

The Land Use Act 1978 Vis-À-Vis Secured Credit Transactions in Nigeria: Monster Or Messiah?

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ABSTRACT: *The Land Use Act 1978 remains the densest exposition of the legal framework as far as matters connected with and pertaining to land in Nigeria is concerned. Since its emergence on the Nigeria legal firmament Forty-One (41) years ago, the Land Use Act 1978 has been the principal and/or chief legislation regulating land tenure, ownership and its incidents in Nigeria. This article periscopes ‘The Land Use Act 1978 vis-à-vis Secured Credit Transactions in Nigeria: Monster or Messiah?’ This article reveals and alludes to the truism which is, namely, that the Land Use Act 1978 which was enacted to address the uncoordinated, informal and apparently anachronistic tenurial arrangements in Nigeria on the one hand has become the albatross of jurisprudence of secured credit transactions in Nigeria on the other hand. This article recommends a repeal of the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which stipulates the entrenchment of the Land Use Act 1978, which in turn will prompt the latter to be in tandem with the changes in dynamics of modern day needs and/or demands.*

KEYWORDS: land use act 1978, secured credit transactions, Nigeria monster, messiah?

INTRODUCTION

The Land Use Act 1978 remains one of the most controversially far reaching legislation that has ever bestrode the Nigerian legal firmament. The Land Use Act 1978 came into being primarily to contribute to the stabilization of government projects mostly in urban areas as well as control the difficulties confronted by government in the course of land acquisition for development purposes. It is also apt to assert that the Land Use Act 1978 was enacted to address the uncoordinated and informal tenurial arrangements that were prevalent in the southern states of Nigeria which were usually prone to litigation. The tenurial arrangement to say the least, were anachronistic as they

imposed impediments and inhibitions on the modernization of the agricultural sector.

The fulcrum of this article shall be to give a critical appraisal of those provisions within the Land Use Act as a legislation which has made secured credit transactions unattractive, undesirable, ignominable, appaling and nauseating. It shall fall within the ambit and contemplation of this article to mirror the pitfalls, setbacks and factors militating against the smooth operation and growth of secured credit transactions in Nigeria in the light of the chief legislation bothering on land in Nigeria, namely the Land Use Act 1978.

The Land Use Act 1978 Vis-Avis The Growth of Securities: A Greek Gift

The Land Use Act 1978 is in its simplest rendition a Greek Gift¹ to the Nigerian legal landscape. There have been a retinue and myriad of concessionary comments about the general failure in object and purpose of the Land Use Act 1978 by notable jurists and legal scholars. There appears to be a consensus amongst legal connoisseurs about the frustrating dilemma of the Land Use Act 1978 being more of a monster than a messiah. This article shall be inundated with the task of giving a graphic trajectory of the provisions of the Land Use Act 1978 which have made the growth of secured credit transactions in Nigeria not to be a dream but a nightmare for investors. They shall therefore be considered under the following sub-headings:

Subjective views and Relative Opinions about the Nature of a Right of Occupancy

The nature of a right of occupancy and what it entails has been a subject of extensive debates and arguments within legal scholarly circles. There have been variegated opinions and different schools of thoughts on this subject- matter. A learned writer² gives vent to the argument that the Land Use Act 1978 creates an interest in the nature of a lease whereas other learned writers³ offer dissenting views as to what the nature of a right of occupancy under the Land Use Act 1978 is by echoing that the Act creates an interest which is different and distinct from as well as inconsistent with a lease. The intellectual gladiators by their subjective reasoning, have made the entire discourse on the nature of a right of occupancy *vis-à-vis* the Land Use Act 1978 more worrisome than workable.

Uncertainty of Title: Section 9(1)

The Land Use Act 1978 has created more problems than it came to solve via its provision in section 9(i)(c) which states thus: "It shall be lawful for the Governor when any person is entitled, to issue a certificate under his hand in evidence of such Right of Occupancy." From the diction in the provision above, it is crystal clear that under the Land Use Act 1978, the Certificate of Occupancy as issued by the Governor is a mere 'evidence' and as such does not create an interest or title to land. It could therefore be deductively stated that a Certificate of Occupancy is not a magic wand as prove of a better title or in an instance where a holder has no title from the outset or even where the Governor had mistakenly or wrongly granted the Certificate of Occupancy to a holder who was not actually entitled to it, such Certificate of Occupancy will be liable to be set aside by a court of competent jurisdiction. Invariably, where

¹ A Gift given or a favour done with a treacherous purpose; an allusion to the story of the wooden horse of Troy used by the Greeks to trick their way into the City of Troy.

