The Status of the Customary Tenant In Relation To Land Held by Him under Customary Law: The Dilemma for the Conveyancers in Nigeria

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Abstract. The article seeks to examine the effects of the Land Use Act of 1978 on the customary system of land holding in Nigeria. Since the inception of the Act, the problem facing our courts, the unlearned public, and lawyers alike has been the determination of the true position of customary tenancy under the right of occupancy system introduced by the Act. In fact, the customary tenant is perplexed about the nature and scope of his property rights and obligations under the Act. These include his present duties and obligations, if any, to his customary overlord. The crux of the issue is whether he is to continue to pay the customary tribute to his overlord. Is he to continue seeking the approval or consent of the customary overlord before effecting a valid land transfer? Is he still under the spectre of forfeiture of his interests upon proof of bad behaviour against his overlord? Is the customary tenant entitled, as against his overlord, to the right of occupancy and the certificate of occupancy to be issued in evidence thereof? Thus, the controversy generated by these issues continues to defy consensus among the "egg heads" of our academia as well as the erudite judges of our courts. Indeed, many judicial decisions seem to demonstrate that the judiciary is yet to put the controversy on this issue to rest. As a result, the judicial quandary for Nigerian conveyancers continues to this day.

Keywords: Customary Tenant, Overlord, Grantor, Grantee, Tribute, Rent, Forfeiture

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INTRODUCTION

The phrase "customary tenant" can be understood by first understanding the meaning of the words "customary" and "tenant." Custom is a written law and is the mainspring of all the laws of a land (Agbosu, 1983). Therefore, "customary" is a word suggesting something that has to do with the law of the land. "Tenant," on the other hand, is one who holds land by any kind of title or right, whether permanently or temporarily, or one who leases premises from the landlord (Huisman, 2016). In other words, a "customary tenant" is a person or family (as a unit) who is granted occupation and use of a piece of land by the traditional owner on payment of rent or tribute. The rent must not necessarily be paid in cash, but in money's worth.A tribute is something given, done, or said to show gratitude, honor, or praise. Thus, the characteristics of customary tenancy are the relationship between the landowner and tenant, as well as the tenant's payment of allegiance, tribute, or loyalty to the landowner. Customary tenancy arises when a customary landowner grants to another person, at customary law, the right of occupation and use of the land in return for the grantee's recognition of the grantor's title and payment of tribute.

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

In customary Land Law Parlance, the customary tenants are not gifted the land; they are not "borrowers" or "lesees", they are grantees of land under customary tenure and hold as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behavior (Oshio, 2018, p. 6).

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

MEANING AND NATURE OF THE INTEREST OF A CUSTOMER TENANT

A customary tenant is a grantee of land under customary law, which he holds in perpetuity and is only determinable upon proof of bad behaviour against the grantor or his successors-in-title (Merrill & Smith, 2000). In other words, the customary tenant holds a perpetual right of occupation and use over the land granted to him, subject to good behavior. In practice, courts now regard this interest as practically indefensible once permanent buildings or other forms of improvement, such as extensive commercial farming and or occupation, have been established thereon by the grantees. Thus, a customary tenant's right to the land is perpetual during good behavior. However, if he exhibits bad behavior, he may be denied perpetual enjoyment of the land by his overlord.

Some of the factors that may amount to bad behaviour on the part of the customary tenant to warrant denying him perpetual enjoyment of the land are (Agbosu, 1983):

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

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

1. Those which have asserted that the interest of the customary tenant cannot be over-reached by the overlord. This is a correct proposition of the law so long as land is subject to customary tenancy; the effect of transfer of such land by the overlord is to make the transferee take subject to the interest of the customary tenancy except where the transfer has been consented to by him. In fact, some of these cases have even asserted that the transferee never obtains from the overlord the right to forfeit the customary tenancy for misbehaviour.
2. Those cases, dealing with the apportionment of compensation payable on the acquisition of land that is subject to customary tenancy as between the overlord and the customary tenant, In ***Josiah Aghenghen & Ors. vs. Chief Maduka Waghoreghor, the*** Supreme Court was faced with the problem of apportioning, between the overlord and his customary tenant, the compensation payable on the compulsory acquisition of land that is subject to customary tenancy (Oshio, 2018). In awarding two-thirds of the compensation money to the customary tenant and one-third to the overlord, the Supreme Court first considered the nature of the interest of the customary tenant as follows:

