NON – NIGERIANS AND THE LAND USE ACT

It has been long the rule in Nigeria that non-Nigerians\(^1\) are restricted in their rights to acquire and alienate any interest in right in or over land in the country. In Southern Nigeria, the law has been that non-Nigerians cannot acquire any in interest or right in or over land from Natives or Nigerians unless the transaction under which the interest or right is acquired has been previously approved in writing, by an appropriate officer,\(^2\) usually the Governor\(^3\) of the State concerned or the Minister charged with responsibility for land matters.  \(^4\) Where any such interest or right had been lawfully acquired by a non-Nigerian, it shall not be lawful for him to transfer, alienate, demise or otherwise dispose of the interest or right to any other non-Nigerian or to be sold to any other non-Nigerian without the approval of the officer first had and received.  \(^5\) However, where the transfer, alienation, demise or disposition is in favour of a Nigerian or a Native of Nigeria, the non-Nigerian need not obtain any such approval or consent. The maximum interest a non-Nigerian could acquire in or over land was a leasehold interest.\(^6\) Non-compliance with the provisions of the law by a non-Nigerian

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\(^1\) The expression “non-Nigerians” is used advisedly to include persons (individuals and corporate) who are not citizens of Nigeria and persons who are not natives of Nigeria.


\(^3\) As in the case of Lagos Law.

\(^4\) As in the case of Eastern Law.

\(^5\) Section 1(1)(b) Lagos Law; Section 4(2) Eastern Law.

\(^6\) Regulation 4, Approval of Transactions Regulations; Section 2(1) Lagos Law; Regulation 4(a) The Acquisition of Lands by Aliens Regulations, L.S.L.N. 14 of 1971.
may render the whole transaction void and of no effect and may also attract criminal
proceedings.  

In Northern Nigeria, the Land Tenure Law which was enacted to define, regulate and
control the tenure of land within the boundaries of Northern Nigeria, contained
provisions intended to reserve the grant of customary rights of occupancy to
Natives, that is, persons whose fathers were members of tribes indigenous to
Northern Nigeria; and to prohibit alienation of rights of occupancy to non-Natives
without the consent of the Minister charged with responsibility for land matters first
had and obtained. It was provided that the grant of statutory right of occupancy to a
non-Native shall not exceed 1,200 acres if granted for agricultural purposes, or
12,500 acres if granted for grazing purposes. Any right of occupancy granted to a non-
Native could be revoked for good cause. What is “good cause” is defined by Section
34(2)(3) of the provisions of the Law and covenants created pursuant thereto, the
holder or occupier of the right of occupancy shall be entitled to compensation for the
value of the unexhausted improvements and inconvenience.

7 Section 1(2) Lagos Law and Section 3(3) Western Law; Section 4(3) Eastern Law.

8 Section 3(2) Lagos Law and Section 6 Eastern Law.


10 Section 2 Northern Law; Olawoye, Title to Land in Nigeria (Nigeria, 1974), p. 163.

11 Ibid.

12 Sections 27 and 28 Northern Law.

13 Section 6(2) Northern Law.

14 Section 34(1) Northern Law.
The brief account given above represents the law on the acquisition and alienation of interests or rights in or over land by non-Nigerians before the Land Use Act\textsuperscript{15} came into effect. With the promulgation of the Act in 1978, a number of changes were made particularly in Southern Nigeria. Some of these changes have, direct or indirect bearing on the interests or rights of non-Nigerians in or over land in the country. Until recently, however, when the Supreme Court of Nigeria decided the case of \textit{Ogunola} v. \textit{Eiyekole}, \textsuperscript{16} academic discussion on the implications of the Act as they affect non-Nigerians was scanty and it cannot be said that the lacunae has been filled. The \textit{Ogunola} case provides a basis for a useful discussion of a number of issues on the subject.

**EXPROPRIATION OF THE PROPERTY OF NON-NIGERIANS**

It is clear that Section 1 of the Act must be the starting point in considering the effect of the Act on the interests or rights in or over land of non-Nigerians lawfully acquired prior to the Act. The section states:

“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 the 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”\textsuperscript{17}

\textsuperscript{15} Section 35 Northern Law.

\textsuperscript{16} Act No. 6 of 29 March 1978; 1978 J.A.L. Vol. 22, No. 2, 137; Cap. 202 1990 Laws of Nigeria (henceforth referred to in this article as “the Act”).

\textsuperscript{17} (1990) 4 N.W.L.R. (Part 146), 632 S.C.
This provision gives an impression that the benefits accruable under the Act are reserved solely for Nigerians. Indeed the preamble to the Act meant perhaps to explain the purport of the Act supports this interpretation. There is thus a ground to suppose that the Act abolished existing interests or rights of non-Nigerians in or over land without compensation and that non-Nigerians cannot benefit from the transitional provisions in the Act intended to preserve existing interest or rights in land before the Act.

The issue is further complicated by the fact that there is no rule at international law which requires in all times and in all places that all property owned by aliens shall not pass from private to public ownership except on payment of compensation. The disagreement of States on this question was clearly demonstrated in an exchange of notes between the United States Secretary of State and the Mexican Minister of Foreign Affairs in 1938. While the United States felt that a foreign government cannot take the property of foreigners in disregard of the rule of compensation under international law and that no government can unilaterally and through its municipal law nullify this universally accepted principle of the international law based as it is on reason, equity and justice; Mexico maintained that there is in international law no rule universally accepted in theory, nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for

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expropriation of general and impersonal character meant to redistribute the land. It was argued that a foreigner who voluntarily moves to a country, which is not, his own in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. This, it was said, is the principle of equality between national and foreigners. In reply, United States thought it astonishing that the doctrine of equality of treatment, like that of just compensation, which appears in many Constitutions, Bills of Rights and documents of international validity and which is treasured and cherished for the protection of personal right and liberty, is the same doctrine being invoked by Mexico not in the protection of personal rights and liberties, but as a chief ground of depriving and stripping individuals of their conceded rights.

