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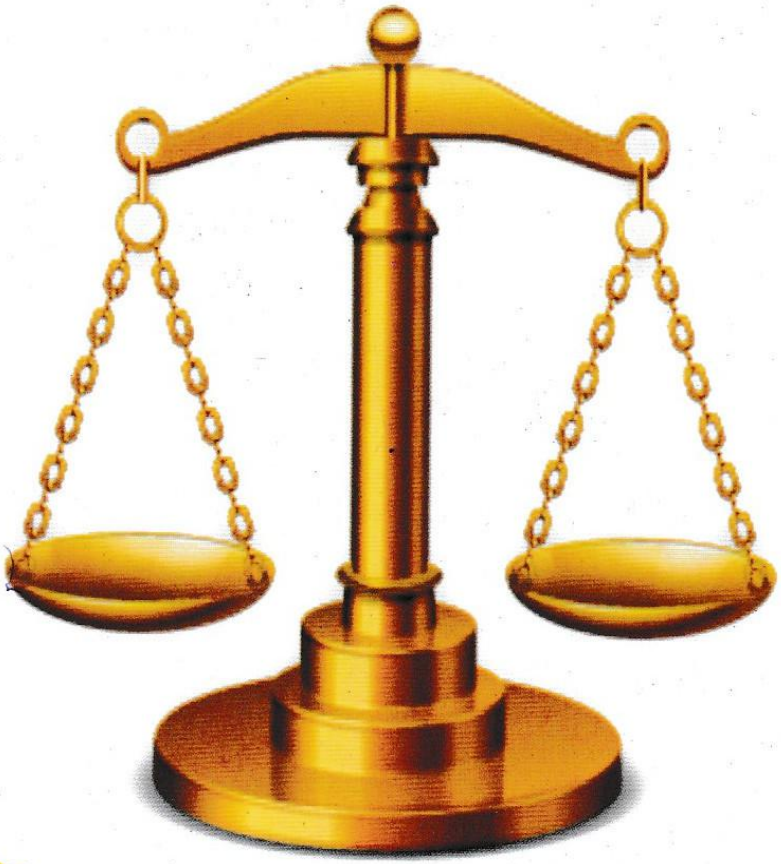

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COMMUNAL OWNERSHIP OF LAND UNDER THE LAND USE ACT, 1978**

Abstract

Land is a vital asset which each succeeding generation seeks to acquire. Before the advent of British government in 1861, Nigeria operated Customary Land Tenure System. This customary land system entails communal ownership of land by which land was seen as a great asset capable being owned by individual persons. Under this system, one person called the family head held the land in trust for the members of the family and could only apportion some portion to any needy member. However, the whole situation changed when the Land Use Act was enacted and put force in 1978. Thus, the mischief aimed by the Land Use Act was the abrogation of allodial ownership or freehold interest of by family, community and individual and in its stead, circumscribed interest, a right of occupancy subject to governor's consent. In view of the foregoing, this study sought to examine communal ownership before and after the Act and submits that though the Act has divested absolutely ownership of land, it nevertheless, leaves some interest both for individual and the community. This paper examines the extent of right of the community in land before the coming into force of the Land Use Act, investigates the extent of interest of the community in land after the Land Use Act, identifies the role of family head or chief in the alienation of interests in communal land and appraises the general intendment of the Land Use Act in order to assess its achievement.

1. Introduction

Before the advent of the British Administration in 1861, Nigerians operated customary land tenure system, which was indigenous to the people. Like all other customs, the customary land tenure system varied from place to place and was accepted as "a mirror of accepted usage".[1] The system continued after the arrival of the British Administration. Although there were statutory erosions into customary law here and there, the system was allowed to maintain its essential

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[1] *Owoniyin v. Omotosho* (1961) 1 All NLR 304; *Kimdey and Ors v. Military Governor of Gongola State and Ors* (1988) 2 NWLR (Pt.77) 445.

character.[2]Following the enactment of the Foreign Jurisdiction Acts, 1890 to 1913, the British Government, which included Parliament and the Crown, had powers to legislate for Nigeria. A major reception legislation arising from the jurisdiction of the British Government was the Interpretation Act,[3] and by section 45 of the Act, the English Common Law of England and the Doctrines of Equity and the statute of general application that were in force in England on the first day of January 1900 were in force in Lagos in so far as the limits of the local jurisdiction and local circumstances permitted and subject to Federal law. On the strength of the above provision of the law, the English law of real property was applicable in Nigeria, subject to the exceptions contained in the section.

Accordingly, the English common law rules relating to tenures, disposition of real property, estates, inheritance, perpetuities and a number of others became applicable in Nigeria. The same could be said of the doctrines of equity, which included the construction of wills, institution and settlement of land and the doctrine of notice. It is important to mention here that a number of pre-1900 real property statutes have been held to be of general application in Nigeria. Some of them include the Statute of Frauds 1677 and the Wills Act 1837. Others include the Real Property Act 1845, the Partition Act 1868, the Conveyancing Act 1881, the Settled Land Act 1882 and the Land Transfer Act 1887.[4] The Nigerian Customary tenure was and is still recognized. The impact of British colonization on land holding and land law generally varied between Northern and Southern parts of Nigeria.

Various Decrees and edicts affecting land in Nigeria were promulgated during the Military government era. A few of these legislations are herein mentioned. The Federal Military Government in response to public outcry promulgated the Rent Control Decree No. 15 of 1966; this Decree was repealed by the Rent Control (Repeal) Decree No. 50 of 1971. The impact of this Decree on the soaring rents in the country was doubtful. The Requisition and other Powers Decree, No. 39 of 1967 was promulgated to empower the Army and Police to requisition land and other property during the period of the emergency. The Decree was amended in 1975 to create the central and state compensation committee to deal with matters of compensation. This was followed by the State Lands (compensation) Decree No. 38, 1968, which deals with issues of compensation in

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[2] *Lewis v. Bankole* (1908) 1 NLR. 81.

[3] Cap 89, Laws of the Federation and Lagos

[4] *Young v. Abira* (1940) 6 WACA 180; Niki Tobi: *Cases and Materials on Nigerian Land Law.* (Nigeria: Mabrochi Books, 1997) pages 1-2

respect of land acquired by the state. It was repealed in 1976 by the Public Lands Acquisition (Miscellaneous Provisions) Decree No.33 of that year.

In 1977, in order to further streamline the various enactments and land tenure systems existing in Nigeria, the Military Government set up Land Use Panel with the following terms of reference: -

(a) to undertake an in-depth study of the various Land Tenure, Land Use, and land conservation practices in the country, and recommend steps to be taken to streamline them,

(b) To study and analyse all the implications of a uniform land policy for the entire country.

