was made by persons who are not the real owners of such land. The English principle is *quicquid plantatur solosolo cedit* – that is whatever is affixed to the soil, belongs to the soil, and is applicable in this circumstance. The maxim though a Roman principle imported into English law is also applicable under customary land law.

The Roman law doctrine of *quicquid plantatur solosolo cedit* is a principle of English, as well as of Nigerian property law. Like many other empirical rule of social regulation of a specific legal situation, the concept of the accession of a building or other structure to the land built upon is reasonable, covenant and universal.[33]Its application in any particular case depends first upon the circumstances of that case, such as the nature of the subject which it is claimed has become part of the soil by attachment thereto, and secondly, upon any statutory enactments modifying the operation of the maxim. The rule though applies under customary law also depends on the circumstances of the case. Where a person builds a house on a land without the consent of the owner, and after the owner has protested severally, will ultimately loose the property to the owner of the land at the suit of the owner as the maxim applies.[34] However, under Customary Law, where the structure or building was erected with the permission of the

[30] Cap 123 Laws of the Federation of Nigeria, 2010.
[31] Of 1959.
[32] S. 2 Cap. 100 Laws of Western Nigeria, 1959
[33] Elias, T. O. Nigerian *Land Law,* (London: Sweet and Maxwell, 1971) p.174
[34] *Osho* v. *Olayioye* (1966) NMLR 329; *Ezoni* v. *Ejodike* (1964) All NLR 402

owner of the land, the improvements remains the property of the person that constructed the building or structure in fact customary law allows the maker to continue using the building or structure as long as they remain on the land.[35] There is no Nigerian Statute which gives a definition of land. An examination of a few relevant statutory provisions however throws some light on what is the statutory meaning of land. The first is the Interpretation Act,[36] which provides as follows:

Land includes any building or any other thing attached to the earth or permanently fastened to, anything so attached, but does not include minerals. This definition covers the *quicquid* principle and the vertical spread of land under the common law, with the exception of minerals.[37] Under it, land includes trees, buildings and other permanent fixtures. In Nigeria, minerals belong to the Federal Government and so individuals cannot lay claim to them and generally, such reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit. The Property and Conveyancing Law 1959 which applies in the states of former Western Region of Nigeria provides:

Land includes land of any tenure and mines and minerals, whether or not served from the surface, buildings or parts of buildings… and other corporeal hereditaments, also a manor, an advowson and a rent and other incorporeal hereditament and an easement, right, priviledge or benefit, in, over or derived from land.[38] This definition concerns itself with both physical land and the assorted rights and interests over land such as easements,[39] profits,[40] rent charges, manor and advowson which are the intangible part of or rights in or over land and are generally referred to as incorporeal hereditaments. Some of the incorporeal hereditaments, for example manor[41] and advowson[42] do not exist in Nigerian law and therefore are of no relevance. However, rights and benefits in, over or derived from land are of relevance since today no person or group has allodial title to land but only a right or benefit therein.[43] Finally, the Registered Land Act 1965, which applies only to Lagos, defines land as: Including all things growing on the land and buildings and other things permanently affixed thereto, and where land is covered with water, the land itself, but does not include water or any mine, minerals, mineral oil or mineral gas.[44]

By including all things growing on the land, the definition conveys the impression that emblements are included in land whereas at common law, they are excluded. Perhaps the statute is here referring to things growing naturally rather than those cultivated. This needs clarification; and it is intended that emblements are included, it is suggested that the same should be unambiguously stated.

For the present purpose, the definition in the Interpretation Act is adopted because it has a nation-wide application. However, in view of the Land Use Act, the principle of *quicquid plantatur solo solo cedit* may no longer be applicable in Nigerian law generally. Under the Act, radical title to land is in the Governor while the 'improvements' or the 'unexhausted

[35] See *Adebiyi v. Ogunbiyi* (1965) NMLR 395.

[36] Cap I23 Laws of the Federation of Nigeria, 2010, s.18 (1)

[37] Statutory definition of 'minerals' may be found in the Mineral Act, Cap M6, Laws of the Federation of Nigeria 2010, s.2.

[38] S.2 (1); S. 2(ii) of the Conveyancing Act 1881 has identical provision. Also, S. 205(i)(ix) of the Law of Property Act (England).

[39] The right either of using the land of another for certain defined purposes such as for walking or driving or the right of restraining the owner from using his land in certain defined ways such as building on it so as to obstruct the access of light or digging in it so as to let down a house.

[40] Right to pass, repass and take something from another's land.

[41] This is a tract of land cultivated as an agricultural whole and organized under aristocratic administration.

[42] This consists of perpetual rights to present an ecclesiastical living, and the owner of an advowson is known as the patron.

[43] Holdsworth, W. S. *A History of English Law,* vol 111 (London: Methuen and Co. Ltd, 1923) p.179

[44] S.166

improvements' on the land belong to occupier of the land. The Act[45] defines 'improvements' or 'unexhausted improvements' as: Anything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes the buildings, plantation of long-lived crops or trees, fencing, walls, roads and irrigation or reclamation works, but does not include the result of ordinary cultivation other than growing produce. However, such distinction between land and the improvements thereon is made only in cases where Government interest is involved, for example in the case of revocation of right of occupancy by Government, where the question of payment of compensation arises. In causes or matters between private persons, the *quicquid plantatur solo solo* rule still applies.

(d) Land Ownership

Ownership implies a complete and total control a person can exercise over land. It is that interest in land that is superior to every other existing interest on land. It is unrestricted use and superior to any other. It is a right to possess either mediate or immediate, and it is the right to use the property in any way or manner whatsoever. The court in the case of *Abraham v. Olorunfemi*[46] explained the term as follows:

It connotes a complete and total right over a property it is not subject to the right of another person. Because he is the owner, he has the full and final right of alienation or disposition of the property, and he exercises his right of alienation and disposition without seeking the consent of another party because as a matter of law and fact there is no other party's right over the property that is higher than that of his; The court went further to explain some of the incidents of ownership when he observed, that, 'the owner of a property can use it for any purpose; material, immaterial, substantial, non-substantial, valuable, invaluable, beneficial or even for a purpose detrimental to his personal or proprietary interest. In so far as the property is his and inures in him nobody can say anything. He is the Alpha and Omega of the property. The property begins with him and ends with him. Unless he transfers his ownership over the property to a third party, he remains the allodial owner.

Every legal system has its own special design for ownership. The meaning given to ownership under English common law is different from that of customary law. In England, all land belongs to the crown as the absolute owner. However, the citizens who occupies land, does so for a period granted by the crown. The right to use and occupy the land is better known as the Estate enjoyed on the land. And this has transformed into ownership, though he does not own the land but he owns the Estate on the land exclusively and such right is enforceable against any other person.

(e) Land Possession

Possession means the effective physical or normal control or occupation of a property. It is a relationship of a person to a thing. Possession of land to be protected by law must be exclusive. A person claiming possession must prove not only his relationship to the land, he must also prove his physical acts showing exclusive control of the land. The act of building, or planting on land are acts of possession. He may not necessarily build, he may fence or use some other items to demarcate it, and he will be held to be in possession.[47]

[45] The Land Use Act. 1978, S. 51(1)
[46] (1991) I NWLR (Part 165) 53
[47] See *Wuta-Ofei v. Danquah* (1961) 3 All ER 596, where demarcation by wooden pegs was held to be sufficient acts of possession.

The person in possession is not without rights. There are two important attributes. The first is that the person in possession has the right to keep away intruders. Even, where he does not have any legal title, in so far as he is in physical possession his right is protected by law. He can keep out all those interfering with his possession. Though, he may not be able to keep out the person with a better title; even then, if he resists the person with a better title the person with better title may have to go to court to eject him from possession. The second right flows from the presumption of law that the person in possession is presumed to have title to the property until the person with better title is established and declared by a competent court. As against other trespassers the person in possession's right to possessory title will be upheld. In fact, if the real owner do not take any step for a period of time, the possessory right may ripen into title for lapse of time or by larches and acquiescence on the part of the real owner.