It goes without saying that the notes written by the United State and Mexico described above could easily have been written today as they were written in 1938. So the question remains as to whether Section 1 of the Act effectively extinguished existing interests or right of non-Nigerians in or over land before the Act. It may be said though that this issue turns not upon international law per se but upon the interpretation of Section 1 of the Act. But how would an international court go about interpreting the section, which is a municipal law when called upon to do so? Will the international court be bound by the decisions of Nigerian courts on the construction of the section? In the Brazilian Loans Case, France v. Brazil, the Permanent Court of International Justice expressed the opinion that once a court arrives at a conclusion that is necessary to apply the municipal law of a particular country, the court must seek to apply it as it would be applied in that country. “It would not be applying the municipal law of a country if it were to apply it in a manner different from that in

21 (1929) P.C.I.J. Reprts, Series A. No. 21, 124.
which that law would be applied in the country in which it is in force.”

Consequently, the court in applying municipal law must pay utmost regard to the decisions of the municipal courts of the country in question. The issue therefore comes to this: What is the opinion of Nigerian courts on the construction of Section 1 of the Act?

Unfortunately, there is a wide divergence of judicial opinion on the scope and meaning of Section 1 of the Act. The seed of discord would appear to have been planted in the case of *Nkwocha v. The Governor of Anambra*,\(^\text{23}\) where Eso, J.S.C. said:

> “the tenor of the Act as a single piece of legislation, is the nationalisation of land in the country by the vesting of its ownership in the State leaving the private individual with an interest in land which is a mere right of occupancy…”\(^\text{24}\)

Many critics have doubted the wisdom of this interpretation.\(^\text{25}\) Nonetheless, the dictum would appear to have influenced the Court of Appeal in *Kasali v. Lawal*.\(^\text{26}\) There, the plaintiffs/respondents who were customary overlords sued the defendants/appellants who were their customary tenants claiming a declaration of title

\(\text{22}\) *Ibid*.

\(\text{23}\) *(1984)* 6 S.C. 362.

\(\text{24}\) *Ibid*, at 404.


\(\text{26}\) *(1986)* 3 N.W.L.R. (Part 28), 305 C.A.
to a piece of land, the subject of tenancy, and forfeiture of the interest of the defendants/appellants. The plaintiffs/respondents rested their claim for forfeiture and injunction on the serious misbehaviour of the defendants/appellants. The trial court entered judgment in favour of the plaintiffs/respondents and granted all the reliefs sought. His judgment was unanimously upheld by the Court of Appeal. Dealing with the applicability of Section 36(2) of the Act on the customary tenancy in the instant case, Ogundare, J.C.A. who read the lead judgment remarked:

“As the 1st and 2nd defendants have alienated their family’s interest in part of the land in dispute to the 3rd defendant before 1978, howbeit wrongfully, they are not protected by Section 36(2) of the Land Use Act. Similarly since the sale to the 3rd defendant was wrongful he derived no title to any part of the land in dispute and is therefore not protected by the Act either.”

Having held that the Act was inapplicable given the particular circumstances of the case, it is starting for his Lordship to have added:

“Be that as it may, having regard to the general tenor of the Land Use Act, it is my view, and I so hold that the notion and incidents of customary tenancy in relation to agricultural lands not in an urban area…have been swept away by the combined effect of sections 1, 36 and 37 of the Act…”

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27 (1986) 3 N.W.L.R. (Part 28), 395 at 321 C.A.

28 Ibid. Emphasis mine.
What then, one may ask, were the precise grounds upon which the case was decided? The Court of Appeal granted the plaintiffs/respondents, inter-alia, a declaration that they were entitled to a customary right of occupancy over the piece of land in dispute. This looks like a decision in favour of the customary overlord. Yet, Ogundare, J.C.A. on behalf of the court made a sweeping statement to the effect that the court can no longer grant forfeiture of holdings over land “except as provided for under the Land Use Act dealing with revocation of rights of occupancy”\(^\text{29}\) And in apparent contradiction, the court granted an injunction in favour of the plaintiffs/respondents in these terms:

“The plaintiffs are hereby granted...(2) an injunction restraining the defendants, their servants or agents from alienating or constructing building or dealing with the said land in anyway”\(^\text{30}\)

It is submitted with respect, that the pronouncement of Ogundare, J.C.A. on the effect of Section 1 of the Act was unnecessary in the particular circumstances of the case and cannot be the law. However, in the previous cases of Akinloye v. Ogungbe\(^\text{31}\), Akinloye v. Oyejide\(^\text{32}\) and Ogunsusi v. Durodola\(^\text{33}\), there were statements, which exhibit a similar pattern. In Akinloye v. Ogungbe, where the issue was whether the court can legally forfeit the interest of a customary tenant who was in breach of his customary tenancy created under native law and custom, having regard to the

\(^{29}\) at 322.

\(^{30}\) Ibid. Emphasis mine.

\(^{31}\) (1979) 2 L.R.N. 282.

\(^{32}\) (Unreported) Suit No. HCJ/9A/81 of 17/7/81.