(c) To examine the feasibility of a uniform land policy for the entire country and make necessary recommendations and propose guidelines for implementation;

(d) To examine steps necessary for controlling future Land Use and also opening and developing new land for the needs of Government and Nigeria's population in both urban and rural areas and to make appropriate recommendation.

The panel's report led to the promulgation of the Land Use Act of 1978, which was later provided for in the Constitution of Nigeria 1989.[5]

Land, being a natural source of all other natural resources is defined to include not only the surface of the earth and subsoil but also all appurtenances permanently attached to it. These include buildings, trees, streams and ponds.[6] Thus, section 3 of the Interpretations Act provides that immovable property or lands include "land and everything attached to the earth or permanently fastened to anything which is attached to the earth and all chattels real". In view of this definition, land was never owned by the individual but by the community for the members thereof before the coming into force of the Land Use Act of 1978, but the Act has overturned communal ownership of land and cast it into abeyance while vesting allodial or radical title in the governor over all land in the territory of a state and reduced ownership of land by individuals to a mere right of occupancy. This development came with inherent issues, namely: there has been uneasy access to land use for various purposes due to necessity of prior consent of the governor in alienation of any interest in land a requirement that in a clog in the wheel of land use; the hitherto owners of land are now mere tenants of the state which subjects them losing plots of land to government on ground of compulsory acquisition and

[5] Section 326 (5)
[6] Niki,T., *Cases and Materials on Nigerian Land Law* (Mabrochi Books, Lagos 1992)

its inadequate compensation, etc. In the light of the above, this paper seeks to examine the effects of the Land Use Act on communal land ownership in Nigeria with a view to making requisite recommendations toward its amendment to serve the needs of Nigerians.

2. Conceptual Analysis of Land

To a layman, land is the surface of the earth. In economics, land is said to be one of the factors of production which is fixed and immovable. To a farmer land is that surface of earth which is used for planting and harvesting of crops. To a builder, land is her surface of earth used for erection of buildings. Land is said to be a free gift from nature which cannot be created or move from one place to the other. The meaning of land to be discussed hereunder is the legal meaning of land. According to Black Law dictionary;

> Land is an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it.[7]

By the Black Law definition of land, is it therefore means that land is not only the surface of the earth alone, but also includes the space above the surface of the earth. The black law dictionary described those items growing on or permanently affixed on the surface of the earth as being part of land. This definition also includes mineral resources and water which can be found under the earth surface and the airspace the aircraft used as part of land.

> At common law; land is understood to include everything upon, in or under the earth, from the surface of the earth, downward to the earth's center, and also everything above the earth up to heavens.[8]

From the definition, common law legal system recognizes land to include both the surface of the earth, those things below the surface of the earth and the airspace above the earth. It means therefore that anything affixed to the earth such as buildings are also part of the land. Based on the definition of land at common law, the principle of *quicquid plantator solo solo cedit* (meaning that land includes fixtures thereon) applies to the English common law; but for it to be applied; it must be shown that the article has become a "fixture" on the land.

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[7] Bryon A. G (ed) *Black Law Dictionary* (9thedn West D Thompson Reuter Business, New York 2009).
[8] Essien E. *Law of Credit and Security in Nigeria* (Golden Educational Publishers, Uyo 2000) 77.

The locus classicus on what is "fixture" (which has become part of the land) is the case of *Holland v. Hodgson*[9] where the court laid down two factors for a chattel become a fixture as follows: firstly, on the intention of the original owner of the chattel as ascertained from the degree of annexation, and secondly, on the purpose of the annexation. In that case, the defendant an owner of a mill conveyed the property to a plaintiff by mortgage to secure the repayment of a loan. The conveyance expressly stated;

> All other fixture whatever which is now or at anytime hereafter during the continuance of this security shall be set up and affixed to the said hereditaments.

The question whether the conveyance included the 400 looms installed in the mill arose for the court to determine on when a fixture becomes part of the land. In the description of the 400 looms, the mill had been specially adapted for the steam powered looms; and in order to keep the looms steady and in their proper position for working, they were fastened to the floors by nails drawn through the holes in their feet into the wood to the floors. However, the looms could easily be removed without serious damage to the floors. The court held that the looms had not become fixtures in that circumstances and therefore not part of the land for the principle of *quicquid plantator solo solo cedit* to be applied. In Nigeria the common law is part of the received English law which forms part of the Nigerian legal system and therefore the principle of *quicquid planator solo solo cedit* is applied as it was in the case of *Ezeani v. Njɨdike*[10] where the Supreme Court held that the demand in the quit notice that the plaintiff/respondent should "remove and pack out all (his) belongings" did not empower him to remove what belongs to someone else, meaning that the house the plaintiff/respondent demolished on the receipt of the quit notice did not belong to him and therefore was not part of his belonging but the property of the owner of the land even though he was the one that built the house.

In the Nigerian statutes, land has not been given any definition. The Land use Act does not also give the definition of land. Land is either described to include or to exclude certain things. Interpretation Act[11] provides that;

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[9] (1872) L. R7C.P. 328
[10] (1965) NMLR 95; (1964) All NLR, 402
[11] Cap 123, Laws of the Federation of Nigeria 2004

> Land includes any building or any other thing attached to the earth or permanently fastened to anything so attached, but does not include minerals.

The Property and Conveyancing Law of 1959, which is identical in words and sections with the 1881 Conveyancing Act, (a statute of general application), applicable to former Western Nigeria provides the definition of land thus:

> Land includes land of any tenure and mines and minerals whether or not severed from the surface, building or parts of building... and other corporeal heredeterments, also a manor, and advowson and a rent and other incorporeal heredeterments and an easements, rights privilege or benefit, in, over, or derived from land.[12]

The definition given by the Conveyancing Law views land from the stand point of the physical land and the various rights and interests on it which include easement, profits, rent, charges, manors and advawson which are generally referred to as incorporeal heredeterments. However, manor and advowson are not relevant as they do not exist in Nigeria as a result of the enactment of the 1978 Land Use Act which takes away the allodial title from individuals and families and allowed them with only the right to use and occupation of land.

In view of all the definitions given above, it could be said that in so far the received English law comprising of the common law, the doctrine equity and the statues of general application, are parts of the Nigeria legal system, the English land law is therefore applicable as a valid land law in Nigeria with an exception of those ones that the Nigeria legislature has been repealed or replaced.

The *quicquid plantator solo solo cedit* principles was applicable in Nigeria land Law as in the case of *Ezeani v. Njidike*[13] thereby showing the acceptability of English law, but at the enactment of the 1978, the principle is no longer applicable, since the Land Use Act has placed the radical title on land in the Governor while the "improvement" or the unexhausted improvements on the land belong to the occupier of the land. The Act defines improvements or unexhausted improvements as:

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[12] CFRN 1999 Cap 24 Laws of the Federation of Nigeria 2004, Second Schedule: Part 1 Exclusive lest Item No. 39.