² P O Adeoye, *The Nature of the Right of Occupancy under the Land Use Act 1978*

³ E E Essien, *Law of Credit and Security in Nigeria* (Golden Educational Publishers, Uyo 2000) p. 119; R W James *Nigerian Land Use Act Policy and Principle* (University of Ife Press Ltd, 1987) pp. 93-95; J A Omotola, *Essays on the Nigerian Land Use Act* (Lagos University Press, Lagos 1980) pp. 12-25

a holder's Certificate Occupancy is set aside by the court as being defective either because there is a prove of better title or that the holder of such a certificate had no title from the outset, the holder of such a certificate of occupancy is simply in possession of a worthless piece of paper. This was the focal point of the court's decision as enunciated in the Supreme Court case of *Ogunieye v Oni*.⁴

It is also submitted here with the greatest respect that the courts have also done incalculable damage by handing down misleading dicta⁵ which have no statutory support as to what a Certificate of Occupancy does with regards to the provisions of section 9(1)(c). It is also worth of note that section 9(1)(c) states "any person entitled." This phrase is vague, imprecise and nebulous. It has failed to categorically state those who comprise of "any person entitled."

Restrictive Definition of a Holder: Section 50

Section 50 of the Land Use Act 1978 provides *inter alia* viz: A holder in relation to a Right of Occupancy means a person entitled to a Right of Occupancy and includes any person to whom a Right of Occupancy has been validly assigned or has validly passed on the death (of a holder but does not include any person to whom a Right of Occupancy has been sold or transferred without a valid assignment, nor mortgagee, sub lessee or sub under lessee)

This provision of the Act appears to restrict the definition of a holder and not to include a person whom a Right of Occupancy has been sold or mortgaged. A Right of Occupancy is also of a limited value from the wordings of Section 50 of the Land Use Act 1978. This provision of the Act renders the essence of land security otiose as it seems to rob the mortgage banker of the guarantee that he should have when advancing loan to the mortgagor. Section 50 of the Land Use Act 1978 is a purveyor of fear for mortgagees since the trepidation that mortgagors may not redeem their loans lurks around this provision of the Act itself. Little wonder then that a learned writer⁶ described the definition espoused in section 30 of the Land Use Act as "not only clear but confusing."⁷

Mandatory, Cumbersome, Costly and Time Consuming Consent Provision: Section 22

By virtue of the provisions of Section 22 of the Land Use Act

1978: It shall not be lawful for the holder of Statutory Right of Occupancy granted by the Military Governor to alienate his Right of Occupancy or any part thereof by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever without the consent of the Military governor first had and obtained.

It is a well-known rule of statutory interpretation that the use of "shall" in the wordings of a statute always presupposes mandatoriness and as such, "It shall" above makes it mandatorily

⁴ (1990) 2 NWLR (Pt. 135) 745 SC; 6 NWLR (Pt. 158), 514

⁵ For instance Ogundare JCA (as the then was in *Chiroma v Suwa*) (1986) 1 NWLR (Pt. 19). 751, 756, stated that "a Certificate of Occupancy "creates" a term of years absolute for the number of years stated." This same observation was upheld in case of *Daturmbu v Adene & Ors.* (1986) 4 NWLR (Pt. 65) 314 at 322, 326

⁶ R A Onuoha *The Law of Land and Company Securities in Nigeria Reformation and Development of Viable Alternatives* (Anon Publishers, Owerri, 2008)

⁷ *Ibid* 119

compulsory for Governor's consent to be "first had and obtained" before any mortgage transaction, for instance, can be valid. It is the compulsory, cumbersome, time consuming, and even costly aspects of the consent provision of the Land Use Act 1978 without which certain transactions will be invalid, null, void and of no effect that is certainly the creditors' albatross in Nigeria.

Dreadful Revocation: Section 28

Mortgagees are usually left at the mercy of Section 28 of the Land Use Act 1978. The woes and misery of a mortgagee who lends money to a mortgagor is made manifest when such a mortgagee is left at the receiving end of the bargain particularly in the event of the revocation of the Certificate of Occupancy that a mortgagor deposits as collateral for the loan he collected from the mortgagee. This position of leaving the mortgagee in dire straits if the revocation of the Certificate of Occupancy takes place, has without any modicum of doubt, stifled the growth of secured credit transactions in Nigeria.

Discriminatory Compensation: Section 29

The compensation provision as contained in section 29 of the Land Use Act 1978 is as selective as it is discriminatory. The fact that no mention has been made of the position of a mortgagee whom a holder has transferred his right to for the purpose of securing bank advances, lends poignancy to the statement above. Although the Act provides that compensation will be paid to the holder of the Right of Occupancy acquired by the State or Federal Government for public and mining purposes, it is however regrettably sad that it is not in all cases that a holder of a Right of Occupancy will enjoy the largesse of compensation paid by the Governor. Accordingly, revocation carried out under section 28, paragraph (a) subsection (2)⁸ and paragraph (d) of subsection (3)⁹ does not attract compensation from revoking authorities. Similarly, compensation is forlorn under sections 2(4)¹⁰ and (5).¹¹ This article therefore submits that it is the selective and discriminatory nature of sections 28 and 29 that have made the supposed growth of security in Nigeria under the Land Use Act 1978 to be nothing but a quagmire and fiasco.