\(^{33}\) (Unreported) Suit No. HOD/8A/82 of 10/1/83.
provisions of the Act, Sijuwade, J. expressed the opinion that the court can no longer legally do so because ownership of such land by virtue of Section 1 of the Act has been vested in the Government of the State, whose Local Government is authorised to issue rights of occupancy.\(^{34}\) In the opinion of the learned judge, it is that authority, rather than the original customary overlords, who can properly and legally complain of a breach that would warrant forfeiture.\(^{35}\) In *Akinloye v. Oyejide, Ogundare*, J. sitting as an appellate judge, reversed the decision of the trial court that the Act did not cancel any previous agreements voluntarily entered into by customary overlords and customary tenants before the enactment of the Act, and held that the use of the word “vested” in Section 1 of the Act has the effect of transferring to the Governor of a State the ownership of all land in that State and that the effect would be to deprive individuals of their vested rights in land without compensation.\(^{36}\) In *Ogunsusi v. Durodola*, Ogunleye, J. held that the Act has effectively eroded the right of customary owners to *Isakole*.\(^{37}\)

It is a little comforting that there are dicta in other cases, which do not support the interpretation that Section 1 of the Act is, expropriatory in character. In *Salami v. Oke*,\(^{38}\) for example, where a plaintiff who was a customary overlord succeeded in his claim for a declaration of title to a piece of land, the subject matter of a customary

\(^{34}\) (1983) C.L.U.A. 143.

\(^{35}\) Ibid.


\(^{37}\) *Isakole* has been defined as “money paid to a land owner by a farmer who was granted permission by the land owner to cultivate food or economic crops on the land for his consumption or benefit”, per Adeloye, J. in *Owoeye v. Adedara*, (1983) C.L.U.A. 143 at 144.

\(^{38}\) (1987) 4 N.W.L.R. (Part 63), 1 S.C.
tenancy, Obaseki, J.S.C. opined that the Act was not intended to transfer possession of a land from an owner to a non-owner or tenant\(^{39}\) and that “it is a misstatement of the law to say that the Land Use Act abolished the remedies or reliefs of forfeiture and injunction.”\(^{40}\) His Lordship declared that under the Act, forfeiture is available whenever a customary tenant disputes the title of his customary overlord or alienates without the customary overlord’s consent first had and obtained, the whole or part of the piece of land let out to him by the customary overlord.\(^{41}\) In Onwuka v. Ediala,\(^{42}\) a case concerning a claim for declaration of title to a piece of land brought by some customary overlords against their customary tenants, Wali, J.S.C. delivered a lead judgment in which he interpreted Section 1 of the Act as taking away freehold title in individuals or communities but not the customary right of use and control of the land.\(^{43}\) In his Lordship’s judgment, a customary tenant remains a customary tenant in spite of the provisions of the Act and is subject to the condition attached to the customary tenancy.\(^{44}\)

\(^{39}\) at 13.

\(^{40}\) at 12.

\(^{41}\) Ibid.

\(^{42}\) (1989) 1 N.W.L.R. (Part 96), 182 S.C.

\(^{43}\) See also Oshio, (1990) JUS Vol. 1 No. 6, p. 93.

\(^{44}\) (1990) 1 N.W.L.R. (Part 96), 182 at 199 S.C.
Two other cases came up in 1990. They were *Ogunola v. Eiyekole* \(^{45}\) and *Ogunleye v. Oni*. \(^{46}\) In the *Ogunola* case, the Supreme Court, per Olatawura, J.S.C. expressed the view that the most pervasive effect of the Act is the diminution of the plenitude of the powers of the holders of land but that the character in which they hold remain substantially the same. \(^{47}\) In the *Ogunleye* case, Belgore, J.S.C. declared that the Act “is not a magic wand it is being portrayed to be or a destructive monster that at once swallowed all rights to land.” \(^{48}\) Although these cases may be viewed as laying down some rules on the construction of Section 1 of the Act, they are definitely inconclusive; for most of the statements were made obiter.

Happily, in 1991, a strong panel of the Supreme Court had an occasion to make a declaration on the meaning and effect of the controversial section of the Act. This was in *Abioye v. Yakubu*. \(^{49}\) One of the issues for determination in the case was whether Section 1 of the Act read with other sections, abolished existing rights of customary owners vis-à-vis customary tenants of land for agricultural purposes. Having regard to the depth of discussions in this case, it would appear that the issue might have been finally laid to rest. \(^{50}\) For the first time in the holding, that the Act is not expropriatory

\(^{45}\) *supra*.

\(^{46}\) (1990) 4 N.W.L.R. (Part 135), 745 S.C.

\(^{47}\) (1990) 4 N.W.L.R. (Part 146), 632 at 648 S.C.

\(^{48}\) (1990) 4 N.W.L.R. (Part 135), 745 at 772 S.C.

\(^{49}\) (1991) 5 N.W.L.R. (Part 190), 130 S.C.

\(^{50}\) In view of the interesting question of law raised in the case, the Supreme Court formally invited all the Attorneys General in the Federation and five Senior Advocates of Nigeria to appear before it as friends of the court. Twenty four of those invited filed briefs of argument and appeared in persons through their officers and addressed the court on the issue.
in character. Each of the seven Justices who heard the case expressed an opinion consistent with this position. Kawu, J.S.C., for example, held that there is nothing in any of the provisions of the Act that remotely suggests any alteration in the rights of customary landlords and their tenants. 51 Similarly, Obaseki, J.S.C. was certain that Section 1 of the Act did not take away the rights of customary owners to enjoyment of tributes. 52 And at page 255 of the report, Olatawura, J.S.C. left no one in doubt when he said:

“To say that the Land Use Act abolished the contractual relationship between customary owners and customary tenants is to say that with that legislation, the customary owner is deprived of his property without hearing. It is against the tenets of natural justice. The fundamental right to own property cannot be supplanted without adequate provision for compensation. I cannot see any section of the Act, which deprives the customary owners of their rights to tributes, or Ishakole. We cannot and must not create obstacles not intended by the Act. It will be a judicial obstacle.”