2. THE EFFICACY AND UTILITY OF NIGERIA'S LAND LAW

The Land Use Act of 1978[48] or the Act is the principal Statute regulating land management in Nigeria. The Land Use Act was given a prominent mention and protection in the Constitution of the Federal Republic of Nigeria.[49] The preamble to the Act shows the reasoning behind its enactment. It provides:

> Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law: AND WHEREAS it is also in the public interest that the right of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved…

The preamble shows that "public interest" is the driving force of the Act; and "the public interest" is the right of all Nigerians to use and enjoy land in Nigeria. Since land provides the physical substratum for all social and economic interaction, land law is inevitable an expression of social status and an instrument of social engineering. Everyone live somewhere, and each therefore stands in some relation to the land as occupier, holder, tenant, licensee, squatter, pledgee, chargee or mortgagee. In this way, land law impinges upon a vast area of social orderings and expectations, expecting a fundamental influence on the lifestyles of even the ordinary people. Real property which is land is technically not merely the earth's surface, but all the land down to the centre of the earth and up to the heavens.[50] Apart from the vertical extension, horizontally, land includes fixtures,[51] which are things permanently, attached or annexed to land, so that by the annexation to land they have lost their chattel nature and have become, in the eye of the law, part and parcel of the land. This is important, because it means that plants, economic trees, buildings and other permanent structures planted in or affixed to the land, become part of the land. Quite apart from the residential dimension, land has a huge economic significance in terms of providing security for capital, investment, business and agriculture. It is in view of the incalculable significance of land that the Land Use Act was promulgated[52] as the single law, which particularly defines the rights and obligations and

[48] Cap L5, Laws of the Federation of Nigeria, 2010.
[49] See Constitution of the Federal Republic of Nigeria 1999, Cap P23, Laws of the Federation of Nigeria 2010, S. 315 (5) (d).
[50] Bennett, J. in *Re Wilson Syndicate Conveyance, Wilson v. Shorrock* (1938) All ER 599 at 602
[51] *Holland v. Hodgson* (1872) LR 7 C .P 328
[52] The Act was originally promulgated as a Decree by the Military regime (Decree No. 6 of 1978) but was, upon the exit of the military regime and taking over of government by Civilian, re-designated Act, vide Section 1 of Adaptation of Laws (Re-designation of Decrees, etc) Order No. 13 of 1980.

specifies conditions precedent for any alienation or encumbrance of the land rights. The aim for imposing conditions is to restrain and control alienations of and encumbrances on land and thus enhance tenurial security.[53] Section 1 of the Act provides:

> Subject to the provisions of this Decree, all land comprised in the territory of each State in the Federation are (sic) hereby vested in the Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Decree.

The section has the effect, particularly in the Southern part of Nigeria, of divesting the allodial title to land from communities, villages, families and individuals and expressly vesting the same in the Governors[54] of the States in trust for the people. Thus, the "Governor", takes over the pre-allodial title to land. That is to say that the Governor becomes the Landlord for the benefit of his people. With the Act, the radical title which individuals had in their personally acquired land can no longer be acquired by them.

2.1 Communal Land Holding

The Land Use Act 1978[55] as noted above is a fundamental statute affecting Land Tenure in Nigeria today. The Act has modified substantially the existing Land Tenure Systems in Nigeria, but the amazing aspect is that it has not abrogated or pretended to substitute them; in its provisions, it recognized the customary land tenure as a valid and subsisting law regulating land tenure in Nigeria. The Act has as its objectives, the following:

a) To remove the bitter controversies, resulting at times in loss of lives and limbs, which land is known to be generating.
b) To streamline and simplify the management and ownership of land in the country.
c) To assist the citizenry, in respect of owing the place where he and his family will live a secure and peaceful life.
d) To enable the government to bring under control the use to which land can be put in all parts of the country and thus facilitate planning and zoning programmes for particular uses.

In this respect, the Act, by virtue of its section 1, provided that all land comprised within the territory of each state is held in trust and "administered for the use and common benefit of all Nigerians", while therefore vesting the land in the Governor, the act recognized the existing rights of all citizens on land. In cases where the land is located in urban areas, the land shall continue to be vested in the person in whom it was vested before the act, if the land is developed, where the land is undeveloped then, any portion in excess of half hectare will be forfeited to the government. In the non-urban areas, the section 36 of the Act provided that the occupier shall continue in occupation as if the customary right of occupancy has been granted by the occupier. Occupier is defined as any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-leases or sub-under lessee of a holder.

[53] This is quite apart from the generally known purposes/ aims of stemming the tide of land profiteering and speculation and easing the burden on government when it needs land for development.
[54] *Dzungwe v. Gbishe(1985)* 2 NWLR (Part 8) 528; *Savannah Bank Ltd. v. Ajilo* (1989) 1 NWLR (Part 97) 805; *Salami v. Oke* (1987) 4 NWLR (Part 63) 1
[55] Herein after referred to as the "Act"

All existing rights in land has been converted to a right of occupancy, where it is in urban area it is deemed grant or granted by the Governor of state and referred to a statutory right of occupancy while in non-urban area it is deemed granted or granted by the appropriate local government and referred to be customary right of occupancy.

The Act has preserved the existing rights being held under customary law by the community and family who are the rightful owners of land under customary law. In section 24 of the Act, the devolution of rights under customary law on the death of the holder of a right of occupancy is preserved, and thereby the family property is preserved, while section 34(4) of the Act recognises any "encumbrance or interest valid in law", and such land shall continue to be so subject and the certificate of occupancy issued". Section 35 of the Act on the issue of compensation also recognises the interest of the land holder under customary law, when it provides that Section 34 of this Act shall have effect not withstanding that the land in question was held under a leasehold, whether customary or otherwise. Affirming the position, the Supreme Court per karibi-whyte in the case of *Ogunmola v. Eiyekole*[56] observed as follows:

> Land is still held under customary tenure even though dominium is in the Governor. The vast pervasive effect of the Land Use Act is the diminution of the plenitude of the powers of the holders of the land. The character in which they held remains the same. Thus an owner at customary law remains owners, owners the same event though he no longer is the ultimate owner. The owner of land, now requires the consent of the Governor to alienate interests which hitherto he could do without such consent.

Clearly, the Act has only modified the customary land tenure, but the rights of the land owner under customary law whether family or communal remains intact. The right enjoyed under customary law had always being known to be absolute rights of ownership. The family or community owner has ultimate rights in the use and management of their land. However, with the coming into force of the Act, the rights had now been converted to statutory or customary right of occupancy depending on whether the land is located in urban or non-urban areas.

It should be noted that only the family has the power to alienate its land or deal with it in any manner whatsoever, however, before a legally valid title can be passed now, there must be consent of the Governor of the State to the transaction.[57] Section 36(5) and (6) of the Act seemed to have prohibited any transfer of land that is subject to customary right of occupancy, but the act specifically provides that any such transfer shall be void. There is a difference between allocation of land within the family members and transfer of the land to a person not being member of the family. Where it is within the family, or community, since the family or community continues as the absolute owner of land and the member only occupies the land, then there is no transfer of interest by the family, but where the transfer is to an outsider, then it will seem to be prohibited where the land is within non-urban area subject to customary right of occupancy.

The Act has not extinguished the incidents of customary ownerships of the land in Nigeria. Section 36(1) and (2) of the Act refers to "occupier" and "holder" of the land. Both may be granted the deemed customary right of occupancy. The holder is the person holding land as customary owner while the occupier is the customary tenant within the meaning of section 50 of the Act.[58]

[56] (1990) 4 NWLR (Part 146) 632 at 653
[57] Sections 22 and 34 of the Act
[58] *Abioye v. Yakubu* (1991) 5 NWLR (Part 190) 130.

The Act recognized the interests of the land holder under customary law though the right that may now be enjoyed is subject to the ultimate power of the Governor, the customary land tenure is still in existence in Nigeria.

The Section 1 of the Act has transferred all land within the state to the Governor of the state to hold in trust for the people. The holders of land under customary tenure continue to hold same as if a statutory or customary right of occupancy has been granted to then by the Governor.

The Land Use Act, 1978 was enacted as a Decree and came into effect on the 29th of March, 1978. By the Adaptation of Laws, (Re- designation of Decrees, etc) Order 1980 Act,[59] it assumed the appellation of an Act, the title suggests that the Act is designed to control land-use and thus a planning statute. The basic philosophy of the Act is, as stated in its Preamble, to make available to and preserve the right of every Nigerian to land. In pursuance of these objectives, the Act created a tripartite system of land-holding; State, Federal and Private.

2.2 State Land

The Land Use Act sets out to vest the title to land comprised in the territory of each State in the Governor to be held in trust and administered for the benefit of every Nigerian. The section provides as follows:

> Subject to the provisions of this Act, all land comprised in the territory of each state in the Federation are hereby vested in the Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.[60]

The exact nature of the Governor's interest in relation to the land under the section remains controversial. There is the opinion that the effect of the section is to nationalize land in Nigeria. In *Nkwocha v. The Governor of Anambra State & Ors,*[61] Eso, JSC held as follows:

> The tenor of the Land Use Act as a single piece of legislation is the nationalisation of all lands in the country by vesting its ownership in the state leaving the private individual with an interest in land which is a mere right of occupancy and which is the only right protected in his favour by law, after the promulgation of the Act.[62]

The argument that the Act nationalized land is further reinforced by the provisions of the Act which makes the right of occupancy the highest interest that can subsist in any person and on devolution whether by will or not, the best interest transferable is also a right of occupancy.[63] Section 26 of the Act provides as follows: "Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of the Act shall be null and void."

In opposition is the view that the provision only expropriates the radical title or the concept of absolute ownership in favour of the Governor in the light of other sections of the Act, which preserve private interests in land. Although the Act has generated considerable impact, it has not in any way nationalized the land. Therefore, the view, which is suggestive of

[59] Sections 1 and 13 of the Act
[60] S. 1 of the Act
[61] (1984) 6 SC 362
[62] *Ibid,* p. 404
[63] Sections 1, 5, 6, 8, 25, 26, 34, and 36 of the Act.

this, is unacceptable. The import of the provision is to vest the radical title to land in the Governor, devoid of the possessory interest of erstwhile land-owners, upon trust. This means that the Governor is not beneficially entitled to the land so vested in him; but he is constituted a trustee of the land for the benefit of all Nigerians. Interestingly, there is unanimity on the trusteeship status[64] of the Governor. As such he holds only nominal ownership of land. It is a settled principle that a trustee is not the real owner of a trust property in the eyes of the law but he is only nominally vested with the land for the purpose of accomplishing the objective of the trust. The implication of this is that the Governor is vested with the bare title to land to the extent that is necessary for him to administer the land within the territory of his state, for the purpose of achieving the objectives of the Act.