Resettlement without Compensation: Section 33

Section 33 is yet another clog in the wheels of the growth of security in Nigeria. This section of the Land Use Act 1978 basically provides for the resettlement in lieu of compensation for

⁸ "The alienation by the occupier by assignment, mortgage, transfer of possession, sub lease or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or any regulation made hereunder"

⁹ The alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval.

¹⁰ The Governor shall revoke a right of Occupancy in the event of the issue of a notice by or on behalf of the (Head of Federal Military Government) if such notice declares (such land to be required by the Government for public purposes)

¹¹ The Military Government may revoke a statutory right of occupancy on the ground of:

- (a) A breach of any of the provisions which a Certificate of Occupancy is by Section 10 deemed to contain
- (b) A breach of any term contained in the Certificate of Occupancy or in any special contract made under Section 8
- (c) 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 Military Governor under subsection (3) of Section 10

an occupier of any developed land on which a residential building has been erected whose Right of Occupancy has been revoked either by the Governor or the Local Government as the case may be. In section 33(3), the Act provides that: “where the person accepts a resettlement, his right to compensation shall be deemed to have been duly satisfied and no compensation shall be payable to such person.” The provision above undermines the value of a Right of Occupancy. A learned scholar¹² posited thus:

The effect of these provisions, in my view, diminishes the value of a Right of Occupancy as security, where it is revoked and the holder/mortgagor accepts the option of resettlement. This is because it renders the effort of the creditor to retrieve the advance improbable without the co-operation of the mortgagor to substitute the property for the revoked one.¹³

Section 33(2) also states that where the value of the alternative accommodation provided for the person whose Right of Occupancy had been revoked is higher than the one revoked, the balance will be converted into a loan, which the person affected shall refund or repay to the government. Again, Onuoha alludes to the disadvantaged position of creditors at this instance when he enthused:

...the clear meaning of this provision is that where such a revoked Right of Occupancy is the subject of a mortgage transaction, the creditor may have to pay off the loan to the government before realizing the security, especially where the mortgagor decides not to settle the difference in the value of the two Properties.¹⁴

Non-Transferability OF Non-Urban Land: Section 36(5)

Section 36(5) of the Land Use Act 1978 has created a huge chasm thereby stultifying the implementation of meaningful development of the non-urban sectors of the Nigerian economy. This section makes the realization of capital virtually impossible because it prohibits any form of alienation with respect to a Customary Right of Occupancy. For purposes of clarity, aptitude and emphasis, section 36(5) shall hereunder be reproduced viz: “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.”

It is noteworthy however, that only the deemed Customary Right of Occupancy is being caught by the provision above. Besides, the problems bedeviling the growth of securities as reflected in the above enumerated provisions of the Land Use Act 1978 and other challenges that are obtainable in practical reality such as the problems of land accessibility, availability and affordability also trail the growth of security in Nigeria.

¹² R A Onuoha, *The Law of Land and Company Securities in Nigeria Reformation and Development of viable Alternatives* (ANON Publishers, Owerri 2008)

¹³ *Ibid* 126

¹⁴ *Ibid* 127

CONCLUSION

It would not be unctuous to concede as the bottom line submission, which in namely, that the Land Use Act 1978 is widely considered a failure in providing the requisite and necessary panacea for land related matters in Nigeria gravely because of the gulf that has existed between the expectations and achievements of the Act.

The perilous incidents and catastrophic consequences that have blighted our polity as far as land transactions are concerned since the advent of the Land Use Act 1978 has made the presence of the Land Use Act 1978 itself within our jurisprudence more of a burden than a benefit, a curse than a blessing and a plague more than a cure especially considering its annihilating and mauling effects on the prospects of secured credit transaction in Nigeria.

Recommendations

Some provisions of the Land Use Act 1978 notably those examined in the course of this paper have longed outlived their relevance and *ipso facto* overstayed their welcome. Accordingly, a repeal of the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which stipulates the entrenchment of the Land Use Act 1978 which in turn will prompt the latter to be in tandem with the changes in dynamics of modern day needs and/or demands should be vigorously pursued. Similarly, scholarly suggestions and opinions of learned authors, writers and thinkers¹⁵ should not be treated with kids' gloves by relevant authorities.

¹⁵ Such as R A Onuoha, E E Essien, C O Olawoye and P A Oluyode to mention but a few.