It must be said immediately that the interpretation placed on the section by the Supreme Court in the Abioye case is reasonable, logical and should be preferred. As pointed out by the court, if the legislature intended to nationalise all existing interests in land before the Act came into effect, it would have done so in specific, unambiguous terms. Having failed to do so, it must be presumed that the legislature did not intend to drastically alter existing interests in land. This presumption is one that cannot be rebutted except by plain words. The provisions of Section 1 of the Act are not plain.

51 (1991) 5 N.W.L.R. (Part 190), 130 at 240 S.C.

52 Ibid, at 217 and 225.
Besides, it is an accepted principle of interpretation of statutes in this country, that statutes which encroach on the personal or proprietary rights of individuals should attract strict construction by the courts.\textsuperscript{53} Thus, in \textit{Bello v. The Diocesan Synod of Lagos},\textsuperscript{54} the Supreme Court, per Coker, J.S.C. (as he was then), held:

“The principle on which the courts acted from time immemorial is to construe \textit{fortissimo contra proferentes} any provision of the law which gives them extraordinary powers of compulsory acquisition of the properties of citizens.” \textsuperscript{55}

Also in \textit{Peenok Investments Ltd. v. Hotel Presidential},\textsuperscript{56} the Supreme Court held that it is an accepted canon of interpretation that any law which seeks to deprive one of his vested proprietary rights must be construed strictly against the law maker.

Therefore, the Supreme Court in the \textit{Abioye} case was in order when it held that since there was no express provision in clear and unambiguous terms within the act expropriating the property of any person, the Act should be construed in favour of preserving existing interests rather than extinguishing them.

Based on the decision of the Supreme Court in the \textit{Abioye} case, and others along that line, it is submitted that existing interest or rights of non-Nigerians in or over land in any part of the country survived the Act. This means that a non-Nigerian who could only be a lessee or customary tenant before the coming into force of the Act will


\textsuperscript{54} (1973) 1 All N.L.R. (Part 1), 247.

\textsuperscript{55} \textit{ibid}, at 268.

remain a lessee or customary tenant, as the case may be, if the lease had not expired or if he had not otherwise forfeited his customary tenancy.

EFFECTS OF THE TRANSITIONAL PROVISIONS

A somewhat greater difficulty arises in respect of the effects of the transitional provisions of the Act on existing interests or rights of non-Nigerians in or over land in this country. On the premise that Section 1 of the Act did not abolish these interests or rights, the question arises as to whether a non-Nigerian can be a holder of aright of occupancy under Section 34 and 36 of the Act. This issue is crucial because although the Act did not abolish existing interests or rights in or over land, it did take away the radical title in land by vesting it in the respective Governors of each State; such that what an individual can now hold under the Act is a right of occupancy, statutory or customary. The implication of course, is that existing interests or rights have been converted to rights of occupancy. So, as between a lessor or customary overlord and a non-Nigerian lessee or a customary tenant, there is the puzzle of who is entitled to the right of occupancy deemed granted by the Act.

In order to effectively tackle this issue, it is perhaps imperative to set out in full the relevant portions of Section 34 and 36 of the Act:

“34(2) Where the land is developed the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was a holder of a statutory right of occupancy issued by the Governor under this Act.”

“36(2) Any occupier or holder of such land, whether under customary rights or otherwise however, shall if that land was on the commencement of this Act
being used for agricultural purposes, continue to be entitled to possession of the land for use of agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government…”

On a cursory reading of Section 34(2) of the Act above, it would seem that if a developed land in an urban area was vested in a non-Nigerian immediately before the commencement of the Act, he shall continue to hold the land as if he is a holder of a statutory right of occupancy. That is the natural meaning of the sub-section. However, the crux of the matter is really whether a non-Nigerian lessee is the person in whom the land was vested immediately before the commencement of the Act. In Ladejobi v. Shodipo, where an action was brought by a plaintiff lessor against a defendant for a declaration of title to a piece of land, it was contended on behalf of the defendant that the plaintiff as a lessor of the land in dispute had no interest in the land in dispute to protect because “on the coming into force of the Land Use Act 1978 ownership of the said land was vested in the Military Governor in trust for the people

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58 “Developed Land” means land where there exists any physical improvement in the nature of road development services, water, electricity, drainage, building, structure for industrial, agricultural or residential purposes: Section 5(1)(1) of the Act. And see Obikoya v. G.I.S. (1987) 1 N.W.L.R. (Part 50), 385 C.A.

59 “urban land” means such area of the State as may be designated as such by the Governor pursuant to Section 3 of the Act: Section 5(1)(1) of the Act.

60 “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 validity 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 a mortgagee, sub-lessee or sub-underlessee: Section 5(1)(1) of the Act. And see Onwuka v. Ediala, supra; and Abioye v. Yakubu, supra.

61 “Statutory right of occupancy” means a right of occupancy granted by the Governor under the Act: Section 5(1)(1) of the Act.