For the purpose of control and management, the land vested in the Governor is zoned by section 2 of the Act into urban and non-urban lands. For land in urban areas of the State, the control and management thereof is vested in the Governor, assisted by the "Land Use Allocation Committee" as advisory body.

For the purpose of interim management of land, section 4 authorizes the Governor to administer the land, in case of states in the North with the Land Tenure Law, 1962, and in accordance with the provisions of the relevant State Lands Law, in relation to states in the South. It is further provided that the Land Tenure Law or State Lands Law shall apply with such modifications as would bring them into conformity with the Act. This is to emphasize that the land vested in the Governor under the Act is neither subject to the incidents of State Lands under the State Lands Law nor subject to the discriminatory and other inconsistent provisions of the Land Tenure Law.[65]

The respective Local Governments are conferred with the powers to control and manage land within their area of jurisdiction of which the land is situated in the non-urban areas of the states.[66] Like the Governor, the Local Government is assisted by an advisory body, which is known as 'Land Use Allocation Advisory Committee'.[67]

2.3 *Federal Land*

Subsection 1 of section 49 of the Act exempts land vested in the Federal Government and its agencies before the commencement of the Act from the Land in the territory of each State vested in the Governor under section 1 of the Act, and sets up distinct system of federal landholding. The section provides as follows: "Nothing in this Act shall affect any title to land whether developed or underdeveloped held by the Federal Government or any agency of the Federal Government at the commencement of this Act and, accordingly, any such land shall continue to vest in the Federal Government or the agency concerned."

Agency is defined in subsection 2 to include any statutory corporation or any other statutory body (whether corporate or unincorporated) or any company wholly-owned by the Federal Government. The powers of control and management of the Federal Land, including the Federal Capital Territory, are vested and exercisable by the Head of the Federal Government or his ministerial nominee. Accordingly, subsection 2 of section 50 of the Act states as follows:

> The powers of a Governor under this Act shall in respect of land comprised in the Federal Government in any state, be exercisable by the Head of the Federal Government or any Federal Commissioner designated by him in that behalf and references in this Act to the Governor shall be construed accordingly.

[64] *Nkwocha v. The Governor of Anambra State & Ors, Supra*
[65] *Ejiofodomi v. Okonkwo* (1982) 11 SC 74
[66] S. 2(1)(b) of the Act
[67] S. 2 (5) of the Act

It will be observed that the above provision makes no reference to land held by Federal agencies, the title to which is preserved by section 49(1) of the Act; it is submitted that the exclusion of such land from the operation of the provision so as to permit the State Governor to extend its powers under the Act to such land will produce absurd results. In order to avoid the anomalies, it is suggested that the provision should be read to include land held by Federal Agencies. The law-maker would not have intended otherwise. By the provisions of sections18 (c) of the Federal Capital Territory Act,[68] the President of the Federal Republic of Nigeria has delegated to the Minister of the Federal Capital Territory, all functions or power relating to land in the Federal Capital Territory just like the power of the Governor to grant consent for alienation of land in the state.[69]

2.4 Private Land

While the whole thrust and purpose of the Act is to assert government's powers and rights over the land, it nevertheless, concedes some proprietary right in land to the individual in the form of right of occupancy. Under the Act, a right of occupancy is either statutory or customary. A statutory right is a right granted or deemed issued in an urban area by the Governor. This means the right may be acquired expressly or by operation of the Act.

Section 5 of the Act makes it lawful for the Governor to grant statutory rights of occupancy to any person for all purposes in respect of any land whether or not in an urban area. Rental may[70] or may not[71] be attached to the grant. It must be granted for a definite term in accordance with section 8 of the Act. Sub-section 2 of section 5 of the Act states that upon a grant of a statutory right of occupancy, all existing rights to the use and occupation of the land which is the statutory right of occupancy are extinguished. It must be noted that a grant of right of occupancy *per se* is incapable of defeating existing private interests in or over land unless the Governor has taken steps to reduce the land into state lands by due process of revocation under section 28 of the Act which provides as follows: "It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest."

However, it may be argued that where the Governor has not exercised the option of revocation before proceeding to make a grant of statutory right of occupancy, the grant cannot be challenged in view of section 47 of the Act. The provision excludes the jurisdiction of the court in relation to any question concerning or pertaining to the right of the Governor to grant a statutory right of occupancy in accordance with the provisions of the Act. It is submitted that to hold that such a grant is saved by the provisions of sections 5(2) and 47 of the Act would work greater insecurity of title contrary to what the act sets out to cure in its preamble. Accordingly, Aniagolu, J.S.C. remarking about the strength of existing rights of occupancy *vis-à-vis* a grant said obiter as follows:[72]

> Neither the Governor nor the Local Government would have a right to divest such land from the person in whom it was properly vested by the issuance of a certificate of occupancy over the land to another in whom the land was not vested.

A statutory right of occupancy is deemed issued to a person in whom land in an urban area was vested at the commencement of the Act in respect of 'developed' or 'undeveloped' land. Developed land is land where there exists any physical improvement in the nature of road

[68] Cap 124, Laws of the Federation of Nigeria, 1990
[69] *Associated Discount House Limited v. Minister, F. C. T.* (2014) All FWLR (Part713) 1864
[70] S. 5 (1)(c) of the Act
[71] S. 17(1) of the Act
[72] *Dzungwe v. Gbishe &Anor* (1985) 2 NNLR (Part 8) 528

development services, water, electricity, drainage, building, structure or such improvement that may enhance the value of the land for industrial, agricultural or residential purposes.[73] In relation to such land in an urban area,[74] subsection 2 of section 34 of the Act states that:

> 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 the Act.

There is no doubt that the above provision converts the interest of the person in whom the land was vested immediately before the commencement of the Act into a statutory right of occupancy. However, doubt exists as to the person entitled to the right of occupancy under the provision where such was vested in more than one person. For example, where the land might have been a subject of a lease; in which case it was vested in the lessee in possession and in the lessor in the reversion. Alternatively, it would have been subject to customary tenancy so as to vest in the overlord in the reversion and the customary tenant in possession. Such land could also be a subject matter of a pledge resulting in the duality of vesting in the pledgor and the pledgee. The land could also have been subject to a lease as well as a mortgage so as to result in its tripartite vesting in the lessor of the land, the lessee as well as the mortgagee. In each of these examples, the land would have been vested in more than one person, although in varying degrees upon the commencement of the Act. The question that arises is who of them is entitled to the right of occupancy.

As it will soon be seen, there has not been any conclusive answer to the question. However, it is suggested that the proper approach is to ascertain the contextual meaning of 'vested' as qualification of the 'person' appearing in the provision. Thus if 'vested' connotes the person in 'occupation' or in whom the absolute ownership inheres, it is such a person who would be a holder of the new statutory right of occupancy. The courts appear to have followed this approach, although it will shortly be shown to have reached a wrong conclusion. In *Momodu Ilo & Ors v. Davies & Ors*[75]*, Nnameka*-Agu J.C.A. (as he then was) was of the view that occupation is the qualification required for entitlement to a right of occupancy. This approach was followed by Ajose-Adeogun J.C.A. in the latter case of *Omonfoman v. Okoeguale*[76]. In reply to the respondent's prayer to be declared entitled to a right of occupancy, the learned judge held that a strict legal title is not necessarily the only qualification for the required declaration. Long possession, as in the case put forward by the respondent either by himself or through his predecessor-in- possession can also suffice. It is submitted that lawful long possession *per se* as being suggested by these authorities cannot be sufficient to support a claim on the provision. The quantum of interest required by a person to be entitled to the statutory right of occupancy in the circumstances of the provision is the vesting in him of the 'absolute ownership', radical title or the allodial ownership in the land at the time of the commencement. The support for this view is derived from the meaning attached to "vested" appearing in Section 1 which appears to be the transfer of the absolute ownership of the land 'vested' in the Governor.

Accordingly, it is persons divested of the allodial ownership under the provision in favour of the Governor who are left with a right of occupancy under the provision of section 34(2). Furthermore, the provision of subsection 4 of section 34 states in part as follows:

[73] S. 50 (1) of the Act
[74] S. 34(1) of the Act
[75] (1983) 3 SC 173
[76] (1986) 5 NWLR (Part 40) 179

> 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 subjected.