[13] (1964) All NLR 402

> Anything of any quality permanently attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes the buildings, plantation of long live crops or trees, fencing, walls, roads and irrigation or reclamation works, but does not include the result of ordinary cultivation other than growing produce.

It therefore means that the Land Use Act which is the land regulating law in Nigeria does not even provide the definition of land but only defines the unexhausted improvement as stated above.

Land therefore in this paper means the surface of the earth and everything that is permanently attached to it, such as plants and buildings, but it does not include minerals as provided by the Interpretation Act.[14] The exclusion of minerals from definition of land particularly in Nigerian statutes is because mineral resources are the federal government source of revenue upon which Nigeria depends for her economy.

3. The Concept of Ownership

The term ownership has been variedly defined by many theorists and thinkers. For Pollock, "it is the entirety of powers of use and disposal allowed by law"[15]. While Salmon asserts that: "ownership in a material thing is the general, permanent and inheritable right to the uses of that thing"[16] and in the thoughts of Keeton.

> Ownership is the ultimate right to the enjoyment of a thing, as fully as the state permits, when all prior rights in that thing vested in persons other than the one entitled to the ultimate use by way of encumbrance, have exhausted.[17]

Atchunten Pillai sees the definition proposed by Keeton as being in a wide sense and denoting the relationship between a person and any right that is vested in him.

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[14] Hodgson (n. 9)
[15] Section 51 1978 LUA
[16] Athunten Pulai P.S. *Jurisprudence and Legal Theory* (Lucknoe: Eastern Book Company 3rd Edition, 1994) 135.
[17] *Ibid*

He further said that ownership extends to all classes of rights whether proprietary or personal in rem or in personam in realiena. Austin defines ownership as: 'A right indefinite in point of user unrestricted in point of disposition and unlimited in point of duration, over a determinate thing'[18].

The definition given by Austin is subject to criticism as no provision is made for the protection of another person or a neighbor on the process of using the owned property thereby ignoring the nuisance law made of "*sic utere tuo at alienum non lead as*"[19]. Dias in his thinking provides that: 'Ownership consists of an innumerable number of claims, liberty, powers and immunities with regards to a thing owned'. The definition given by Dias includes claims over a thing owned, liberty to use, powers and immunities attached to it with regards to only the owner and therefore does not recognize the person in possession. In defining ownership, Smith opines that:

> Ownership in its theoretical and practical form connotes an infinite and absolute right in land[20] following the idea that ownership has link with possession Pollock avers that when the right of a claimant to possess, use, and dispose land is not subject to or restricted by superior right of another person, the right of ownership is said to be vested on him[21].

Ownership therefore do not only connotes the right to possession, whether it is mediate or immediate but it also carries with it the right to use the property in absolute, in the sense that it is unconditional and not subject to the right of another person. The owner can dispose of it or give it away conditionally or unconditionally and may destroy same without legal consequences.

The term "ownership" if viewed critically is used with reference to "things" that have two meanings depending upon whether it is used in reference to physical objects, corporeal things or certain rights, incorporeal things ownership is needed to give effect to idea of "mine" and "not mine" or "thine". One aspect of it is that the idea becomes necessary when there is some relation between persons. The ownership of a right opposed to the encumbrance on it. The owner of a right is he in

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[18] *Ibid*

[19] Use your property as not to injure your neighbor(s)

[20] Dias, *Jurisprudence* 5th edn (1985) 292

[21] Smith, I. O., 'Effect of the Land Use Act on Customary Land Tenure System in Nigeria' (1991) 2(6) *JUS* 119-126.

whom the right itself is vested while the encumbrance on it is he in whom is vested not the right itself, but some adverse dominant and limiting right in respect of it. Ownership may be reduced to a mere name rather than a reality e.g landlord ownership of a building used by tenant. Where a servant is in possession by occupation, yet none the less, the landlord remains the owner of the property while the tenant only has the right to use and in a proper manner.

There are various types of ownership as follows:

(1) Sole Ownership: When the ownership is vested on a single person.
(2) Duplicate Ownership: When the ownership is vested in two or more persons at the same time. There are instances where duplicate ownership occurs as follows:
(a) Co-ownership: Here the right of co-owners is not divided. Each of them have the same right, and at the same time and this right is united as one right.

Co-ownership may assume different forms by virtue of different incidents attached to it by laws[22]. In English law, co-ownership is divided into two, namely ownership in common that is, the right of the deceased who was a co-owner descends to his successor like any inheritance right or right of succession and joint ownership where at the death of one of the co-owners, his ownership dies with him and the surviving co-owner becomes the sole owner by virtue of his right of survivorship.

(b) Trust and Beneficial Ownership: This is another type of duplicate ownership. Here, the trust property is owned by two people at the same time. The difference between these two owners is that one of them is under an obligation to use this ownership for the benefit of the other. "The former is called a trustee and his ownership is a trust ownership: the latter is called the beneficiary and his ownership is beneficial ownership"[23].
(c) Legal and equitable Ownership: The legal and equitable ownership is also a duplicate ownership. It involves the ownership of one thing by two persons. Here, one person may be the legal and another equitable owner of the same thing or right at the same time. Legal ownership is that which has its origin in the rules of common law, while equitable ownership is that which

[22] Athunten Pulai P.S.) Jurisprudence and Legal Theory (3rd Edition: Eastern Book Company, Lucknoe 1994) 137.
[23] *Ibid* 137.

proceeds from the rule of equity"[24]. If A owes B and B assigned C verbally to collect the debt, C becomes the equitable owner while B becomes the legal owner of the same debt. In doing this the debt being a single item own by one person is now being owned by two persons.

(d) Vested Interest and Contingent of Ownership: Vested interest and contingent interests are parts of duplicate ownership because the matter is capable of being owned by more than one person at a time. A vested interest is an immediate right of present enjoyment or right of future enjoyment by more than one person over a property at a time. The contingent interest on the other hand is the ownership of one subject matter by more than one person and their right of enjoyment or ownership depends on some event or conditions. The distinction between vested interest and contingent interests was made clear in the High Court of Calcutta in the case of *Sashi Kanha v. Pramodachanndra*[25] where the court said "an estate or interest is vested as distinguished from contingent either when enjoyment of it is presently conferred or when its enjoyment is postponed, the time of enjoyment will certainly come to pass. In other words, an estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent of the right of enjoyment if made to depend upon some event or condition which may or may not happen. In other words, an estate or interest is contingent when the right of enjoyment is to accrue on an event which is dubious or uncertain.