> *… In customary land law parlance, the defendants, are not gifted the land; they are not 'borrowers' or 'lessees', they are grantees, of land under customary tenure and hold, as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behaviour … They enjoy something akin to emphyteusis, a perpetual right in the land of another (Elias, 1977, p. 42).*

Thus, it is settled law that the possessory right of a customary tenant goes on and on in perpetuity, unless and until the tenancy is forfeited. It is instructive or worthy of note to point out here that the customary tenancy has no equivalent in English law. It is neither a leasehold interest nor a tenancy at will or a yearly tenancy. The main incident of such tenure is the payment of tribute, not rent, by the customary tenant to

the overlord. Undoubtedly, from the views expressed above, Nigerian courts have taken the position that the interest of a customary tenant over the land in his possession is significant and equal, if not superior, to that of the overlord.

NATURE OF CUSTOMARY TENANCY BEFORE THE ACT

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

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

No doubt, it is evident from the view expressed by Supreme Court above, it is judicially settled that the interest of the tenant cannot be over reached by the over lord. In other words, once the land is subject to customary tenancy, the Landlord is not entitled to and cannot lawfully take any step or steps that may be prejudicial to, or capable of diminishing the interest of the customary tenant. This invariably implies that the customary overlord cannot grant a lease, mortgage or effect an outright sale over the land which is subject to customary tenancy without the consent and/or approval of the tenant (Goldstein¸ 2012). The customary tenant interest on the land is more substantial due to the fact that he is more accorded higher or equal portion of the land as compared to the overlord. In ***Chief Etim vs. Chief Eke,*** Martindale J. was emphatic and observed that:

> *It is now settled law that once land is granted to a tenant in accordance with native law and custom whatever be the consideration, full rights of possession are conveyed to the grantee The only right remaining in the grantor is that of reversion, should the grantee deny title or abandon or attempt to alienate. The grantor cannot convey to strangers without the grantee's permission of any rights in respect of the land (Olawoye, 1974, p. 44).*

Thus, when a grant of tenancy under customary law is made, the tenant takes full rights of possession which in law is exclusive against all including the landlord. What therefore arises infavour of the landlord is a reversion which remains dormant until it crystalizes upon proof of bad behavior on the part of the tenant and that would mean the end of the tenancy. From the foregoing, it therefore seems judicially settled that the interest of the customary tenant is practically indefeasible and that declaration of forfeiture of his interest would be a rarity.

NATURE OF CUSTOMARY TENANCY UNDER THE LAND USE ACT

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

> *I must pause here to advise myself that an important process in the exercise of my interpretative function is to find out what the law was before the promulgation of the Act, what mischief the Act set out to combat and what result was intended by the Act. In other words, what was the relationship between the customary land owner and his customary tenant before the Act came into effect. What was the Act designed to correct in this respect? (Sholanke, 1992, p. 53).*

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

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

> *Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this Act, being used for agricultural purposes, continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate local government and the reference in this section to land being used for agricultural purposes includes land which is, in accordance with the customary law of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil (Mwalimu, 2005, p. 195).*

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

The crux of the issue here is who are the holders and the occupiers? Occupier was defined in Section 50 of the Land Use Act as *"any person lawfully is occupying land under customary law and a person using or occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-lessee or sub-under-lessee of a holder"* (Bamgbose, 2013, p. 72).While the Holder is the person entitled to the right of occupancy, the Supreme Court seemed to havelaid to rest the arguments on the proper relationship of the customary tenant and the overlord

in view of the impact of the Act in the case of ***GarubaAbioye and Others, vs. Sa'aduYakubu and Others.***

In this case, the main issue before the Supreme Court was whether having regard to the provisions of the Act, Customary overlords as against their customary tenants, were entitled to a declaration of right of occupancy or whether, put differently, the Act abolished the rights of customary owner's*vis-à-vis* the customary tenants. In fact, the brief facts of this case is that the customary tenants of the Plaintiffs after about 60 years on the land as tenants, put up a sign post on the land that suggests that the land now belongs to them absolutely. The plaintiffs sued for forfeiture of the customary tenancy and the tenants claimed the Act had converted their rights to that of customary right of occupancy under the Act, the High Court held *inter alia* that the Act did not convert the occupiers (tenants) into holders (owners) of the land. Upon appeal, the Court of Appeal held *inter alia,* that being occupiers of the land before the Land Use Act, the tenants are entitled to the customary right of occupancy, and that they now become the tenant of the Local Government (Ilori & Adebayo, 2019). The plaintiffs appealed to the Supreme Court. The Supreme Court held as follows:

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

(2) The Act did not expressly divest or extinguish the customary rights of the owners of agricultural land in non-urban areas, as it did in respect of undeveloped land in excess of half hectare in urban areas. In deciding therefore the grant of the tenant of the deemed customary right of occupancy tantamount to the extinction and extinguishment of the customary right of the owner, the right to tributes, forfeiture and reversion, it is necessary to examine the quantum and content of the deemed customary right of occupancy granted to the occupier in the light of the rules of interpretation of expropriatory statutes.