The provision preserves lesser interests to which the land may be subject against it. It however, recognizes that such person cannot be entitled to certificate of occupancy over the land and likewise the statutory right of occupancy hereto. It therefore postulates that in the event of a certificate of occupancy being issued to the person who had held the absolute ownership to the land under subsection 2, the lesser interests should be noted on the certificate of occupancy as encumbrance unless the Military Governor is of the opinion that their continued existence is inconsistent with the provisions or general intendment of the Act. It is submitted that the scheme of the subsection 4 is consistent with the general principle of property law that a lesser interest cannot support a larger interest. In relation to undeveloped land, subsection 5 of section 34 provides as follows:

a) One plot or portion of the land not exceeding half hectare in area shall subject to subsection 6 below, continue to be held by the person in whom the land was so vested as if the holder of the land was the holder of a statutory right of occupancy granted by the Military 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 Military Governor and administered as provided in this Act.

By these provisions, a person who held an undeveloped urban land is to continue to hold same as if he has been granted a statutory right of occupancy in respect of one plot or portion of the land not beyond half hectare in extent; the excess being extinguished in favour of the Governor to administer in accordance with the provisions of the Act. However, where a person held more than one plot of undeveloped land in different urban areas within a state, the subsection 6 states that such plots are banked up and considered together for the half-hectare entitlement, and the remainder taken over and administered by the Governor. The idea behind this provision is land 'pooling' to make for, presumably, the equitable distribution of undeveloped urban land.

Customary right of occupancy, like its statutory counterpart, may be expressly or impliedly acquired. A local government is empowered to grant a customary right of occupancy over any land which is not in an urban area to any person or organization for agricultural and such other purposes ancillary to agriculture.[77] However, a limit is placed on the extent of the area a single customary right of occupancy can partake. Thus subsection 2 of section 6 of the Act restricts a customary right of occupancy granted for agricultural and grazing purposes not to exceed 500 and 5000 hectares, respectively, unless with the consent of the Governor. Subsection 4 of section 36 of the Act provides as follows:

> Where the land is developed, the land shall continue to be held by the person 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.

The provision, like similar earlier provisions, converts the interest of persons who had held the absolute ownership of developed non-urban land to a system of customary right of

[77] S. 6(2) of the Act.

occupancy. However, an exception is created in favour of a person who, before the commencement of the Act, was using the land for agricultural purposes. The exception is contained in the combined effect of subsections 1 and 2 of section 36 of the Act.

Under this provision, unlike the requirement of subsection 34(2), (5) or 36(4) of the Act, a holder or occupier of land who held possession and was using the land for agricultural purposes before the commencement of the Act is the one entitled as against the person who held the allodial ownership to the customary right of occupancy arising therefrom. Thus to be entitled to the customary right of occupancy, it is not necessary for a claimant to establish that the absolute ownership in the land vested in him at the commencement of the Act. The essential qualifications for entitlement are that the claimant was in lawful occupation and using the land for agricultural purpose. However, until a holder applies for registration of his interest under subsection 3 of section 36 of the Act, he is not vested with the customary right of occupancy. The view is not correct and represents a misconception of the implication of a 'deemed' grant by which the interest is created by operation of the Act. The subsection does not set any condition precedent for the vesting of the interest under subsection 2 of the section in the holder or occupier. Rather, it gives discretion to the holder to register such interest with the local government. Subsection 7 of section 34 of the Act prohibits the transfer of the statutory right of occupancy in relation to underdeveloped land in urban area within the provision of subsection 5 or 6 of section 34 of the Act without the consent of the Governor. The subsection provides as follows:

> No land to which subsection (5) or (6) above 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 Governor.

A holder without the prior consent of the Governor cannot alienate improvement made on land comprised in a statutory right of occupancy. Accordingly, section 15(b) of the Act states that:

> During the term of a statutory right of occupancy the holder may, subject to the prior consent of the Governor, transfer, assign or mortgage any improvements on the land which have effected pursuant to the terms and conditions of the certificate of occupancy relating to the land.

The consent requirement here is restricted to a holder of statutory right of occupancy which is granted with special covenants in pursuant to sections 8 and 19 of the Act in relation to improvements. In the absence of such covenants, it appears a holder can alienate improvement without reference to the Governor. The transfer of customary right of occupancy is controlled by the provision of section 21of the Act. It provides as follows: "It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by the assignment, mortgage, transfer of possession, sublease or otherwise however-

a) Without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable Sheriffs and civil process Law, or
b) In other cases with the approval of the appropriate Local Government."

It is interesting to note that the provision has made out a distinction between the sales of customary rights of occupancy in pursuance of a court order for which the consent of Governor is required and in other cases for which that of the Local Government is a prerequisite. However, alienability is not an attribute of customary right of occupancy deemed to have been granted under section 36 of the Act. Consequently, subsection 5 of the section provides that:

> No land to which this 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.

2.5 Certificate of Occupancy

From the inception of the Land Use Act, the certificate of occupancy has become the means of proving title to land.[78] A certificate of occupancy is not defined in the Act, but from the provisions of the Act,[79] it is clear that it is a document issued by the Governor in evidence of a person's customary or statutory right of occupancy. Section 9(1) and (2) of the Act provides thus:

> 9(1) It shall be lawful for the Governor-
>
> (a) When granting a statutory right of occupancy to any person; or
>
> (b) When any person is in occupation of land under customary right of occupancy and applies in the prescribed manner; or
>
> (c) When any person is entitled to a statutory right of occupancy, to issue a certificate under his hand in evidence of such right of occupancy.
>
> (2) Such certificate shall be termed a Certificate of Occupancy.

Thus a certificate of occupancy does not create a right in land in favour of the person to whom it is issued; it merely evidences such right, as stated in section 9(1) (c) above. The fact that a certificate of occupancy is merely evidence a right of occupancy carries with it two implications. Firstly, that the right in the land must exist before the grant of the certificate of occupancy or at least arise simultaneously with the grant such as where the right is granted with an accompanying certificate in evidence of it. The second implication is that the certificate of occupancy is not conclusive as to a person's right to the land; it is not a proof of a right but merely raises a rebuttable presumptive right.[80] Accordingly, the certificate of occupancy can be set aside if it turns out that the holder had no right to the land.[81] It can also be set aside in favour of a conveyance which pre-dates the Land Use Act or in favour of a person who had held the land before the Land Use Act came into force and so is now a deemed grantee of a right of occupancy under section 34 of the Act.

However, it must be stated here that a certificate of occupancy issued on the Land Use Act, cannot be said to be conclusive evidence of any interest or valid title to land in favour of the grantee; it is only *prima facie* evidence of such right, interest or title without more and may in appropriate cases be effectively challenged and rendered invalid, null and void.[82]

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[78] *Fasoro & Anor v. Bajioku & Ors* (1988) 4 SCNJ 23. There are five ways of proving title to land in Nigeria; by evidence of traditional history of the land which includes mode of acquisition of same such as deforestation of the virgin forest by first settler, conquest of the original owners through acts of war, gifts, etc; by production of documents of title; by acts of the person or persons claiming the land, such as selling, leasing, or renting out all or part of the land or farming on it or on a portion of it; by acts of long possession and enjoyment of the land which therefore raises a presumptive rebuttable ownership; and by proof of possession of connected, adjacent or adjoining land. See *Udenze v. Nwosu* (2008) 154 LRCN 110. It is upon such proof that a right of occupancy may be granted under the Act as evidence.

[79] S. 9 (1) of the Act

[80] *Ogunleye v. Oni* (1990) 2 NWLR (Part135) 745

[81] *Adediji v. Williams* (1989) 1 NWLR (Part 99) 611

[82] *Adole v. Gwar* (2008) Vol. 164 LRCN 157; *Mohamoud J. Lababedi v. Lagos Metal Ind. (Nig) Ltd* (1973) NSCC 1 at 6

2.5.1 Revocation of Right of Occupancy

The Land Use Act does not give the meaning of a right of occupancy. It however defines a customary right of occupancy as follows: "The right of a person or community lawfully using or occupying land in accordance with customary law and including a customary right of occupancy granted by a local government under the Act."[83] The act went further to define a Statutory Right of Occupancy as a right of occupancy granted by the Governor under the Act.[84] The above definitions do not give much meaning to the status and nature of a right of occupancy. In outline, however, we may say that the right is concerned with the occupation and use of land rather than ownership of it.[85] Evidently it is not a right to own land. It is a right that is alienable with the consent of the government. In property law, the super imposition of the consent of the state as a crucial component of the right deprives it of any ownership character. In other words, the invalidity of alienation for lack of consent deprives the interest affected of any proprietary quality.

2.5.2 Grounds for Revocation
(a) Revocation for Overriding Public Interest

Revocation or acquisition of interest in land is not novel. It dates back to the colonial era under the State Land Law, Public Lands Acquisition Act and Land Tenure Law. In all these statutes, the phrase used to justify revocation is public purpose or interest. The Land Use Act introduces for the first time the word "overriding" to qualify 'public interest' in section 28. If the presumption that no word in a statute is a tautology is applied, a person whose right of occupancy is about to be revoked can challenge the procedure on the ground that the purpose for which he put his land is more important to the public than the purpose for which the governor attempts to revoke it. For instance, where a governor attempts to revoke a right of occupancy over a piece of land of which a person farms for the purpose of building a recreational centre, the right holder can argue that production of food overrides recreation. Suppose a farmer's land is to be acquired for agricultural development, a heavy onus would be on a governor to prove that there is something overriding in that purpose.