62 (1989) 1 N.W.L.R. (Part 99), 596 C.A.
and that by that virtue of the lease and possession, the sad African Company of Nigeria Ltd. is entitled to a right of occupancy.” It was argued further that whatever right to a reversion the plaintiff might have had, had been extinguished by the Act. the Court of Appeal rejected these submissions and held that the Act is not intended to deprive a lessor of his reversionary interest in a piece of land. Citing Salami v. Oke63 as authority, it held that the Act was not intended to transfer possession of land from an owner to his tenant. Accordingly, the court held that the plaintiff lessor was entitled to a declaration of a statutory right of occupancy.

Regrettably, the court did not refer to any section of the Act in support of its stance that a lessor is entitled to a statutory right of occupancy in respect of a developed land situate in an urban area. Nevertheless, the point may be taken that the case may have been decided on the basis of Section 34(2) of the Act. That being the case, it is submitted that the decision is likely to command general acceptance.64 The argument that a lessor has no interest to protect in his land because Section 1 of the Act effectively abolished his reversionary interest in the property cannot be sustained. As we have seen, the Act did not abolish existing interests of either of a lessor or a lessee of land. The design of the Act is such that Section 1 thereof is made subject to other provisions of the Act. This is a self-limiting clause. By this clause, it would seem that the right of occupancy deemed granted by a Governor by Section 34(2) of the Act is duly protected. So, if a lessor’s reversionary interest in a property subsists, it must mean that he has an interest to protect. That interest, it is submitted, will be a statutory right of occupancy if the land is developed and is in an urban area. This broadside derives not only from Section 34(2) of the Act, but also Section 34(4), which clearly

63 supra.

implies that a lessor continues to be a lessor and a lessee remains as such under the Act. However, if a lessor applies for a Certificate of Occupancy in evidence of his statutory right of occupancy, as he is entitled to do, it is incumbent on the Governor to make the Certificate of Occupancy subject to any subsisting leasehold interests. This is the saving grace of a non-Nigerian lessee under the Act. Thus Section 34(2) of the Act does not change his position. While he is not entitled to a statutory right of occupancy under the subsection, the terms of his lease remain valid. It is believed that this is a tidy arrangement.

Unlike Section 34(2) discussed above, Section 36(2) has generated heated debate over the years. While it seems clear that the words “holder” and “occupier” mentioned in the subsection refer to a customary overlord and a customary tenant respectively, yet it has been very difficult task ascertaining who between a customary overlord and a customary tenant is entitled to the customary right of occupancy impliedly granted by the subsection. Indeed, on the applicability of the Act to non-Nigerians, the point has been made that non-Nigerians cannot be beneficiaries under the Act. This was in the 1990 case of Ogunola v. Fivekole. By a majority of four to one, the Supreme Court construed the provisions of Sections 1 and 36 of the Act as excluding non-Nigerians

65 Sections 9 and 34(3) of the Act.

66 Section 34(4) of the Act.


from enjoying the benefits derivable from the Act. It was held that the Act applies to
and is limited to the benefits of Nigerians and that by virtue of Section 1 of the Act,
non-Nigerians cannot apply for statutory or customary rights of occupancy, as the
words “any person” in Section 36(1) of the Act do not include aliens but to mean “any
Nigerian.” 70

The Ogunsola case arose from a claim filed at the High Court of Ogun State for,
inter-alia, a declaration that the plaintiffs are entitled to a customary right of
occupancy in respect of a defined piece of land in a non-urban area. The trial court
found out that the plaintiffs were the customary overlords of the defendants who were
aliens being citizens of the Republic of Dahomey; and that the defendants had been
guilty of gross misconduct by denying the title of the plaintiffs and refusing to pay
tribute or rent to them. On this score, the Supreme Court agreed with both the trial
court and the Court of Appeal that under customary law, the fact that a tenant pays
rent is no licence for misconduct or a licence to deny the overlord’s title. 71 The
Supreme Court went a little further than the lower courts to hold that the defendants,
because of their gross misbehaviour, had forfeited their customary tenancy and effect
of their behaviour is not altered by the provisions of the Act for the Act has not done
away with all incidents of customary land tenure particularly the incidence of
forfeiture. 72

69 supra.

70 (1990) 4 N.W.L.R. (Part 146), 632 at 647 S.C.

71 Ibid. at 647.

72 Both the trial court and the Court of Appeal held that forfeiture was no longer available because of the Act.
So, it seems that the statements of the court regarding the applicability of the Act to non-Nigerians were made *obiter*. Indeed, the ultimate decision in the case is not a reflection of the stance of the court on the issue. Nonetheless, it may be queried whether these statements can be supported on the ground stated by the court or even on any ground.

The first issue to be examined here is the logic of the claim made by the court that Section 1 of the Act limits the benefits of the Act to Nigerians. At first blush, it might seem that Section 1 of the Act does not have that effect since the section specifically states that the Governor of a State shall hold all land within the territory of his State “for the use and common benefit of all Nigerians”. In spite of this apparent grammatical meaning of the section, it does not seem that the section was intended to have that effect. The opening words of the section indicate that the provisions of the section are not to be interpreted in isolation. They are to be construed with reference to the context of other provisions of the Act so as to make a consistent reading of the whole Act. Thus it is illogical to hold that the benefits of the Act are reversed solely for Nigerians to the exclusions of non-Nigerians simply because the Act speaks of “all Nigerians.”