(3) Section 1 has not taken away the right of the customary owners of enjoyment of the tributes rather it left it untouched.

(4) The occupier is the customary tenant while holder is the customary owner.

(5) Where a certificate of occupancy is granted to a tenant who is subject to customary tenancy, the overlord retains his right as a reversionary in case the certificate of occupancy is revoked for any reason and the overlord may apply for a grant of certificate of occupancy to him.

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

> *A customary tenant has acquired the right to occupy and use land from its customary owner's on terms under customary law which includes the owner's right to tributes, the continued recognition by the customary tenant of the reversionary right of the owner and the right to forfeiture. Consequently in the absence of express provision in the Act divesting the customary owner of his rights or*

extinguishing the same, Section 36 ought to be strictly construed so as to preserve the rights of the customary owners (Alewo & Olong, 2012,. p. 54).

Thus, Bello CJN, who read the judgment of the Supreme Court, felt that the customary tenant should pay the customary tribute to the overlord. According to him: "In the absence of express provision in the Act divesting the customary owner of his rights or extinguishing the same, Section 36 ought to be strictly construed so as to preserve the customary owner" (Fekumo, 2002, p. 424).

CLASSIFICATION OF CUSTOMARY TENURE

There are two main classifications of customary tenancy: (1) the length of tenancy and (2) the consideration given.

Tenancy Duration-Based Classification

This class includes two major types; those granted for a specific or definite period of time, usually a farming season, and those granted for an indefinite or indeterminable period of time (Salawu, et al., 2022). The difference between the two types lies in the fact that, whereas a "term," more or less certain, is set upon the one granted for a specific period, beyond which it cannot extend, the one granted for a long, indefinite period has no specific period set upon it and goes on for as long as the parties wish, often forever; its maximum duration depends on what the parties intended the grant to be. It is important to note that if the overlord intends the grant of the land as a permanent residence for the grantee, then the grant is a perpetual one. But if it is understood between the parties that the grantee, although desiring to settle and work on the land, would eventually give up the use of the land and return to the *status quo ante*, that is, by going back to his home, then the tenancy has a limited or finite duration and may be determined by the grantor at any time by notice.

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

It has been suggested that a third type of tenancy based on duration also exists in the form of a periodic tenancy. Nwabueze (2002) has doubted the possibility of such an existence and rather states that the suggestion seems to be based upon confusion between "periodic tenancy," as strictly defined, and "a tenancy for a specific period,

renewable at the end of each completed period." A periodic tenancy implies a continuing grant, which means that even if the tenancy is for one year, month, or quarter, it continues indefinitely, without interruption, from year to year, or month to month, as the case may be, until determined by either party giving the other appropriate notice. In the case of a tenancy for a specific period, on the other hand, the tenancy comes to an end when its purpose has been accomplished, e.g., when the crops have been harvested, though the grantee is usually allowed the option of renewal during the next farming season. It is worth noting, however, that the distinction between periodic and specific tenancies appears subtle but is significant.

CLASSIFICATION ACCORDING TO THE CONSIDERATION GIVEN BY THE GRANTEE TO THE GRANTOR

The consideration given to the grantor or overlord is an important classification of the nature of the customary tenancy created. The consideration may be in the form of tribute (called ishakole in Yoruba customary law) or rent negotiated and agreed upon by the parties. The difference between tribute and rent consists in the fact that whereas rent, whether payable in cash or in kind, depends upon agreement between the parties, tribute, on the other hand, arises by operation of law independently of agreement, both the form of the tribute and its amount being determined by customary law. In ***Mgbelekeke Family v. Iyaji***, where a tenant under a grant made in return for tribute sublet the land at an economic rent to a European firm, a claim by the grantors to a share of the rent reserved by the lease was dismissed on the ground that there was no custom entitling them to such a share (Mbajekwe, 2006). It was further held that, by the customary law of the area where the land was situated (Onitsha), all the grantors were entitled to a customary payment in kola and/or drinks. and that the right to a share of the cash rent could only be asserted if the parties had reached an agreement to that effect.