What constitutes public interest and public purpose are listed in Sections 28 and 51 of the Act. In defining public interest, Section 51 uses the word "includes". The question now is, is the governor at liberty to revoke for other purposes not expressly listed in the Act on the ground that the object is public all the same? In *Olatunji v. Military Governor, Oyo State*,[86] Salami, JCA opined, obiter that other public purposes not stated under section 51 must take their coloration or meaning from the public purposes stated therein; they must be similar to those stated in the section.

On the other hand, in *Osho v. Lagos State Devt and Corp*[87]. Obaseki, JSC says other purposes not specified as public purpose in the Act cannot be lawful purpose. We believe that Section 28 and 51 are expropriatory and must therefore be given a very restrictive construction.[88] It is difficult to envisage a public purpose that will not come within the very broad listing in section 51. The courts have held that a right of occupancy cannot be revoked for the purpose of granting the land to a private individual or corporate body.[89] Where it is granted

[83] S. 5 of the Act
[84] There are certain attempts at judicial definition of right of occupancy:- See e.g. Abernathy J. in *Director of Lands v. Sohan* (1952) ITLR 631; *Havingchsorft v. Dodd* (1960) IEA 327 at 335; *Majiyagbe v. A. G. Northern Region* (1957) NRNLR 158.
[85] E.g. Sections 21, 22 ,24 and 26 of the Act.
[86] (1995) 5 NWLR (Pt. 397) 586, 606.
[87] (1991) 4 NWLR (Pt. 184) 157
[88] *Bello v. The Diocesan Synod of Lagos* (1973) 3 SC 131
[89] *Kyari v. Alkali* (2001) 11 NWLR (Pt. 724) 412 SC

to a corporate body, it must be shown that government holds shares, stocks or debentures in it.[90] A revocation that does not accord with this provision is invalid *ab initio*. A revocation that is in accord with the Act but which is subsequently altered for private use can be nullified.[91]

Title to land in Nigeria is presently governed by the Land Use Act, 1978.[92] Under the Act, the erstwhile radical title to land is automatically converted into a right of occupancy, a mere usufructuary right, and, at the same time, "all land comprised in the territory of each State in the Federation" is vested in the Governors of the respective States,[93] not beneficially though, but as trustee for all Nigerians.[94] The Act gives the Governors a whole range of administrative, managerial and other powers over land, including the power to grant a right of occupancy in respect of land to any person.[95] Very significantly for our present purpose, the Act also gives the Governor power to revoke rights of occupancy for diverse reasons and purposes.[96] Of immediate concern to this paper is the revocation of a right of occupancy for public purposes.

The Land Use Act has not made any pretence at a definition of the term "public purpose"; it only enumerates what the term "includes", thereby suggesting that the enumeration is not exhaustive.[97] Though not defined in the Land Use Act, nor in the Public Lands Acquisition Act before it, the term "public purpose" has been judicially defined.[98] The acquisition must be for *bona fide* public purpose. It is suggested that for a particular purpose to qualify as public purpose or public interest, it must not be vague and the way it benefits the public at large must be capable of proof. The test is whether or not the purpose is meant to benefit the public and not just aid the commercial transaction of a company or a group of people for their own selfish or financial purposes.[99] The operative consideration therefore is the purpose or the use to which the land is put.

Section 28 of the Land Use Act states the instances when the Governor of the State may revoke a holder's right of occupancy for public purposes and goes further to enumerate some of what would come under (or be "included") in the term "public purpose".[100] Section 28 of the Act provides:

(1) It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest.
(2) Overriding public interest in the case of a statutory right of occupancy means –
(a) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation.
(3) Overriding public interest in the case of a customary right of occupancy means –
(a) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation.

[90] S. 51 (1) (b) of the Act
[91] *Ukwa v Awka Local Council* (1966) NMLR SC 20; *Administrator/Executor of Estate of Abacha v. Ekespiff* (2003) 1 NWLR (Pt. 800) 114
[92] Cap. L5 vol. 7, Laws of the Federation of Nigeria, 2010.
[93] S. 1 of the Act.
[94] *Ibid.*
[95] S. 5 of the Act.
[96] S. 28 of the Act.
[97] The word "includes" typically indicates a partial list. See: Bryan A. Garner, *Black's Law Dictionary*, 9th Edition, at p. 831.
[98] *Alhaji Bello v. The Diocesan Synod of Lagos & Ors* (1960) WNWL 166.
[99] *Goldmark Nigeria Ltd v. Ibafon Company Ltd* (2012) 10 NWLR (Part 1308) 291 at 356.
[100] S. 51 of the Act; *C. S. S. Book shops Ltd v. Registered Trustee & Ors* (2006) 142 LRCN 2613, ratio 6; *Dantosho v. Mohammed* (2003) 6 NWLR (Part 817) 457 at 483; *Ibrahim v. Mohammed* (2003) 6 NWLR (Part 817) 615 at 644; *Oluhunde v. Adeyoju* (2000) 10 NWLR (Part 676) 562.

The "public purposes" which justify a revocation are enumerated in Section 51 of the Act to "include":

(a) for exclusive Government use or for general public use;
(b) for use by anybody corporate directly established by law or by body corporate registered under the Companies and Allied Matters Act as respects which the Government owns shares, stocks or debentures;
(c) for or in connection with sanitary improvements of any kind;
(d) for obtaining control over land contiguous to any part or over land the value of which will be enhanced by the construction of any railway, road or other public work or convenience about to be undertaken or provided by the Government;
(e) for obtaining control over land required for or in connection with development of telecommunications or provision of electricity;
(f) for obtaining control over land required for or in connection with mining purposes;
(g) for obtaining control over land required for or in connection with planned urban or rural development or settlement;
(h) for obtaining control over land required for or in connection with economic, industrial or agricultural development;
(i) for educational and other social services.

It is instructive that prior to the Land Use Act, the Public Lands Acquisition Act 1957,[101] had enumerated what constituted "public purposes" basically in the same terms as the Land Use Act.[102] What was included in the Public Lands Acquisition Act, which is not included in the Land Use Act, or, at least, is not expressly so stated, is the requirement of the land "for or in connection with the laying out of any new township or improvement of any existing township or government station", and, requirement of the land "for or in connection with housing estate".

Though both the Constitution and the Land Use Act accord legal right to the government to compulsorily acquire land in any part of Nigeria for public purpose, the Constitution also (the 1963, 1979 Constitutions, and the 1999 Constitution, as amended) guarantee the individual's right to acquire and own land in any part of Nigeria. Accordingly, the Governor's revocation of an individual's right of occupancy must be according to law. No one, including the government, can deprive a holder or occupier of his land unless the land is acquired compulsorily in accordance with the provisions of the Land Use Act, and in that case notice of the revocation must not only be issued but must also be served on the holder, clearly indicating that the land intended to be acquired is for no other thing than for public purposes.[103] As Lord Cranwell, L.C. emphasized in *Galloway v. The Mayor and Commonalty of London,*[104] it has become a well-settled head of equity, that any company authorised by the legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing.[105]

Section 28 (6) of the Land Use Act states clearly that the revocation shall be signified under the hand of a public officer duly authorised in that behalf by the Governor and notice thereof shall be given to the holder personally.[106] Thus, it is not enough to publish the notice of revocation in a gazette.[107] The law therefore obviously imposes the duty on the acquiring authority to strictly adhere to the formalities prescribed by law in revoking a right of

[101] Cap. 167 vol. v, Laws of the Federation of Nigeria 1958. The Law was first enacted as Public Lands Acquisition Ordinance No. 9 of 1917.
[102] See Section 2 of the Public Lands Acquisition Act.
[103] *Adole v. Gwar* (2008) 11 NWLR (Part1099) 562 held 11.
[104] (1866) LR. IHL 34.
[105] *Ibid*, at p. 43.
[106] *Olateju v. Commissioner for Lands & Housing, Kwara State* (2010) 14 NWLR (Part 1213) 297.
[107] *Ibid.*

occupancy. In *Goldmark (Nig) Ltd v. Ibafon Co Ltd.*,[108] the Supreme Court held that publication of the revocation/acquisition in a gazette does not constitute sufficient notice; there must be personal service of same on the person. In the words of the court:[109]

> Much as in certain other situations, publication in the Gazette constitutes constructive notice to the whole world … constructive notice is not enough. The law insists upon actual notice of the intention to acquire. So, anything short of that amounts to non-compliance with the express provisions of the laws.

The Act also specifically underscores personal service. By Section 44 (a), (b) and (c) of the Land Use Act, any notice required to be served on any person shall be effectively served on him

(a) by delivering it to the person on whom it is to be served; or
(b) by leaving it at the usual or last known place of abode of that person; or
(c) by sending it in a pre-paid registered letter addressed to that person at his usual or last known place of abode.

Section 28 of the Land Use Act dealing with revocation/compulsory acquisition is expropriatary; it encroaches on the land holder's proprietary, constitutionally guaranteed[110] rights and therefore must be construed *"fortissimo contra preferente"*, that is, strictly against the acquiring authority but sympathetically in favour of the person whose proprietary rights are being taken away. It is against this background that one should consider the question of what happens where the public purpose which prompted the revocation subsequently fails.