Again, it is evident from the provisions of Section 46(1) of the Act that the application of the Act is not limited to Nigerians as claimed by the court. Section 46(1) of the Act empowers the National Council of States to make regulations for the purpose of carrying the Act into effect and particularly with regard to the transfer by assignment or otherwise howsoever of any rights of occupancy, whether statutory or customary,

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73 Interestingly, the lead judgment contains a statement to the effect that a foreigner who has validly owned or occupied any land before the coming into force of the Act is deemed to be an occupier under the Act. See p. 547.

including the conditions applicable to the transfer of such to persons who are not Nigerians. Regrettably, the court overlooked this subsection.

As regards the point made by the court that non-Nigerians cannot apply for customary rights of occupancy under Section 36 of the Act because the words “any person” refer to and mean “any Nigerian”, it is very doubtful whether this is the law. The words ‘any person” are not defined in the Act; but it seems to us clear that they are intended to cover individuals or any body of person corporate or unincorporated, Nigerian or foreign. We believe that the court took a somewhat simplistic view of the purpose of the section.

Section 1 or 36 of the Act contains nothing to prevent a non-Nigerian from applying for a Certificate of Occupancy in evidence of his interest or right of occupancy in or over land. In fact, the language of the provisions of Section 36 of the Act is such that a non-Nigerian is automatically entitled to a customary right of occupancy provided he can show that he is a holder or an occupier within the meaning of Section 50 of the Act and provided that the land in issue was being used for agricultural purposes before the commencement of the Act. in such a case, it is specifically provided that it shall be lawful for the Governor to issue a Certificate of Occupancy under his hand in evidence of the right of the applicant. The expressions “any person”, “any holder” and “any occupier” which form the bedrock of Section 36 of the Act cannot be “construed as to limit their application only to Nigerians.”

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75 Section 18(1) of the interpretation Act, cap. 192 L.F.N. 1990.

76 Adebiyi v. Williams, (1989) 1 N.W.L.R. (Part 99), 611 C.A.

77 Section 9 of the Act.

78 per Agbaje, J.S.C., (1990) 4 N.W.L.R. (Part 146), 632 at 655 S.C.
The question however remains as to whether a non-Nigerian customary tenant is entitled to an implied customary right of occupancy under Section 36(2) of the Act in spite of the existing reversionary interest of his customary overlord. A similar issue came up for determination in the Abioye case. Whereas the court was unanimous in its view that the Act did not abolish customary tenancy, it disagreed on the question of who is entitled to the customary right of occupancy deemed granted under Section 36(2) of the Act. The language of their Lordships is open to two interpretations. First, there are certain statements, which suggest that a customary tenant, rather than a customary overlord, is the person entitled to the right. Bello, C.J.N. for example, adopted this reasoning when he said:

“I do not need to invoke any canon of interpretation to hold that a customary tenant was deemed to have been granted a customary right of occupancy over the land subject to the tenancy while the customary owner was also deemed to have been granted a customary right of occupancy in respect of all land which was not subject to any customary tenancy at the commencement of the Act.”79

The second possible interpretation of the decision as it relates to Section 36(2) of the Act is that a customary overlord, rather than a customary tenant, is the person entitled to the implied right. This is apparent from the judgments of Obaseki, Karibi-Whyte and Olatawura, J.S.C. at page 225 of the report, Obaseki, J.S.C. puts the state of the law succinctly thus:

“Where there is a holder, the tenant although an occupier, is not entitled to a customary right of occupancy.”

Karibi-Whyte, J.S.C., too after showing that the words “holder” and “occupier” are the central concepts on which Section 36(2) operates and holding that a customary overlord qualifies as a holder while a customary tenant is an occupier, said:

“The essential distinction, which could be made between a “holder” and a “occupier” as defined, is that whereas the former is a person entitled in law to a right of occupancy, the latter is not a person so entitled. The legal effect of the distinction is that an “occupier” will necessarily hold of a “holder” who will at the commencement of the Land Use Act be entitled to a customary right of occupancy. Hence the fact that the “occupier” is in possession and the “holder” is not does not alter the true legal status of the parties. It is in this regard that the provisions of Section 36 equating the “occupier” with the “holder” with respect to the grant of Certificate of Occupancy seems to me a misunderstanding of the status of the two persons and the very purpose of the Land Use Act.”

Olatawura, J.S.C. made the same point in the precise terms as follows:

“I will say positively that the plaintiffs who are holders have the rights and are entitled to the right of occupancy.”

It is to be noted that their lordships Kawu and Belgore, JJ.S.C, refrained from making any positive statements on this issue.

It is suggested that there are many reasons why the interpretation proffered by Obaseki, Karibi-Whyte, and Olatawura, JJ.S.C. should be preferred. In the first place,

80 Ibid. at 234.

81 Ibid. at 255.
apart from the fact that the interpretation may constitute the majority decision on this issue, \(^{82}\) it is reasonable construction of Section 36(2) of the Act, which has no precise legal meaning. In according preference for a construction that favours a customary tenant, Bello, C.J.N., relied heavily on the literal meaning of the provisions of Section 36(2). However, even if it is conceded that the words of the subsection are clear and unambiguous, “there is no doubt that to give effect to them will result in manifest absurdity.”\(^{83}\) This is what Nigerian courts should consciously avoid.