It is important to note that tribute is determined by the customary law of the area and that of the family granting the tenancy. It may be in the form of kola nuts, drinks, or a part of the corn harvest from the land. Tribute differs also from rent both in its form and purpose; whilst tribute invariably consists of kola, drink, and/or farm produce and bears no economic relation to the value of the land, being intended simply as an acknowledgement of the grantor's title, rent, on the other hand, is paid in cash or in kind, more usually in cash, and provides not only an acknowledgement of the grantor's title but also an economic return on the land.

Upon the initial payment of tribute, the tenant is enjoined to bring an annual payment in the form of crop yields and part of the harvest from the land to show appreciation for the grant and as an acknowledgement of his status. Despite the token nature of the tribute, if the tenant fails to bring it, it does not necessarily lead to the termination of his right to the land. The tribute is converted to a monetary consideration in the case of rent, which was alleged to be foreign to a customary tenancy and that its incidence in customary tenancies today was a current innovation

due to an increase in civilization and economic activities. In this case, however, it bears relevance to the value of the land. While tribute may not be definite in nature, rent is more specific and precise in nature, and its payment has a greater obligatory force.

It may be argued that rent is foreign to customary law, but Nwabueze (2002) points out in his book that there has never been any custom prohibiting parties to a customary tenancy from adopting a form of payment different from the normal customary tributes, and the predominance of tribute in the olden days should not obscure this fact. Rent is generally recognised as a form of ishokole in modern terms. In the case of ***Ife Overlords v. Modakekes,*** the plaintiffs claimed from the defendants 6 cwt., 1 qr., or its equivalent in this case, of cocoa, calculated at £18 25.6d, representing the Ishakole due from the latter to the plaintiffs with respect to the year ended December 31, 1947 (Okuda, 2019). The plaintiffs alleged that under an agreement of 1886, the defendants, through their predecessors, undertook to pay yams and kola nuts as ishakole to the plaintiffs' predecessors until the cocoa to be grown on their allotments should begin to bear fruits, at which point each grantee of land must pay 1 cwt of cocoa or its money equivalent to the grantors.

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

Payment of rent or tribute is clear evidence of the existence of customary tenancy. The fact that tribute was not paid annually, however, does not prove that the relationship is not one of customary tenancy. In the case of ***Okuojevor v. Sagay*****,** the court observed as follows: "It has... been held by the courts in many cases that non-payment of rent or tribute by the occupier is not itself conclusive as to his ownership of land held under customary tenure" (Olawoye, 1971). Nowadays, rent is almost always paid in cash, for cash is the basis upon which most customary transactions are carried out. The court, no doubt, may order tribute to be paid in cases where it is found that the relationship is one of customary tenancy. Tribute may consist of a single payment in kola and drinks made at the time of the grant, or it may couple such an initial payment with an annual payment in kola, drinks, and/or farm produce. A payment of tribute may be appropriate in order to remove the bitter controversy.

On the payment of yearly rent and its significance on the nature of the tenure, Obaseki, J.S.C observed in the case of ***OjomorAjao, thus:*** "He did not get a freehold title but a customary title to remain on the land provided he pays his yearly rent…. The

grant has been loosely described as a 'lease' but it is not a lease in the strict legal sense of the word". And on the distinction between rent and tribute, His Lordship was very forthcoming, as he said that one of the obligations of a customary tenant is to pay his rents into which tributes formerly paid in olden times have been converted.

The above extracts from the Ojomo case have blurred the distinction between rent and tribute as a determinant of customary tenancy. It is submitted that the distinction is not necessary. Customary tenancy and a customary lease, mean one and the same thing, hence, we agree with Aniagola J.S.C that the practical effect is the same. The most relevant incident is the perpetuity of tenure and not whether the consideration is rent or tribute (Ahmadu, 2018). The foregoing opinion has support from the recent decision of the Supreme Court in the case of ***AuduMakinde V. DawudaAkinwale*** where it was held that there can be customary tenancy without the payment of tribute. As Uwaifo, J.S.C observed.