2.5.3 The Failure Of Public Interest

Before dwelling on what happens where the public purpose fails, there is the antecedent question of when "public purpose" can be said to have failed, i.e., what amounts to failure of public purpose. Generally, where the intended public purpose is no more, or can no longer be carried out, the public purpose can be said to have failed. If the compulsory acquisition of the land/revocation of the right of occupancy is in order to build a stadium, but after the acquisition Government changes its mind and decides to build a hospital instead, it would be incontestable that the land is still used for public purpose, and therefore the revocation is still valid. On the other hand, where the public purpose is abandoned and instead the land is re-allocated to or taken over by a private person who then uses the land for his/her own private purpose or personal interest, public purpose would be said to have failed. In such case, the land would revert to the person from whom it was compulsorily acquired. This is because it is unlawful for the Governor to revoke a holder's right of occupancy only to grant it to another private person for private purpose under any guise.

In *Goldmark Nigeria Ltd v. Ibafon Company Ltd*[111] the respondents were in possession of some parcels of land and were exercising ownership right including fencing them until when by Government Notice No. 601 of 22nd June, 1976, the Federal Military Government purportedly acquired the said parcels of land for public purpose and in particular for the use of the Nigerian Ports Authority. The respondents later discovered that rather than use the lands for its own purposes, the Nigerian Ports Authority had leased out the said lands to private individuals and companies who used the parcels of land for their businesses such as the selling

[108] (2012) 10 NWLR (Part 1308) 291 at 356. See also: *Ononuju v. A-G Anambra State* (2009) 10 NWLR (Part 1148) 182.
[109] (2012) 10 NWLR (Part 1308) 291 held 12. See also: *Lateju v. Fabayo* (2012) 9 NWLR (Part1304) 159, held 3, 4.
[110] See Section 44 of the 1999 Constitution, as amended, which guarantees right to property.
[111](2012) 10 NWLR (Part1308) 291 (SC)

of sand and other businesses which were totally private and which had nothing to do with the purpose for which the lands were purportedly acquired. The court held that the use of the land did not constitute use for public purpose under the Public Lands Acquisition Act, Cap. 167, a precursor to the Land Use Act, 1978.

The same decision was reached in *Chief Commissioner, Eastern Provinces v. Onenye & Ors,*[112] where it was held that the acquisition of land by the then Central Government of Nigeria in Onitsha for the purpose of granting a lease of it to a commercial company was not a public purpose within the Public Lands Acquisition Ordinance (Cap.88). Waddington J. asserted:[113] "by no stretch of the imagination can I see how the grant of a lease to a commercial company could be brought within the range of this definition of "public purpose".

In the case of *Ereku v. Military Governor of Mid-Western State & Ors*[114] the revocation was in favour of a private "person", though allegedly for public purpose. The main issue here was whether, since the objects stated in McDermott Overseas Inc. (a private company) were in consonance with the declared objectives of Government to advance the industrial and economic development of the State, the revocation from private individual and leasing of same to the private company was in accordance with public purpose of Government under the Public Lands Acquisition Law. The Court held[115] that an acquisition by the Government of the Mid-Western State for the private need of a private corporation or person is unlawful since by no stretch of the imagination can one say that the enterprises of the McDermott Overseas Inc., beneficial though it might be, can be regarded as being for "public purpose of the State". The court added that, Section 2 of the Public Lands Acquisition Law clearly contemplated acquisition for the public purpose of the State and not any private enterprise that might incidentally be of benefit to the community or a section of it.

In *Osho v. Foreign Finance Corporation*,[116] the evidence showed that the right of occupancy of the plaintiff was revoked on the pretext of overriding public interest, but in reality the land was thereafter granted to the 3rd defendant, a private person, for its private business. In invalidating the revocation the court said:

> With the exception of revocation on ground of alienation under section 28(2) (a) or for the requirement of the land for mining purposes under 28(2)(c), the Governor has no right to revoke the statutory right of an occupier and grant the same to a private person for any other purpose than those specified by section 28(2) of the Act.

Similarly, in *The Administrator/Executors of the Estate of General Sani Abacha (Deceased) v. Eke-Spiff*,[117] the respondent was allocated a plot of land at Diobu G.R.A., Port Harcourt, Rivers State, by the Government of Rivers State. The Building Lease was registered in his name at the Lands Registry, Port Harcourt. He submitted a building plan for approval but up to the institution of the suit his plan had not been approved. Later, he discovered that his right of occupancy had been revoked without any notice to him, and the same piece of land was re-allocated to Major General Sani Abacha.[118] The Supreme Court held that, "certainly the re-

[112] (1944) 17 NLR 142.
[113] *Ibid*, at p. 702.
[114] (1974) All NLR 695.
[115] *Ibid* at p. 701.
[116] (1991) 4 NWLR (Part 184) 157
[117](2009) 7 NWLR (Part 1139) 97 (SC)
[118] Major General Sani Abacha was the Head of State of Nigeria and Commander-in-Chief of the Armed Forces of Nigeria.

allocation of the land to Major General Sani Abacha cannot be assimilated to an action taken in the overall public interest".[119] In the court's view:

> By re-allocating the same plot of land to Major General Sani Abacha after revoking the right of occupancy of the plaintiff, the 1st and 2nd defendants cannot be said to have satisfied the provisions of Section 28 (1) and (2) of the Land Use Act which states as follows: "It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest."[120]

After holding that the revocation in this case "was not carried out in the overall interest of the public",[121] the court concluded:[122]

> Failure to serve on the 1st plaintiff/respondent the notice of revocation smacks of some fraud. Let me say it loud, it is not only unconscionable to take away a piece of land already allocated and now re-allocate same to someone else without serving a notice of revocation on the earlier allottee and not paying that person compensation. It is also very unlawful and unconstitutional to so do. The court always has an undoubted jurisdiction to relief (sic) against every species (sic) of fraud. The fraud here is an unconscientiously use of the power arising from the circumstance or condition of the parties. The 1st plaintiff, a former Permanent Secretary of the Government of Rivers State has since retired, no longer at the corridor of power. The person to whom the plot was later re-allocated was a weighty man of authority.

The court was equally unsparing in the latter case of *Olateju v. Commissioner for Lands & Housing, Kwara State*[123] where it said:

> Times without number, State Governments are fond of using the Land Use Act to deprive legitimate owners their use vide the Land Use Act, however it is very sad that after the acquisition, this same acquired land that was acquired for public purpose will now be turned into jamboree and it would be shared among same sets of individuals. This is just like robbing Peter to pay Paul. The Land Use Act was not enacted for this purpose of selfishness and greediness but for the public use or purposes.

It is clear from the foregoing, the circumstances when public purpose is said to have failed. It is also so far clear, from case law, that where the public purpose fails, the land, or right of occupancy thereof, reverts to the rights holder, rather than being re-allocated to another private person. This, we submit, is so even where the holder had been paid full and satisfactory compensation or had been comfortably re-settled. The Government can only retain the land for another public purpose, and not re-allocate it to another private person for private use.

The term "private person for private use" is used here advisedly, because there is the ancillary question of, who carries out the public purpose? If public purpose is the end, does it, or should it, matter what means is used to achieve that end? To put it in context: Where

[119] (2009) 7 NWLR (Part1139) 97 at 131.
[120] *Ibid*, at page 130 Lines C – D.
[121] *Ibid*, at page 132 Lines A – B.
[122] *Ibid*, at Lines B – D.
[123] (2010) 14 NWLR (Part1213) 297, held 5 (at page 328 D – F), per Denton–West, JCA.

Government is unable to use the land for public purpose, can Government re-allocate the land to private persons to develop it for the same public purpose intended by Government?

The case of *Federal Government of Nigeria v. Akinde*[124] is very instructive. The plaintiffs/respondents contended that in 1976 the appellants informed them that their land had been acquired along with other lands in the neighbourhood. They claimed that they were not served with acquisition notice before they were driven away from the land and their buildings demolished, after which the appellants divided the land into plots and sold them contrary to the appellants' reason for the acquisition which was for the construction of Law Cost Housing Estate. The central issue was whether the acquiring authority could divert land acquired for public purpose to any other use upon failure of the purpose for which it was acquired, and whether sale of the acquired land under the site and services scheme of the appellants met the purpose of the acquisition.

From the facts of the case, the land was acquired for Federal Government Housing Scheme. Owing to financial constraints, the appellants introduced Sites and Services Scheme which entailed the demarcation of the land into plots allocated to interested members of the public for a token amount, a different purpose. Can it be said that the change of procedure from direct construction to allocation of plots to individuals to carry out the construction themselves means a conversion of the purpose of the acquisition for a different purpose? The trial court answered in the positive. The Court of Appeal disagreed, holding:

> With all due respect to the learned trial Judge, I am of the humble view that change of procedure from direct construction by Government to allocation of plots duly demarcated to interested members of the public for direct construction by the allottees meets the purpose of the acquisition. Even after direct construction by the Government, the houses are sold to interested members of the public…. In either case, it fits within the definition of public purpose in Section 2 of the Public Lands Acquisition Act, as amended. If the learned trial Judge accepted the acquisition for Federal Government Housing Scheme as a valid public purpose within the law, there is no basis for holding that the change of procedure made it no longer a public purpose.