Ownership has to do with a right and interest of a person over a thing. It is a total right to use a thing, a total right to destroy a thing and a total right to give the thing out to any person. It is entirely the powers to use and disposed as allowed by law over a thing provided it does affect another person.

On the legal concept of land, again the learned author also wrote that "land is generally defined to include not only the surface of the earth and subsoil, but also all appurtenances permanently attached to it. These include buildings, trees, streams an panels. Thus, section 3 of the interpretations Act provides that immovable property or land include "land and everything attached to the earth or permanently fastened to anything which is attached to earth and all chattels real".

By the above definitions, the principle or maxim of English common law of *quid quid plantatur solo solo cedit* which literarily means the soil is applicable to the definition of land. By this both the natural contents which include the surface of the earth and the subsoil and things which grow on it, as well as the artificial

[24] *Ibid* 137
[25] *Ibid*, n 18

contacts in the form of buildings and other permanent fixtures, will generally belong to the owner of the land.

Essien[26] opined that before the Land Use Act, Nigerian land law was an amalgam of multiple and divergent customary laws, sundry local statutes and the received English law. Under customary law, land was mostly communally owned. This fact is underscored by Lord Haldane in the case of *Amodu Tijani v. Secretary* to the Government of southern Nigeria[27] when he said "land belongs to the community, the village or family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the chief or Headman of the community or village, or head of the family has charge of the land, and in a loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build upon goes to him for it. But the land so given remains the property of the community or family.

The only qualification that may put to Lord Haldane's dictum is that though the ownership was predominantly communal, individual ownerships also existed, in fact that the very notion of family ownership carries with it 'the acknowledgement of an original individual acquisition by the founder of the family[28]. This qualification may also be added to the subsequent dictum of Brett, FJ who said "I cannot recall a case in which it has been suggested that rural land... in Nigeria was anything but communally owned.[29] Apart from case law, there is also consensus of academic opinions that land was predominantly communally owned under customary law[30].

4. The Land Use Act

The Land Use Act of 1978[31] or the Act is the principal Statute regulating land management in Nigeria. The Land Use Act was given a prominent mention and protection in the Constitution of the Federal Republic of Nigeria.[32] The preamble to the Act shows the reasoning behind its enactment. It provides:

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[26] E. Essien., *General principles of Nigeria Law*. (Golden educational Publisher, Uyo.2012)
[27] (1921) 2 AC 399 at 404
[28] K. Bentsi-Enchill, *Ghana Land Law*. (Sweet and Maxwell, London 1964) 81.
[29] *Ojiake & Sons v. Ogueze & Sons* (1962) I All NLR 58 @ 62
[30] e.g Nwabueze, B.O.: Nigerian Land Law, Yakubu, M. G. Land Law in Nigeria.
[31] Cap L5, Laws of the Federation of Nigeria, 2010.
[32] See Constitution of the Federal Republic of Nigeria 1999, Cap P23, Laws of the Federation of Nigeria 2004, S. 315 (5) (d).

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

The preamble shows that "public interest" is the driving force of the Act; and "the public interest" is the right of all Nigerians to use and enjoy land in Nigeria. Since land provides the physical substratum for all social and economic interaction, land law is inevitable an expression of social status and an instrument of social engineering. Everyone live somewhere, and each therefore stands in some relation to the land as occupier, holder, tenant, licensee, squatter, pledgee, chargee or mortgagee. In this way, land law impinges upon a vast area of social orderings and expectations, expecting a fundamental influence on the lifestyles of even the ordinary people. Real property which is land is technically not merely the earth's surface, but all the land down to the centre of the earth and up to the heavens.[33] Apart from the vertical extension, horizontally, land includes fixtures,[34] that is things permanently, attached or annexed to land, so that by the annexation to land they have lost their chattel nature and have become, in the eye of the law, part and parcel of the land. This is important, because it means that plants, economic trees, buildings and other permanent structures planted in or affixed to the land, become part of the land. Quite apart from the residential dimension, land has a huge economic significance in terms of providing security for capital, investment, business and agriculture. It is in view of the incalculable significance of land that the Land Use Act was promulgated[35] as the single law, which particularly defines the rights and obligations and specifies conditions precedent for any alienation or encumbrance of the land rights. The aim for imposing conditions is to restrain and control alienations of and encumbrances on land and thus enhance tenurial security.[36] Section 1 of the Act provides:

> Subject to the provisions of this Decree, all land comprised in the territory of each State in the Federation are (sic) hereby vested in the

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[33] Bennett, J. in *Re Wilson Syndicate Conveyance, Wilson v. Shorrock* (1938) All ER 599 at 602

[34] *Holland v. Hodgson* (1872) LR 7 C .P 328

[35] The Act was originally promulgated as a Decree by the Military regime (Decree No. 6 of 1978) but was, upon the exit of the military regime and taking over of government by Civilian, re-designated Act, vide Section 1 of Adaptation of Laws (Re-designation of Decrees, etc) Order No. 13 of 1980.

[36] This is quite apart from the generally known purposes/ aims of stemming the tide of land profiteering and speculation and easing the burden on government when it needs land for development.

> Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Decree.

The section has the effect, particularly in the Southern part of Nigeria, of divesting the allodial title to land from communities, villages, families and individuals and expressly vesting the same in the Governors[37] of the States in trust for the people. Thus, the "Governor", takes over the pre-allodial title to land. That is to say that the Governor becomes the Landlord for the benefit of his people. With the Act, the radical title which individuals had in their personally acquired land can no longer be acquired by them.

5. Objectives of the Act

The Land Use Act 1978[38] as noted above is a fundamental statute affecting Land Tenure in Nigeria today. The Act has modified substantially the existing Land Tenure Systems in Nigeria, but the amazing aspect is that it has not abrogated or pretended to substitute them; in its provisions, it recognized the customary land tenure as a valid and subsisting law regulating land tenure in Nigeria.
The Act has as its objectives, the following;

(a) To remove the bitter controversies, resulting at times in loss of lives and limbs, which land is known to be generating.

(b) To streamline and simplify the management and ownership of land in the country.

(c) To assist the citizenry, in respect of owing the place where he and his family will live a secure and peaceful life.

(d) To enable the government to bring under control the use to which land can be put in all parts of the country and thus facilitate planning and zoning programmes for particular uses.