> *…. It is not unknown that there can be customary tenancy without the payment of tribute….. As long as the land owners accept or permit the use and occupation or possession of their land not upon absolute grant although without spelling out the terms of the tribute, not for a temporary use as licensees, a customary tenancy is liable to forfeiture when the tenant commits any offence that can lead to forfeiture or that is incompatible with the customary tenancy such as the denial of the over lordship of the land owners (Ilori & Adebayo, 2019, p. 94).*

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

THE CUSTOMARY TENANT AND THE TRANSFER OF LAND IN NIGERIA: THE JUDICIAL DILEMMA FOR THE CONVEYANCERS' TODAY

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

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

He proceeded to suggest a legislative reform in the nature of the moribund Epetedo Lands ordinance (Cap. 60) which would invest a customary tenant with absolute title

free from any customary incident (Omotola, 1975). This, it is submitted is exactly what the Land Use Act, 1978 has sought to achieve, hence, the submission that the above writer was prophetic.

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

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

The reason for the above-described elaborate procedure is to enable the tenant to set out in detail the facts upon which he relies, such as the circumstances leading to the breach. This would also provide the landlord with the opportunity to reply to the facts on which the tenant is relying. Issues as to whether to grant relief or not would therefore be joined, neither party would be taken by surprise, and the court, after hearing evidence from both sides, would be in a better position to come to a conclusion one way or the other. To the conveyancer, perhaps the most intriguing question today is the exact status of the customary tenant in relation to the land held by him under customary law. This question frequently raises the issue of the legality of a conveyance of land subject to customary tenancy.

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

In any case, it is safe to conclude that the Act has customary tenure in mind but fails to give it adequate recognition, and this omission, it is submitted, will provide one

of the causes of conflict or confusion for the conveyancers in Nigeria today. For instance, Section 24(a) of the Land Use Act 1978 preserves the customary law rules regarding devolution of property, and Section 25 of the same Act prohibits the partitioning of land expressly, exempting cases that are regulated by customary law. A disposition of family property must be in accordance with customary law, and this law requires that it enjoy the consent of the family as a whole, which has now been taken to mean the consent of the head of the family and the principal members. It should be noted that under customary law, a customary tenant holds his land in perpetuity, subject to good behavior. It appears that his position remains the same even if the land is in a non-urban area. Section 36 of the Land Use Act, which enables him to continue in possession, does not fix any duration for his possession, and it can therefore be implied that he is to hold in perpetuity, subject, of course, to the provisions contained in Section 28 regarding revocation. Section 36, subsection 2, enacts:

> *Any occupier or holder of such land whether under customary rights or otherwise however, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government … (Mabogunje, 2016, p. 628).*

Furthermore, Section 36 subsection 3 enacts:

> *On the production to the Local Government by the occupier of such land at his discretion of a sketch or diagram or other sufficient description of the land in question and on application thereof in the prescribed form, the Local Government shall if satisfied that the occupier or holder was entitled to the possession of such land whether under customary rights or otherwise, however and that the land was being used for agricultural purposes at the commencement of the Act, register the holder or occupier as one to whom a customary right of occupancy had been issued in respect of the land (Mwalimu, 2005, p. 195).*

Finally, Section 36 subsection 4 enacts:

> *Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of the Act as if the holder of the land was the holder of a customary right of occupancy issued by the Local Government…" (Home, 2011, p. 67).*

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

Thus, the Act clearly recognises the customary right of occupancy of the customary tenant who, at the commencement of the Act, has developed the land or is using it for agricultural purposes. Akorede et al (2017) has stated emphatically that "*the use of the word "holder" in several places under Section 36(4) of the Act does not in any way diminish the force of our above conclusion."* It is no more than an anomaly or misnomer in draftsmanship. Furthermore, the reference to "holder" in the later part of Section 36, subsection 3, is evidence of confused drafting. Obviously, it would be anomalous to register the holder or overlord upon an application and survey plan or sketch presented or submitted by the tenant—the occupier—who, at his own expense, produced the sketch, plan, or diagram of the land. This scenario is not practical or commonsensical.

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

> *It will be an injustice to the holder, who was the owner of the land before the commencement of the Act and who gave his erstwhile customary tenant a status and a right to which he was not entitled before the Act—a typical illustration of the appropriate metaphor to "rob Peter to pay Paul (*Alden Wily, 2018, p. 120).

However, the writer of this article submits that it is not a case of "robbing Peter to pay Paul," but a void declaration of national policy and objectives. In considering questions of entitlement to right of occupancy under the Act, the interests of the fee simple could, in certain circumstances, be subsumed under those with only possessory rights, such as customary tenants, as has been judicially settled.