The view taken by the appellate court is expressly that a definition of public purpose includes instances where land is acquired from private individuals or communities, laid out into plots and subsequently re-allocated to corporate organisations or private individuals under an industrial or housing scheme. In this sense, a purpose which is for the benefit of an individual could still qualify as public purpose where the individual benefits, not as an individual but in furtherance of a scheme of public utility.

Before proceeding, it should be pointed out that the Public Lands Acquisition Act, Cap. 167, section 2(i) thereof, expressly included compulsory acquisition of land for or in connection with "*housing estate*", and 2(h) provided for compulsory acquisition "for or in connection with *housing estates,* economic, industrial, or agricultural development…". The Land Use Act, on the other hand, does not include development of housing estates in its enumeration of public purpose. However, this does not mean that the construction or development of housing estate is excluded from, and therefore cannot be, a public purpose, since the enumeration of public purposes in the Land Use Act is not intended to be exhaustive.

Also, the *Akinde Case* has implications beyond the development of housing estates. It has the implication that the Government can compulsorily acquire a holder's land, revoke his right of occupancy and then re-allocate the land to another private person who would then

[124](2013) 7 NWLR (Part1353) 349.

undertake any of the public purposes listed in section 51 of the Land Use Act. Ordinarily, as shown above, revoking an individual's right of occupancy only to re-allocate to another individual is unlawful. The twist here is that the individual to whom the land is re-allocated is using it for public purpose as prescribed by Government. In other words, the end is public purpose, though the means is private person rather than government. It is arguable that so long as the public purpose is achieved it does not matter who achieved it; the object of the revocation is met. On the other hand, can it not be said that the private re-allocatee does not stand to gain (financially) even more than the initial owner by the fact of the re-allocation? First, no businessman would acquire land from government to develop an estate and hand over to government without any personal financial gain. Second, where the housing estate is developed and then sold to the public, nothing stops the developer from acquiring one of the houses; after all, he is a member of the public.

Instead of re-allocating the land to a private person on the subterfuge that he is to carry out a public purpose, it would be more proper to simply award him the contract to develop the land on behalf of government and to the government's specification. This is the fulcrum of the decision in the Akinde case. Indeed, it can be said that the decision in Akinde case is not without precedent. In *Lawson v. Ajibulu & Ors*.,[125] the 1st respondent, Chief Ajibulu, bought a parcel of land from the Aina Ala Adeniyi families in Agbara village. He affixed on the land a signboard bearing his name as the owner. He later noticed that Chief Lawson was encroaching on the land. Chief Lawson approached him to sell the land to the latter but the 1st respondent refused. The land was later acquired by the Ogun State Government and released to Chief Lawson's company for development. The suit for was for, *inter alia*, a declaration that the acquisition was invalid and an order setting it aside. The case succeeded at the trial court and the court of appeal. On further appeal to the Supreme Court, the apex court noted:

> The trial court as well as the Court of Appeal relied heavily on the case of *Ereku v. Military Governor of Mid-Western State & Ors* (1974) 10 SC 59 in arriving at the conclusion that the acquisition whereby land is taken by government from one citizen and given to another citizen is not done for public purpose. *Non potest rex gratiam facere cum injuria et damno aliorum*. What we have now is a far cry from the situation in *Ereku's case*.

The Supreme Court then took time to explain, *per* Ogundare JSC:

> It is under similar provisions in Federal statutes such as the Public Lands Acquisition Act (now replaced by the Land Use Act) that the Federal Government acquires land compulsorily and leases same to oil companies in furtherance of their oil prospecting activities. It has not been suggested that such acquisitions were not for public purpose. The prevalent practice of Governments acquiring land compulsorily and leasing same to developers for housing estate, economic, industrial or agricultural development must be seen in the same light, that is, the involvement of the private sector in the orderly development of both the urban and rural areas.

Fortunately the courts have by sheer judicial activism and purposive interpretation mitigated the absurdities and contradictions inherent in the transitional provisions. To a commendable degree, the courts have ably stood up to protect the interest of individual land owners against the caprice and high-handedness of government.

[125] (1997) 6 NWLR (Part 507) 14

Perhaps no other piece of legislation, in the history of this country has generated as much controversy and contentious litigation as the Land Use Act. The reasons for the unprecedented controversy generated by the Act are, however, not far-fetched. To begin with, it was the first legislative effort to harmonize the land tenure system in Nigeria.[126] It was the first and is still the only comprehensive legislation regulating the acquisition, se, disposition and extinguishment of rights in land throughout Nigeria.[127]. Therefore, being "a statute of unique importance and impact" and property legislation for that matter[128], it is not surprising that the Act has generated so much controversy.

However, it is not so much the novelty of the Act as its infelicitous and inarticulate wording that has been responsible for the monumental controversy and confusion generated by the Act. Indeed the bad drafting of the Act has since been widely acknowledged. In the celebrated case of *Savannah Bank of Nigeria Ltd. v. Ajilo*,[129] Obaseki, J.S.C. remarked, "This case has once more highlighted the unnecessary difficulties created by lack of precision and in elegant drafting of statutes. The Land Use Act as a major legislation affecting the fortunes of every Nigerian leaves a lot to be desired in its drafting".

The practice whereby the Governor, when issuing a certificate of occupancy to the holder of a deemed right of occupancy whose existing interest prior to the Act was of a permanent character, curtails such interest to a fixed term of years should stop. There is no provision in the Act enabling the Governor to do so. Such unjustified deprivation or curtailment of vested rights in property without payment of compensation is not only unconstitutional but against the spirit and letters of the Act.

One of the most contentious aspects of the revocation power and which has been widely abused by the Governor and public officers is where there is failure of purpose. Failure of purpose could arise in many ways, it could arise where part of the land was used for the public purpose for which it acquired and the remnant shared by the acquiring authority to private individuals. The most recent example was the Osborne Land in Lagos which was acquired for erection of electricity grid and power station but was later shared by the officials to construct private houses.[130]

The second pattern is where private citizens are divested of their land under section 28 but the Governor later allocated the land to private interest. The question flowing from these scenarios is whether the land should be allowed to revert to the original owner or the Governor should be allowed to hold on to the land in trust until when the acquired land will be required for similar public purpose.

Furthermore, does the subsequent reallocation of land to other private individuals who utilize such land for socially beneficially purpose qualifies as public purpose? The answer to this question will depend on the broad interpretation of the term "public purpose". In United States of America, the United State Supreme Court gave a liberal construction of the term "public purposes", in *Clark v. Nash*.[131] It stated that a purpose which is for the benefit of an individual may still be a public purpose, provided that such an individual benefits not as an individual but in furtherance of a scheme of public utility. By this analogy, where land is legally acquired from private individuals, laid out in plots and subsequently reallocated to

[126] *Nkwocha v. Governor of Anambra State* (1984) 6 SC 362

[127] Prior to the Act, a Similar Statute, the Land Tenure law, Cap 59 Laws of Northern Nigeria 1963 had been in force in the Northern part of Nigeria.

[128] Indeed, most of the conflicts between individuals and between nations or states are triggered by disputes over land or interest in land.

[129] (1989) 1 NWLR (Part 97) 305 at 324

[130] See the Federal Government White Paper on Federal Land and Buildings in Nigeria "Otherwise called Brig. Oluwole Rotimi's Report" Submitted to the President. The Report indicted many public functionaries and such land must be returned to the government.

[131] (1905) 190 US 361

corporate organizations or private individuals under a housing and industrial scheme such allocation will be valid even though it benefits individuals.

Generally, the Land Use Act has been widely touted as creating trust in favour of the citizen. Section 1 of the Act was interpreted to constitute trust in favour of the Governor for the overall benefit of Nigerian people. The nature of trust has also generated valuable comments… Under the conventional law of trust, where there is a failure of trust, the trust property reverts to the estate of the settler or testator. However, the nature of trust created under the Act in anomalous and the question of reversion becomes confusing. Nonetheless, the issue of failure of purpose received judicial construction in *Olatunji v. Military Governor of Oyo State*[132] and *Ajibulu v. Lawson*[133]. The facts of these cases are similar. In these cases, the Governor exercised his power of revocation under Section 28 of the Act to acquire the land privately owned by Plaintiffs ostensibly for public purpose but later reallocated the land to private individuals who converted the land for other purposes outside the public purposes. The Court of Appeal in both cases rightly came to the conclusion that a property ostensibly acquired for public purpose but later directly or indirectly diverted to serve private needs does not amount to valid acquisition. The acquiring authority cannot rob Peter to pay Paul by divesting one citizen of his interest in a property and vesting same in another.

Consequently, if the acquiring authority can no longer find a public purpose for the land acquired, the only avenue open to it is to de-acquire it and let the same revert to the person in whom it was already vested. A failure of public purpose requires that the land must revert to the original owner.