In this respect, the Act, by virtue of its section 1, provided that all land comprised within the territory of each state is held in trust and "administered for the use and common benefit of all Nigerians", while therefore vesting the land in the Governor, the act recognized the existing rights of all citizens on land. In cases where the land is located in Urban Areas, the land shall continue to be vested in the person in

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[37] *Dzungwe v. Gbishe(1985)* 2 NWLR (Pt.8) 528; *Savannah Bank Ltd. v. Ajilo* (1989) 1 NWLR (Pt. 97) 805; *Salami v. Oke* (1987) 4 NWLR (Pt. 63) 1

[38] Herein after referred to as the "Act"

whom it was vested before the act, if the land is developed, where the land is undeveloped then, any portion in excess of half hectare will be forfeited to the government. In the non-urban areas, the section 36 of the Act provided that the occupier shall continue in occupation as if the customary right of occupancy has been granted by the occupier. Occupier is defined as any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-leases or sub-under lessee of a holder.All existing rights in land has been converted to a right of occupancy, where it is in urban area it is deemed grant or granted by the Governor of state and referred to a statutory right of occupancy while in non-urban area it is deemed granted or granted by the appropriate local government and referred to be customary right of occupancy.

The Act has preserved the existing rights being held under customary law by the community and family who are the rightful owners of land under customary law. In section 24 of the Act, the devolution of rights under customary law on the death of the holder of a right of occupancy is preserved, and thereby the family property is preserved, while section 34(4) of the Act recognises any "encumbrance or interest valid in law", and such land shall continue to be so subject and the certificate of occupancy issued". Section 35 of the Act on the issue of compensation also recognises the interest of the land holder under customary law, when it provides *interalia:* Section 34 of this Act shall have effect not withstanding that the land in question was held under leasehold, whether customary or otherwise. Affirming the position, the Supreme Court per karibi-whyte in the case of *Ogunola v. Eiyekole*[39] observed as follows:

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

Clearly, the Act has only modified the customary land tenure, but the rights of the land owner under customary law whether family or communal remains intact. The right enjoyed under customary law had always being known to be absolute

[39] (1990) 4 NWLR (Pt. 146) 632 at 653

rights of ownership. The family or community owner has ultimate rights in the use and management of their land. However, with the coming into force of the Act, the rights had now been converted to statutory or customary right of occupancy depending on whether the land is located in urban or non-urban areas. It should be noted that only the family has the power to alienate its land or deal with it in any manner whatsoever, however, before a legally valid title can be passed now, there must be consent of the Governor of the State to the transaction.[40] Section 36(5) and (6) of the Act seemed to have prohibited any transfer of land that is subject to customary right of occupancy, but the act specifically provides that any such transfer shall be void. There is a difference between allocation of land within the family members and transfer of the land to a person not being member of the family. Where it is within the family, or community, since the family or community continues as the absolute owner of land and the member only occupies the land, then there is no transfer of interest by the family, but where the transfer is to an outsider, then it will seem to be prohibited where the land is within non-urban area subject to customary right of occupancy.

The Act has not extinguished the incidents of customary ownerships of the land in Nigeria. Section 36(1) and (2) of the Act refers to "occupier" and "holder" of the land. Both may be granted the deemed customary right of occupancy. The holder is the person holding land as customary owner while the occupier is the customary tenant within the meaning of section 50 of the Act.[41] The Act recognized the interests of the land holder under customary law though the right that may now be enjoyed is subject to the ultimate power of the Governor, the customary land tenure is still in existence in Nigeria. The Section 1 of the Act has transferred all land within the state to the Governor of the state to hold in trust for the people. The holders of land under customary tenure continue to hold same as if a statutory or customary right of occupancy has been granted to then by the Governor.

The Land Use Act, 1978 was enacted as a Decree and came into effect on the 29th of March, 1978. By the Adaptation of Laws, (Re- designation of Decrees, etc) Order 1980 Act,[42] it assumed the appellation of an Act, the title suggests that the Act is designed to control land-use and thus a planning statute.The basic philosophy of the Act is, as stated in its Preamble, to make available to and preserve the right of every Nigerian to land. In pursuance of these objectives, the Act created a tripartite system of land-holding; State, Federal and Private.

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[40] Sections 22 and 34 of the Act

[41] *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 130.

[42] Sections 1 and 13 of the Act

6. Management of State Land

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

> Subject to the provisions of this Act, all land comprised in the territory of each state in the Federation are hereby vested in the Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.[43]

The exact nature of the Governor's interest in relation to the land under the section remains controversial. There is the opinion that the effect of the section is to nationalize land in Nigeria. In *Nkwocha v. The Governor of Anambra State & Ors,*[44] Eso, JSC held as follows:

> The tenor of the Land Use Act as a single piece of legislation is the nationalisation of all lands in the country by vesting its ownership in the state leaving the private individual with an interest in land which is a mere right of occupancy and which is the only right protected in his favour by law, after the promulgation of the Act.[45]

The argument that the Act nationalized land is further reinforced by the provisions of the Act which makes the right of occupancy the highest interest that can subsist in any person and on devolution whether by will or not, the best interest transferable is also a right of occupancy.[46] Section 26 of the Act provides as follows:

> Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of the Act shall be null and void.

In opposition is the view that the provision only expropriates the radical title or the concept of absolute ownership in favour of the Governor in the light of other sections of the Act, which preserve private interests in land.Although the Act has generated considerable impact, it has not in any way nationalized the land. Therefore, the view, which is suggestive of this, is unacceptable. The import of the provision is to vest the radical title to land in the Governor, devoid of the possessory interest of erstwhile land-owners, upon trust. This means that the Governor is not

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[43] S. 1 of the Act
[44] (1984) 6 SC 362
[45] *Ibid,* p. 404
[46] Sections 1, 5, 6, 8, 25, 26, 34, and 36 of the Act.

beneficially entitled to the land so vested in him; but he is constituted a trustee of the land for the benefit of all Nigerians. Interestingly, there is unanimity on the trusteeship status[47] of the Governor. As such he holds only nominal ownership of land. It is a settled principle that a trustee is not the real owner of a trust property in the eyes of the law but he is only nominally vested with the land for the purpose of accomplishing the objective of the trust. The implication of this is that the Governor is vested with the bare title to land to the extent that is necessary for him to administer the land within the territory of his state, for the purpose of achieving the objectives of the Act.For the purpose of control and management, the land vested in the Governor is zoned by section 2 of the Act into urban and non-urban lands.For land in urban areas of the State, the control and management thereof is vested in the Governor, assisted by the "Land Use Allocation Committee" as advisory body.