Secondly, Bello, C.J.N., endorsed the view that a customary tenant is entitled to a customary right of occupancy under the Act because he felt that the tenant was in possession of the land at the material time. But underlying the term “possession” used in Section 36(2) of the Act in the context of the meaning of “holder”, “occupier”, customary overlord and customary tenant, there lurked a dangerous misunderstanding. Was it possession *de jure*? or possession *de facto*? In other word, was it possession in point of law? or possession in point of face? The answer to this question is crucial because if it was possession in law, the customary overlord was the person in possession; whereas if it was possession in fact, the customary tenant was the person in possession. Unfortunately, Bello, C.J.N. did not address this issue in his lead judgment. However, their Lordships, Obaseki, Karibi-Whyte, and Nnaemeka-agu dealt with it at length. Both Obaseki and Karibi-Whyte, J.J.S.C. expressed the opinion that the possession required under Section 36(2) of the Act is possession in law. Nnaemeka-Agu, J.S.C. preferred *de facto* possession.

It is submitted that there is much to be said in favour of the opinion expressed by Obaseki and Karibi-Whyte, J.J.S.C. a customary overlord who is entitled to receipt of

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\(^{82}\) Of the seven justices that decided the case, three were in favour, two were against, while two did not comment on the issue.

\(^{83}\) (1991) 5 N.W.L.R. (Part 190), 130 at 234 S.C.
rent or tribute from his customary tenant is in possession. A customary tenant cannot be in possession if his customary overlord is out of possession. The possession a customary tenant enjoys as a matter of law is that of his customary overlord. It is our view that the Act did not alter this state of affairs.

Thirdly, if a customary tenant is held entitled to the customary right of occupancy subject to the tenancy, as proposed by Bello, C.J.N. and Nnaemeka-Agu, J.S.C., it will mean that a customary tenant will be answerable to both his customary overlord and the appropriate Local Government or Governor. The immediate effect of this is that the customary tenant may then have to pay rent to both his customary overlord and the Governor. This is possible because if the customary tenant takes a Certificate of Occupancy from the Governor as he can do under Section 9(1)(b) of the Act (if he is the person entitled to the implied customary right of occupancy), then the customary tenant will automatically bind himself to pay to the Governor the rent fixed by the Governor or rent which may be agreed upon. On the other hand, if a customary overlord is held entitled to the customary right of occupancy subject to the tenancy, the customary tenant will hold of his customary overlord and therefore answerable only to him. There will be no contractual or even statutory nexus between the customary tenant and the Governor in this respect and thus he does not pay any rent to the Governor. He continues to pay rent or tribute to his customary overlord who in turn pays rent to the Governor, where appropriate. In this manner, the additional financial obligation on the customary tenant envisaged by the proposal of Bello, C.J.N. and Nnaemeka-Agu, J.S.C., will be removed. This is how it should be.

Finally, the interpretation favoured in this article is supported by the significant fact that the Supreme Court in the Abioye case unanimously entered judgment in favour of
the plaintiffs/appellants who were the customary overlords. The effect of this decision is that the customary overlords’ claim for declaration of title to the land in dispute succeeds. By virtue of Section 40 of the Act,\(^8^5\) this declaration must mean a declaration that the customary overlords are entitled to a customary right of occupancy in respect of the land in dispute. Thus the victory, it seems, was for the customary overlords.

In summary therefore, we see that the Abioye decision can be construed as protecting a non-Nigerian customary tenant who is an occupier; while preserving the right of his customary overlord to the customary incidents of the customary tenancy especially the payment of rent or tribute and the right to a reversion. The decision is also authority for the view that the customary overlord is the holder of the customary right of occupancy deemed granted under Section 36(2) of the Act.

ACQUISITION OF PROPERTY BY NON-NIGERIAN

In discussing the right of a non-Nigerian to acquire interest in right in or over land under the Act, one must again refer to the provisions of Sections 1 of the Act. It is there provided that all land vested in the Governor of a State shall be held in tryst and administered for the use and common benefit of all Nigerians. As indicated previously, the emphasis on “all Nigerians” can probably be read to mean that non-Nigerians cannot be beneficiaries of the trust created by the Act. The implication of this is that a non-Nigerian may not be able to acquire any interest or right in or over land under the Act. We will again stress here that this interpretation cannot possibly be the intention of the lawmaker. The provisions of Section 1 of the Act are not only subject to other provisions in the Act; the bare trust created by the section must be executed by the Governor “in accordance with the provisions of the Act.” One of such

\(^8^5\) Ikuomola v. Oniwaya (1990) 4 N.W.L.R. (Part 146), 617 S.C.
provisions is Section 5(1)(a) which empowers the Governor of a State to grant statutory rights of occupancy to any person\textsuperscript{86} for all purposes whether or not the land is in urban area. This provision is wide enough to enable a Governor make a grant of a statutory right of occupancy to a non-Nigerian and it would seem that a Nigerian court cannot question the exercise of a Governor’s power in this regard.\textsuperscript{87}

Along the same lines, it is lawful for Local Government in respect of land not in an urban area to grant customary rights of occupancy to a non-Nigerian or a foreign organisation for agricultural, residential or grazing and other purposes.\textsuperscript{88} The reason is simple. It is that, unlike Section 1 of the Act, which appears discriminatory in favour of Nigerians, Section 6 of the Act is non-discriminatory. It is thus clear that any real or apparent conflict between Sections 1 and 6 must be resolved in favour of Section 6. However, it is enacted that any customary right of occupancy granted under Section 6 of the Act shall not exceed 500 hectares if granted for agricultural purposes or 5,000 hectares if granted for grazing purposes except with the consent of the Governor of the State in which the Local Government is situate.\textsuperscript{89}

In regards the length of term of a statutory right of occupancy, which may be granted to a non-Nigerian under Section 5(1)(a) of the Act, it is provided that the right of occupancy shall be for a definite term and may be granted subject to the terms of any

\textsuperscript{86} Emphasis mine.