In this regard, the provisions of Section 28 of the Act should be modified or redefined to permit individuals to challenge injudicious revocation of interest in land and there should be the inclusion of a statutory provision in the Land Use Act which will compel the Governor to return expropriated land to the original owner where such public purpose originally intended has patently failed.

2.5.4 Breach Of The Terms Of The Grant Of The Certificate Of Occupancy

The Government may revoke a statutory right of occupancy on grounds provided for in section 28(5):

(a) a breach of any of the provisions which a certificate of occupancy is by section 10 of the Land Use Act deemed to contain (b) a breach of any term contained in the certificate of occupancy or in any special contract made under section 8

© a refusal or neglect to accept and pay for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Governor under section 10(3).

2.6 *Procedure for Revocation of Certificate of Occupancy*

The Land Use Act 1978 vests in the Governor administrative or management powers over land in urban areas and constitutes him only a trustee. Unless land is revoked in accordance with the provision of the Land Use Act such revocation is invalid.

(a) Condition Precedent

Section 28 of the Land Use Act provides that where title of the holder of a right of occupancy is revoked, it is mandatory to put him on notice about the revocation of title and proof of service of such notice to the holder is fundamental to a valid revocation.

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[132] (1995) 5 NWLR 587

[133] (1991) 6 NWLR (Part195) 44

Section 28 (6) of the Land Use Act 1978 provides that the revocation of a right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Governor and notice of it shall be given to the holder. In *Ononuju v. A G Anambra State,*[134] the Supreme Court held that revocation of a right of occupancy can only be valid if notice of same has been issued and served on the owner or occupier of the property concerned.

(b) Service of Notice

Section 44 of the Land Use Act requires such notice to be effectively served on the holder of the right occupancy by:

a) delivering it to the person on whom it is to be served or
b) leaving it at the usual or last known place of abode of that person or
c) sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode or
d) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at its registered or principal office or sending it in a prepaid registered letter addressed to the secretary or clerk of the company or body at the office.
e) if it is not practicable after reasonable inquiry to ascertain the name or address of a holder or occupier of land on whom it should be served by addressing it to him by the description of "holder" or "occupier" of the premises (naming them) to which it relates and by delivering it to some person on the premises or if there is no person on the premises to whom it can be delivered by effecting it or a copy of it to some conspicuous part of the premises.

In Administrators and executors of the Estate of *General Sani Abacha (deceased) v Samuel David Eke – Spiff & Ors,*[135] the supreme court held that it is not only unconscionable to take away a piece of land already allocated and relocate same to someone else without serving a notice of revocation on the earlier allottee. It is also unlawful and unconstitutional to do so in *Nigerian Engineering Works Ltd v Denap Ltd*[136] the supreme court similarly held that the powers of the Governor to revoke any right of occupancy must be exercised in the overriding interest of the public and more importantly the holder of the right of occupancy being revoked must be notified in advance of the revocation. The notice must state the reason or reasons for the revocation and will give the holder opportunity to make any representation he or she wishes to make. Where the notice is not given or it is inadequate or not in compliance with the provisions of section 28 of the Act, the revocation will be null and void.

(c) Content of a valid Notice of Revocation

Section 44(e) requires any notice required by the Land Use Act 1978 to be served on any person to be addressed to "holder" or "occupier" of the premises to which it relates. In *Ononuju v. A. G. Anambra State*[137] the supreme Court emphasized that where a notice of revocation does not bear the word "holder" or "occupier", it is non compliant with section 44 of the Land Use Act and it invalidates the notice of revocation of the Appellant's land and renders it null and void. The revocation notice should be signified under the hand of a public officer duly authorized in that behalf by the Governor and the notice of it shall be given to the holder.[138] Inspite of the power vested in the Governor to revoke a holder or occupier's right of

[134] (2009) 10 NWLR (Part 1148) 182
[135] (2009) 7 NWLR (Part 1139) 97
[136] (2001) 18 NWLR (Part 746) 56
[137] (2009) 10 NWLR (Part 1148) 182,
[138] S. 28 (6) of the Act; see also *Adole v Gwar, supra.*

occupancy, the scope and extent of the exercise of his powers are regulated by the necessity to notify such holder or occupier of the revocation. Non compliance renders the revocation invalid, null and void.

3. CONCLUSION

In this paper, there has been a demonstration of the practical implications of the provisions of the Act relating to land tenure system, individual and community rights and how the implementation of those provisions have been bedeviled by imprecise and incoherent drafting. It can be seen from the foregoing that the gap between the transitional provisions of the Act, on one hand, and the position under the general law on the other hand, is largely responsible for the failure to achieve most of the desired objectives of the Act in the past quarter of a century. It reflects little credit on the part of those concerned with the drafting of the Act that, in seeking to preserve existing interests they did not give adequate consideration to the law as it previously stood with respect to land relationships and rights.

Fortunately the courts have by sheer judicial activism and purposive interpretation mitigated the absurdities and contradictions inherent in the transitional provisions. To a commendable degree, the courts have ably stood up to protect the interest of individual land owners against the caprice and high-handedness of government.

Perhaps no other piece of legislation, in the history of this country has generated as much controversy and contentious litigation as the Land Use Act. The reasons for the unprecedented controversy generated by the Act are, however, not far-fetched. To begin with, it was the first legislative effort to harmonize the land tenure system in Nigeria.[139] It was the first and is still the only comprehensive legislation regulating the acquisition, disposition and extinguishment of rights in land throughout Nigeria.[140]. Therefore, being "a statute of unique importance and impact" and property legislation for that matter[141], it is not surprising that the Act has generated so much controversy.

The practice whereby the Governor, when issuing a certificate of occupancy to the holder of a deemed right of occupancy whose existing interest prior to the Act was of a permanent character, curtails such interest for a fixed term of years should stop. There is no provision in the Act enabling the Governor to do so. Such unjustified deprivation or curtailment of vested rights in property without payment of compensation is not only unconstitutional, but against the spirit and the letters of the Act.

One of the most contentious aspects of the revocation power and which has been widely abused by the Governor and public officers is where there is failure of purpose. Failure of purpose could arise in many ways, it could arise where part of the land was used for the public purpose for which it acquired and the remnant shared by the acquiring authority to private individuals. The second pattern is where private citizens are divested of their land under section 28 but the Governor later allocated the land to private interest. The question flowing from these scenarios is whether the land should be allowed to revert to the original owner or the Governor should be allowed to hold on to the land in trust until when the acquired land will be required for similar public purpose.

Furthermore, does the subsequent reallocation of land to other private individuals who utilize such land for social beneficially purpose qualifies as public purpose? The answer to this question will depend on the broad interpretation of the term "public purpose". In United States of America, the United State Supreme Court gave a liberal construction of the term "public

[139] *Nkwocha* v. *Governor of Anambra State* (1984) 6 SC 362

[140] Prior to the Act, a Similar Statute, the Land Tenure Law, Cap 59 Laws of Northern Nigeria 1963 had been in force in the Northern part of Nigeria.

[141] Indeed, most of the conflicts between individuals and between nations or states are triggered by disputes over land or interest in land.

purposes", in *Clark* v. *Nash*.[142] It stated that a purpose which is for the benefit of an individual may still be a public purpose, provided that such an individual benefits not as an individual but in furtherance of a scheme of public utility. By this analogy, where land is legally acquired from private individuals, laid out in plots and subsequently reallocated to corporate organizations or private individuals under a housing and industrial scheme such allocation will be valid even though it benefits individuals.

Generally, the Land Use Act has been widely touted as creating trust in favour of the citizen. Section 1 of the Act was interpreted to constitute trust in favour of the Governor for the overall benefit of the Nigerian people. The nature of trust has also generated valuable comments. Under the conventional law of trust, where there is a failure of trust, the trust property reverts to the estate of the settler or testator. However, the nature of trust created under the Act in anomalous and the question of reversion becomes confusing. Nonetheless, the issue of failure of purpose received judicial construction in *Olatunji* v. *Military Governor of Oyo State*[143] and *Ajibulu* v. *Lawson*[144]. The facts of these cases are similar. In these cases, the Governor exercised his power of revocation under Section 28 of the Act to acquire the land privately owned by Plaintiffs ostensibly for a public purpose, but later reallocated the land to private individuals who converted the land for other purposes outside the public purposes. The Court of Appeal in both cases rightly came to the conclusion that a property ostensibly acquired for public purposes but later directly or indirectly diverted to serve private needs does not amount to valid acquisition. The acquiring authority cannot rob Peter to pay Paul by divesting one citizen of his interest in a property and vesting same in another.

Consequently, if the acquiring authority can no longer find a public purpose for the land acquired, the only avenue open to it is to de-acquire it and let the same revert to the person in whom it was already vested. A failure of public purpose requires that the land must revert to the original owner.

In this regard, the provisions of Section 28 should be modified or redefined to permit individuals to challenge injudicious revocation of interest in land and there should be the inclusion of a statutory provision in the Land Use Act, which will compel the Governor to return expropriated land to the original owner where such public purpose originally intended has patently failed.

[142] (1905) 190 US 361
[143] (1995) 5 NWLR 587
[144] (1991) 6 NWLR (Part 195) 44