For the purpose of interim management of land, section 4 authorizes the Governor to administer the land, in case of states in the North with the Land Tenure Law, 1962, and in accordance with the provisions of the relevant State Lands Law, in relation to states in the South. It is further provided that the Land Tenure Law or State Lands Law shall apply with such modifications as would bring them into conformity with the Act. This is to emphasis that the land vested in the Governor under the Act is neither subject to the incidents of State Lands under the State Lands Law nor subject to the discriminatory and other inconsistent provisions of the Land Tenure Law.[48]The respective Local Governments are conferred with the powers to control and manage land within their area of jurisdiction of which the land is situated in the non-urban areas of the states.[49] Like the Governor, the Local Government is assisted by an advisory body, which is known as 'Land Use Allocation Advisory Committee'.[50]

7. Management of Federal Land

Subsection1 of section 49 of the Act exempts land vested in the Federal Government and its agencies before the commencement of the Act from the Land in the territory of each State vested in the Governor under section 1 of the Act, and sets up distinct system of federal landholding. The section provides as follows:

> Nothing in this Act shall affect any title to land whether developed or underdeveloped held by the Federal Government or any agency of the Federal Government at the commencement of this Act and, accordingly,

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[47] *Nkwocha v. The Governor of Anambra State & Ors, Supr, n. 2*
[48] *Ejiofodomi v. Okonkwo* (1982) 11 SC 74
[49] S. 2(1)(b) of the Act
[50] S. 2 (5) of the Act

> any such land shall continue to vest in the Federal Government or the agency concerned.

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

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

It will be observed that the above provision makes no reference to land held by Federal agencies, the title to which is preserved by section 49(1) of the Act; it is submitted that the exclusion of such land from the operation of the provision so as to permit the State Governor to extend its powers under the Act to such land will produce absurd results. In order to avoid the anomalies, it is suggested that the provision should be read to include land held by Federal Agencies. The law-maker would not have intended otherwise. By the provisions of sections18 (c) of the Federal Capital Territory Act,[51] the President of the Federal Republic of Nigeria has delegated to the Minister of the Federal Capital Territory, all functions or power relating to land in the Federal Capital Territory just like the power of the Governor to grant consent for alienation of land in the state.[52]

8. Management of Private Land

While the whole thrust and purpose of the Act is to assert government's powers and rights over the land, it nevertheless, concedes some proprietary right in land to the individual in the form of right of occupancy. Under the Act, a right of occupancy is either statutory or customary. A statutory right is a right granted or deemed issued in an urban area by the Governor. This means the right may be acquired expressly or by operation of the Act.Section 5 of the Act makes it lawful for the Governor to grant statutory rights of occupancy to any person for all

[51] Cap 124, Laws of the Federation of Nigeria, 2004

[52] *Associated Discount House Limited v. Minister, F. C. T.* (2014) All FWLR (Pt.713) 1864

purposes in respect of any land whether or not in an urban area. Rental may[53] or may not[54] be attached to the grant. It must be granted for a definite term in accordance with section 8 of the Act. Sub-section 2 of section 5 of the Act states that upon a grant of a statutory right of occupancy, all existing rights to the use and occupation of the land which is the statutory right of occupancy are extinguished. It must be noted that a grant of right of occupancy *perse* is incapable of defeating existing private interests in or over land unless the Governor has taken steps to reduce the land into state lands by due process of revocation under section 28 of the Act which provides that it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest.

However, it may be argued that where the Governor has not exercised the option of revocation before proceeding to make a grant of statutory right of occupancy, the grant cannot be challenged in view of section 47 of the Act. The provision excludes the jurisdiction of the court in relation to any question concerning or pertaining to the right of the Governor to grant a statutory right of occupancy in accordance with the provisions of the Act. It is submitted that to hold that such a grant is saved by the provisions of sections 5(2) and 47 of the Act would work greater insecurity of title contrary to what the act sets out to cure in its preamble. Accordingly, Aniagolu, J.S.C. remarking about the strength of existing rights of occupancy *vis-à-vis* a grant said obiter as follows:[55]

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

A statutory right of occupancy is deemed issued to a person in whom land in an urban area was vested at the commencement of the Act in respect of 'developed' or 'undeveloped' land. Developed land is land where there exists any physical improvement in the nature of road development services, water, electricity, drainage, building, structure or such improvement that may enhance the value of the land for industrial, agricultural or residential purposes.[56] In relation to such land in an urban area,[57] subsection 2 of section 34 of the Act states that:

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[53] S. 5 (1)(c) of the Act
[54] S. 17(1) of the Act
[55] *Dzungwe v. Gbishe &Anor* (1985) 2 NNLR (Pt.8) 528
[56] S. 50 (1) of the Act
[57] S. 34(1) of the Act

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

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

As it will soon be seen, there has not been any conclusive answer to the question. However, it is suggested that the proper approach is to ascertain the contextual meaning of 'vested' as qualification of the 'person' appearing in the provision. Thus if 'vested' connotes the person in 'occupation' or in whom the absolute ownership inheres, it is such a person who would be a holder of the new statutory right of occupancy. The courts appear to have followed this approach, although it will shortly be shown to have reached a wrong conclusion. In *Momodu Ilo& Ors v. Davies & Ors,*[58] *Nnameka*-Agu J.C.A. (as he then was) was of the view that occupation is the qualification required for entitlement to a right of occupancy. This approach was followedby Ajose-Adeogun J.C.A. in the latter case of *Omonfoman v. Okoeguale.*[59]In reply to the respondent's prayer to be declared entitled to a right of occupancy, the learned judge held that a strict legal title is not necessarily the only qualification for the required declaration. Long possession, as in the case put forward by the respondent either by himself or through his predecessor-in- possession can also suffice. It is submitted that lawful long possession *per se* as being suggested by these authorities cannot be sufficient to support a claim on the provision. The quantum of interest required by a person to be

[58] (1983) 3 SC 173
[59] (1986) 5 NWLR (Pt. 40) 179

entitled to the statutory right of occupancy in the circumstances of the provision is the vesting in him of the 'absolute ownership', radical title or the allodial ownership in the land at the time of the commencement. The support for this view is derived from the meaning attached to "vested" appearing in Section 1 which appears to be the transfer of the absolute ownership of the land 'vested' in the Governor.

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

> Where the land to which subsection 2 of this section applies was subject to any mortgage, legal or equitable, or any encumbrance or interest valid in law, such land shall continue to be so subject and the certificate of occupancy issued shall indicate that the land is so subjected.

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

In relation to undeveloped land, subsection 5 of section 34 provides as follows:

> (a) One plot or portion of the land not exceeding half hectare in area shall subject to subsection 6 below, continue to be held by the person in whom the land was so vested as if the holder of the land was the holder of a statutory right of occupancy granted by the Military Governor in respect of the plot or portion as aforesaid under this Act; and
>
> (b) All the rights formerly vested in the holder in respect of the excess of the land shall on the commencement of this Act be extinguished and the excess of the land shall be taken over by the Military Governor and administered as provided in this Act.