\textsuperscript{88} Section 6 of the Act.

\textsuperscript{89} Section 6(2) of the Act.
contract which may be made by the Governor and the grantee that such terms are not inconsistent with the provisions of the Act.\textsuperscript{90} This provision implies that the Governor has discretion in fixing the length of the term of a statutory right of occupancy, though it is said that it is negotiable. This is different from what obtained prior to the promulgation of the Act. Before 1978, in the States constituting the old Western and Eastern Regions, the maximum interest which a non-Nigerian could acquire in land was a lease for 99 years, inclusive of any option of renewal and the lease may not be granted to commence more than twelve months after the application for approval of the transaction was lodged.\textsuperscript{91} In Lagos State, the maximum interest that may be approved was for 25 years inclusive of any option of renewal and must not be granted to commence for more than a month after the approval of the transaction.\textsuperscript{92} In the former Northern States, the Land Tenure Law provided that rights of occupancy granted under the provisions of the Law may be for a definite or for an indefinite term, and may be granted subject to the terms of any contract, which may be made in that respect.\textsuperscript{93} Of course it is obvious that these pre-1978 provisions are to continue to apply only in so far as they are not inconsistent with the provisions of the Act. but it would seem that a Governor in exercising his discretion under the Act, will be mindful of these provisions and will take into consideration the purposes or uses to which a non-Nigerian applicant wishes to put the land.

\textsuperscript{90} Section 8 of the Act.

\textsuperscript{91} Olawoye, op. cit., at 159.

\textsuperscript{92} Regulation 4 of the Acquisition of Lands by Aliens Regulations, L.S.L.N. 14 of 1971.

\textsuperscript{93} Section 8 Northern Law.
It has recently been argued however, that there is danger in granting rights of occupancy for terms exceeding 10 years to non-Nigerians.\textsuperscript{94} This argument is based on the belief that given the weakness of the Nigerian currency in the international market and the legal emergence of wholly foreign owned corporate bodies in Nigeria. It may not be too remote that foreign based realtor may deem it appropriate to acquire residential and commercial properties and thereby become landlords in Nigeria “by default of inertia”. This argument appears attractive in that it seeks to put Nigerians in firm control of their natural resources. Nevertheless. There is doubt as to whether the suggested restriction can achieve the desired objective. In any event the point taken is no longer of practical importance in view of the emerging national economic deregulation policy of the Federal Military Government intended in the main, to attract foreign participation in the Nigerian economy.

The point was made clear that prior to the coming into effect of the Act, a non-Nigerian could not acquire any interest or right in or over land from a Nigerian or a fellow non-Nigerian except with the approval of the appropriate authority. Without such consent the transaction was null and void and of no effect whatsoever. Under the Act, there are similar restrictions on the right of a Nigerian to transfer, alienate, demise or otherwise dispose of his property to a non-Nigerian or another Nigerian. For instance, Section 21 of the Act prohibits alienation of customary rights of occupancy except with the consent of the Governor in cases where the property is to be sold under the order of any court,\textsuperscript{95} or without the approval of the appropriate


Local Government in other cases. Likewise, Section 22 of the Act forbids alienation of statutory rights of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever, without the consent of the Governor first had and obtained. These restrictions are not confined to actual grants of rights of occupancy by a Governor or Local Government, they are also applicable to rights of occupancy deemed granted under Sections 34 and 36 of the Act. This was the effect of the decision in the celebrated case of Savannah Bank of Nigeria v. Ajilo. So a Nigerian who wishes to alienate his interest in a right of occupancy, actual or implied, statutory or customary, to a non-Nigerian under the Act must seek and obtain the requisite consent at the appropriate time. Expectedly, failure to comply with these consent provisions would attract the full rigour of Section 26 of the Act and render any transaction or any instrument in relation therewith null and void. In some cases, contravention of the provisions may attract an imprisonment for one year or a fine of N5,000.00 on conviction.

The point ought to be made briefly that with respect to alienation of property under the Act, what applies to a Nigerian applies equally to a non-Nigerian. That is, just as a Nigerian cannot dispose of his property under the Act without the necessary approval, it is unlawful for a non-Nigerian to alienate his interest or right in a property except with the consent specified in the Act. It is immaterial that the disposition is in favour of a Nigerian and not a non-Nigerian.

CONCLUSION

96 supra.


98 Sections 36(6) and 37 of the Act.
The Nigerian Land Use Act may have made a number of changes in the Nigerian land Law, these changes are not necessarily arbitrary or fatal to the interests or rights of non-Nigerians in or over land in the country. We have endeavoured to show that existing interests or rights of non-Nigerians in or over land in any part of the country survived the Act. We demonstrated that while a non-Nigerian lessee or customary tenant is not entitled to a right of occupancy by implication of law, the terms of his lease or tenancy remain valid and subsist. It is lawful for a Governor or Local Government to grant rights of occupancy, statutory or customary as the case may be, to non-Nigerians. Also, a non-Nigerian may still acquire rights of occupancy from a Nigerian or even a fellow non-Nigerian provided the requisite consent is obtained. It can thus be seen that “the Land Use Act is not a magic wand it is being portrayed to be or a destructive monster that at once swallowed all rights on land.”

Before the enactment of the Act, it was unnecessary for a non-Nigerian to obtain any approval before alienating his interest in right in or over land to a Nigerian whereas he was required to do so if his grantee was a non-Nigerian.

per Belgore, J.S.C. in Ogunleye v. Oni, (supra) at 772.