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

The customary tenant pays tribute to his overlord; he may be required to pay rent to the governor or the local government. Again, his rights are affected, especially if the land is in an urban area; he may not be able to retain more than half a hectare unless the same is developed. Where his land is in non-urban areas, he enjoys greater freedom since there is no real limit to the amount of land he can hold under Section 36 of the Act. His possession, however, is no longer exclusive since it is now subject to the right of the governor in the case of land in urban areas, and where the land is in non-urban areas, the local government has exclusive possession of the land.

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

The problem appears to have resulted from the use of the word "person" in Section 34. This word is not defined in the Act, and the question is whether "person" as used there will include the overlord, the customary tenant, the family, or indeed the community as known to customary law. This point is also important in interpreting Section 36, where the same word is used. If the overlord, the customary tenant, the family, or the community come within the definition, as indeed they must if an absurd result is to be averted, then there is the further problem of the unit of land holding. For instance, when the Act provides for the maximum size of undeveloped land in urban areas, which can be held by any person within any state, there may be a problem deciding who is the "person" for this purpose. Is it the family in the case of family land or the individual member of the family who is referred to in the Act? Suppose that prior to the Act, a family was entitled under customary law to one thousand hectares of land in what has now become an urban area of a state. Do you cut this to half an hectare, or do you line up all the members of the family and give them each half an hectare? This difficulty will also arise in the case of land held by customary tenants and communities prior to the Act. Omotola has suggested that these problems may be resolved by the High Court on application to it under Section 39 or by the Customary Court or Area Court under Section 41 of the Land Use Act.

It is a well-established legal principle that a man who has no title cannot transfer it to another (nemo da quod non habet).It should be noted that while in Section 34 of the Act the word "vested" is used, Section 36(2) prefers the expression "being used." Under Section 34, therefore, the person who is to be entitled to hold a right of occupancy in the land as if the same is granted by the Governor appears to be the person in whom the land was "vested" immediately before the commencement of the Act. Under Section 36(2), however, the person who shall be entitled to possession of the land as if he held a customary right of occupancy granted by the local government shall be the person by whom the land was being used for agricultural purposes. This lack of clarity has given rise to some misconceptions that have resulted in feuds among people since the Act came into effect.

Again, the Act in Section 50 defines a customary right of occupation as "the right of a person or community to lawfully use or occupy land in accordance with customary law and includes a customary right of occupancy granted by local government under this Act." Yet Section 6 permits this right to be granted by the local government, having converted in Section 36 all rights held in land in non-urban areas to a customary right of occupancy. It is clearly inconsistent to say that a right is held and enjoyed in accordance with customary law yet permit such a right to be granted by the local government, which is a statutory body. The same view was held by Lord Lugard in his dual mandate, where he said that land in the Northern Region of Nigeria could not properly be described as "native lands." Where the Governor's consent was necessary to the validity of the native occupier's title, the Governor had the right to demand rent, to nullify all alienations without his approval, and above all, to revoke the right at will. The solution perhaps lies in removing the local government from the scheme and accepting that this type of right is to continue to be dealt with by the obas, obis, chiefs, and heads of family as before the Act. This is so because if a customary right of occupancy is one that is enjoyed in accordance with customary law, then the customary law rule may continue to apply to such a right, which means that the right cannot be validly transferred without the consent of the obas, obis, chiefs, and heads of family, as the case may be.

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

CONCLUSION

The Land Use Act and customary landowners share many similarities. They are complimentary to each other. Nothing has changed except that the Land Use Act strengthened the customary tenure for better. Delays in granting certificates of occupancy and consent are the most noticeable changes in the southern states.

Without a doubt, the Act is poorly written. The Act is silent on the question of consent with respect to the holder of a deemed statutory right of occupancy under Section 34. It took the intervention of the Supreme Court applying the policy and object of the Act to hold that Section 22 applies to holders of rights of occupancy expressly granted by the governor as well as to those deemed granted under the transition provision.

The same problem is caused by the indiscriminate use of the words "holder" and "occupier" in Sections 36(2) and (3) of the Act. This created a lot of problems in the

interpretation of that section in the case of ***Abioye v. Yakubu.*** We therefore share the view of Olatawura JSC (as he then was) when he said that: *"It is to be noted that opinions are still divided on the correct interpretation of Sections 36(2) and (3) of the Act. This is not unexpected... "To save money and time, the time has now come for a comprehensive review of the Act"* (Babalola & Hull, 2019, p. 42).

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

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

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

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