By these provisions, a person who held an undeveloped urban land is to continue to hold same as if he has been granted a statutory right of occupancy in respect of one plot or portion of the land not beyond half hectare in extent; the excess being extinguished in favour of the Governor to administer in accordance with the provisions of the Act. However, where a person held more than one plot of undeveloped land in different urban areas within a state, the subsection 6 states that such plots are banked up and considered together for the half-hectare entitlement, and the remainder taken over and administered by the Governor. The idea behind this provision is land 'pooling' to make for, presumably, the equitable distribution of undeveloped urban land.Customary right of occupancy, like its statutory counterpart, may be expressly or impliedly acquired. A local government is empowered to grant a customary right of occupancy over any land which is not in an urban area to any person or organization for agricultural and such other purposes ancillary to agriculture.[60]

However, a limit is placed on the extent of the area a single customary right of occupancy can partake. Thus subsection 2 of section 6 of the Act restricts a customary right of occupancy granted for agricultural and grazing purposes not to exceed 500 and 5000 hectares, respectively, unless with the consent of the Governor. Subsection 4 of section 36 of the Act provides as follows:

> Where the land is developed, the land shall continue to be held by the person whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a customary right of occupancy issued by the Local Government.

The provision, like similar earlier provisions, converts the interest of persons who had held the absolute ownership of developed non-urban land to a system of customary right of occupancy. However, an exception is created in favour of a person who, before the commencement of the Act, was using the land for agricultural purposes. The exception is contained in the combined effect of subsections 1 and 2 of section 36 of the Act.

Under this provision, unlike the requirement of subsection 34(2), (5) or 36(4) of the Act, a holder or occupier of land who held possession and was using the land for agricultural purposes before the commencement of the Act is the one entitled as against the person who held the allodial ownership to the customary right of occupancy arising therefrom. Thus to be entitled to the customary right of occupancy, it is not necessary for a claimant to establish that the absolute ownership

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

in the land vested in him at the commencement of the Act. The essential qualifications for entitlement are that the claimant was in lawful occupation and using the land for agricultural purpose. However, until a holder applies for registration of his interest under subsection 3 of section 36 of the Act, he is not vested with the customary right of occupancy. The view is not correct and represents a misconception of the implication of a 'deemed' grant by which the interest is created by operation of the Act. The subsection does not set any condition precedent for the vesting of the interest under subsection 2 of the section in the holder or occupier. Rather, it gives discretion to the holder to register such interest with the local government. Subsection 7 of section 34 of the Act prohibits the transfer of the statutory right of occupancy in relation to underdeveloped land in urban area within the provision of subsection 5 or 6 of section 34 of the Act without the consent of the Governor. The subsection provides as follows:

> No land to which subsection (5) or (6) above applies held by any person shall be further subdivided or laid out in plots and no such land shall be transferredto any person except with the prior consent in writing of Governor.

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

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

The consent requirement here is restricted to a holder of statutory right of occupancy which is granted with special covenants in pursuant to sections 8 and 19 of the Act in relation to improvements. In the absence of such covenants, it appears a holder can alienate improvement without reference to the Governor. The transfer of customary right of occupancy is controlled by the provision of section 21of the Act. It provides as follows:

> It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by the assignment, mortgage, transfer of possession, sublease or otherwise however-
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> (a) Without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable Sheriffs and civil process Law, or

(b) In other cases with the approval of the appropriate Local Government.

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

> No land to which this section applies shall be subdivided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested as aforesaid.

9. Certificate of Occupancy

From the inception of the Land Use Act, the certificate of occupancy has become the means of proving title to land.[61] A certificate of occupancy is not defined in the Act, but from the provisions of the Act,[62] it is clear that it is a document issued by the Governor in evidence of a person's customary or statutory right of occupancy. Section 9(1) and (2) of the Act provides thus:

9(1) It shall be lawful for the Governor-

(a) When granting a statutory right of occupancy to any person; or

(b) When any person is in occupation of land under customary right of occupancy and applies in the prescribed manner; or

(c) When any person is entitled to a statutory right of occupancy, to issue a certificate under his hand in evidence of such right of occupancy.

(2) Such certificate shall be termed a Certificate of Occupancy.

a certificate of occupancy does not create a right in land in favour of the person to whom it is issued; it merely evidences such right, as stated in section 9(1) (c) above. The fact that a certificate of occupancy is merely evidence a right of

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

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

occupancy carries with it two implications. Firstly, that the right in the land must exist before the grant of the certificate of occupancy or at least arise simultaneously with the grant such as where the right is granted with an accompanying certificate in evidence of it. The second implication is that the certificate of occupancy is not conclusive as to a person's right to the land; it is not a proof of a right but merely raises a rebuttable presumptive right.[63] Accordingly, the certificate of occupancy can be set aside if it turns out that the holder had no right to the land.[64] It can also be set aside in favour of a conveyance which pre-dates the Land Use Act or in favour of a person who had held the land before the Land Use Act came into force and so is now a deemed grantee of a right of occupancy under section 34 of the Act. However, it must be stated here that a certificate of occupancy issued on the Land Use Act, cannot be said to be conclusive evidence of any interest or valid title to land in favour of the grantee; it is only *prima facie* evidence of such right, interest or title without more and may in appropriate cases be effectively challenged and rendered invalid, null and void.[65]

10. The Land Use Act and Communal Land Ownership

Before the enactment of the Land Use Act, it can be said that the land tenure system in our country followed broadly the usual south and North dichotomy characterization. In the south, land rights were regulated basically by the customary law. In the North, customary land tenure suffered early disruptions through the activities of Fulani conqueror and the officials. The British later introduced statutory regulations of land rights under the land Native Right Proclamation and Ordinance of 1910 and 1916 respectively. The 1916 ordinance was substantially re-enacted as the Land Tenure Law, 1962. The law declared certain management and control of land in "the minister for land and survey to administer such lands for the use and common benefits of the natives".

Basically in the South, land was communally-owned. Land never belonged to the individual but to the community, family and village. Thus, the land tenure system was anchored on customary law that forbade individual ownership but approved communal ownership. The locus classicus on this is the case of *Amodu Tijani v. Secretary Southern Nigeria*[66] where Lord Halolane held that "Land belongs to the community, the village or the family, never to the individual". The

[63] *Ogunleye v. Oni* (1990) 2 NWLR (Pt.135) 745
[64] *Adediji v. Williams* (1989) 1 NWLR (Pt.99) 611
[65] *Adole v. Gwar* (2008) Vol. 164 LRCN 157; *Mohamoud J. Lababedi v. Lagos Metal Ind. (Nig) Ltd* (1973) NSCC 1 at 6
[66] (1921) AC 399

aim of the customary law was to preserve the property of the group for the group. As a re-enforcement to this principle, it was held recently in *Olodo v. Josiah*[67] that in a customary Nigerian setting, land belongs to the people and never to the individual.

11. Control and Management of Communal land

The chief is recognized in traditional societies as occupying a position of political and social pre-enounce in any given community. It is a common feature of chieftaincy institutions to have a fusion of various political, administrative and judicial powers in the chief. These powers may be exercised by the chief alone, or by the chief and a council of Elders depending on the prevailing customary law in that area. Thus, the powers, rights and privileges of a chief depends on the customary law of the particular locality he precedes over. In a bid to find a proper designation for the chief, with regard to communal land, the Privy Council held in *Amodu Tijani v. Secretary Southern Nigeria*[68] that the chief is a trustee with respect to community land. The chief, the court further stated, has charge of the land and in a loose mode of speech may be called the owner. Any member of the family in need of land goes to the chief for a piece of land.

Caution should be taken when using the word "trustee" because the chief is not like the English law trustee where legal ownership is vested in the trustee. The legal estate of the land is vested in the community as a whole and not in the chief. Infact, the responsibility of the chief is managerial and administrative. The chief however, cannot hold communal land in a private capacity.[69]Thus, the chief allocate land to family members for cultivation purposes. The land held in *Ekpendu v. Erika*[70] that a family chief entrusted with the management of communal land is required to act in consultation with the principal members in making important alienations of communal land. Thus, an alleviation of family land by the chief without consultation with principal member is voidable.[71]

The chief represents the community in law-suits with respect to communal land; he receives compensation on behalf of the community. Again, he receives in come of community land for the benefit of the community. In totality, the role of the chief with regard to community land is managerial. The positions of the family heads or elders of hand in hand with respect to administration of family land. The

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[67] (2010) 18 NWLR 653
[68] *Supra*
[69] *Adesanyo v. Otuewu* (1993) 1 NWLR (Pt. 270) 414
[70] (1959) SCNLR 186
[71] *Amodu Tijani* (1921) AC 399

family head is basically a member of the family and in capacity enjoys rights and privileges and performs such obligations as expected of him. The family head has control of family property and administer some for the good and mutual benefit of all members of the family. He allocates portions of land to individual members for their use. Any member in need of land therefore goes to the family head for a piece[72]. The family head has power to sue and defend actions in court on behalf of the family.

The family head, like the chief in case of communal land has the power to revoke any grant of family land to customary tenants and to evict such tenants. Again, the family head has the power to bind the family especially where allocation of land to strangers is involved. He can only act with the consent of the principal members of the family after due consultation. Failure to do this renders the transaction or allocation voidable[73].

The elders on the other hand, are the principal members of the family. They work in tandem with the family head for the common good of the family. An alienation a principal member without the consent of the family head and other principal members is void.[74] Land in the traditional setting is communally owned. Family members are co-owners of communal land. Everything done is peared towards the benefit of the community. Family members have the right to participate in management of communal land. A member, if he is a principal member, is entitled to be consulted before alienation of communal land is effected. Family members again, have the right to demand for account. In *Archibong v. Archibong*[75]the court held that the family head was accountable to the rest of the family members for his management, application and disposition of funds accruing to the family from family land. Family members have the right to protect communal interest. Significantly, the family members have to use family land. They have the right to form and cultivate on the land.

12. The Land Use Act and Communal Ownership of Land

Section 1 of the Land Use Act vests all land comprised in the territory of each state in the Federation in the Governor to hold in trust and administer for the use and common benefit of all Nigerians. This section or the word "vest" was

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[72] *Adagun v. Fagbola* (1932) 11 NLR 110
[73] *Ekpendu v. Erika* (1959)4 FSC 79
[74] *Ekpendu v. Erika,* supra
[75] (1947) 18 NLR 117

interpreted in the case of *Nkwocha v. Governor of Anambra State*[76] to mean that the communities, villages and families no longer have allodial title to the property or land. That the section vests the radical title of land in the State Governor to hold it in trust for the benefit of Nigerians.

However, the community still has interest in land which it held before the enactment of the Act subject to customary law of that area. This is so because in compensation cases where communal land is involved, the compensation goes to the community. But on the whole, the community does not have radical title any longer.The Land Use Act 1978 did not come to abolish customary rights and their incidents accruable to the overlord. The Act still recognizes customary and common law land right. For example section 24 (Q) preserves the customary law rules on devolution of property; section 25 prohibits partitioning of land expressly unless regulated by customary law; section 50(1) implies the continual application of a customary law and the preservation of customary land rights. This, the Supreme Court noted that "the primacy of customary law in the definition of a customary right of occupancy leaves no room for the contention that the rights of landlords under customary law have been transferred to the tenants.

The Land Use Act did not come to rob Peter to pay Paul. It is not intended to rob a landlord to pay tenant. Thus, before one is entitled to a customary right of occupancy, he must have been entitled to the land by virtue of customary law. Customary tenancy still exists even after the land Use Act and the tenant is mandates to pay rent to the landlord, and not a dispute the landlord's otherwise it will be sanctioned by forfeiture.[77]

13. Conclusion and Recommendations

It has been discussed that before the coming into forces of the Act, the existed a system of land management, control and ownership in Nigeria. This was known as Land Tenure System in the south and family in heritance in the northland was only allotted to persons on demand for the purpose for which they wanted such land. The family heads were the trustees holding land for members of the family. The coming into force of the Act has positioned the Governor as the trustee holding all land within the territory of a state for the benefit of all Nigerians. Land is no

[76] Sections 1 and 13 of the Act
[77] *Abioye v. Yakubu* (1991)5 NWLR(Pt.190) 130

more controlled, managed and or owned by the family, village and community but by the Governor of a state.

Since the Land Use Act of 1978 came into force, it has reduced community, village and family ownership, control and management of land into a mere right of occupancy to the individual. The allodial title to the land now belongs to the Governor of the state. The Governor allocates, land, grant certificate or right of occupancy, revokes the land collects rent, etc. he is by virtue official in charge of all land within the territory of a state holding it for the benefit of all Nigerians.

However, this right as a trustee is controlled by the Land Use Act as he is expected to grant certificate or right of occupancy to persons who have both deemed customary and statutory rights. That is to say those who have been in possession of such land before the coming into force of the Land Use Act. Since land is now controlled, managed and owned by the Governor, it has become uneasy for individuals to have access to land with ease. It is therefore suggested that the Land Use Act should be amended to suit the pressing needs of individuals who need this land for farming, industrial and building purposes.

The issue of controlling all land within the territory of a state is touching, the Governor should only control some portion of land, while some should be left for the community, village and individual to use for their own purposes by doing this, people would be gingered to build more industries and communities would take up community development projects and individuals would be touched to maximized this natural resources for the good of all.