Customary Tenancy and the Land Use Act: A Critical Review

*M. A. Banire**

Much literature already exists on this topic to the extent that one would have wondered whether any need still exists for any further contribution, but for the conflicting academic and judicial views on the issue. These views are quite varied and the debate might well continue till a justifiable and consensual conclusion is reached, or until the outcome of the ongoing review of the Land Use Act[1] is known. Thus, in this write-up, we intend to revisit the nature and incidents of customary tenancy; examine the effects of the Act on traditional institution; determine through existing literature, judicial authorities and the provisions of the Act, the status of the parties, that is, the overlord and the customary tenant under the Act, and then suggest through critical analysis the view which should be preferred.

---

* *By M.A. Banire, LL.M., B.L., Lecturer in Law, Department of Private and Property Law, University of Lagos.*

1. **The Land Use Act, Cap. 202 of the Laws of the Federation of Nigeria 1990. (Hereinafter throughout the discussion to be referred to as "the Act").**

(A) Nature of Customary Tenancy

Customary Tenancy is a traditional, institutional mode of holding land which involves a grant of land by a landowner to another person including a group, usually strangers, in consideration of the acknowledgement of the former's title by the latter through payment of Tributes or Ishakole. The grantor of such land is called the overlord while the grantee is referred to as the Customary Tenant. It is a concept which is predominant in Southern Nigeria, although similar to Kola Tenancy obtainable in the Eastern Nigeria. It is also of the essence of customary tenancy that possession must be transferred from the overlord to the Customary Tenant for a specific purpose or purposes. However, it is important to note that the act of taking possession by the customary Tenant, in the observation of Elias, C.J.N. (as he then was) in *Waghoreghor v. Aghenghen*[2] does not make him a 'Licensee', 'borrower' or 'Lessee', but just grantee of land under customary tenure whose interests exists in perpetuity subject to good behaviour. Nor could the interest of the customary tenant be likened to a leasehold interest, tenancy at will, or yearly tenancy. In the words of Dan Ibekwe in *Lasisi & Anor v. Tubi & Anor,*[3] it has no equivalent in English Law. Thus, it is an institution which is peculiar to customary land law.

(B) Incidents of Customary Tenancy

Once there has been a grant of land to the customary tenant, he acquires exclusive possession of the land, and such interest is also transmissible.[4] While the overlord's interest lies in the reversion, the customary tenant's interest is in possession.[5] However, the customary tenant cannot alienate the land without the consent of

---

2. (1974) 1 SC p. 1 at p.8
3. (1974) 1 All NLR p. 438 at 44.
4. *Ojomu v. Ajao* (1983) 9 SC., p.22; *Etim v. Eke* (1941) 16 NLR p.43 at 50; *Adagun v. Fagbola* 11 MER. 100.
5. *Etim v. Eke* (supra), *Lawani v. Tadeyo* 10 WACA p.37

the overlord,[6] and the overlord cannot also do the same without the consent of the customary tenant.[7] This is based on the fact that each of the interests constitute an encumbrance on each other. Another feature of this institution is that, mostly, the interest of the customary tenant enures in perpetuity subject to good behaviour. Thus, it is not surprising at times to find the grant being mixed up with freehold grant after a memorable passage of time. This point was made by Dr. T.O. Elias when he said:

> "It is thus possible for these species of transferred land rights, i.e. leases for life and for indefinite period, to give rise to disputes and confusion after the memory of the original bargain shall have failed and witnesses to the transaction have long been dead. The tenancy is for the descendants by their progenitor and for the descendants of the original lessor to assert that only a tenancy had been conferred in the first instance. Endless litigation has very often resulted, particularly since land has acquired a commercial value in many parts of the country".[8]

However, circumstances of determination of customary tenancy would include the grantee's abandonment of the use of the land, denial of overlord's title,[9] attempted alienation etc.[10] It should be noted further that where the misbehaviour or misconduct of a customary tenant is a serious one, it could earn him forfeiture which is a judicial determination of the interest of a customary tenant upon prove of allegation of misbehaviour.[11] The following

---

6. *Ojomu v. Ajao* (supra).
7. *Lasisi v. Tubi* (supra) at p. 44.
8. Elias, T.O. "Nigerian Land Law" 4th Ed. (Sweet & Maxwell) 1972 p. 160.
9. Bello Kassim (1969) 1 NWLR 148 Sagay-v-Mew Independence Rubber Co. Ltd. (1977) 5 SC. 143.
10. *Lasisi v. Tubi Op.cit.; Aghenghen v. Waghoreghor op.cit. Martindale T.* in *Etim v. Eke op.cit*, at p.60.
11. *Akintola v. Oyelade* (1993) 3 W.M.L.R., p.379 at 386.

misconducts have been held capable of earning a customary tenant forfeiture; persistent refusal to pay customary tributes;[12] alienation or attempted alienation of the land without the consent of the overlord;[13] and Wanton destruction of overlord's property on the land.[14] Hence, the categories of acts in which the court will decree forfeiture are never closed. It is also the law that the discretion to grant forfeiture is never automatic and it is only an exceptional circumstances that the courts will grant it.[15] Furthermore, in respect of abandonment as a means of determining the relationship, it is vital to note that vacation of the land is not sufficient ground, but this must be coupled with intention not to return to the said land.[16] Again, as initially said that the grant could be for a definite purpose; where the purpose has been accomplished either through expiration of time, completion of project, or change of user without consent, it may lead to the determination of the relationship.[17]

Now, from the foregoing analysis of the nature of customary tenancy and it's incidents, one thing seems abundantly clear that both the overlord and the customary tenant have valuable interests in the subject matter of grant. This is further reinforced by the compensation sharing formulae in cases of compulsory acquisition of such land, where the money is usually divided between the two parties.[18] Having thus established the existing interests of both parties in such land, we intend to proceed in our examination of the effect of the Act on the traditional institution.

(C) Effect of Land Use Act on Customary Tenancy

---

12. *Salami v. Oke* (1987) 4 NWLR, Pt. 55 p.1
13. Johnson v. Onisiwo (1941) 7 WACA, 67.
14. Taiwo v. Akinwunmi (1975) 1 ANLR, p.202.
15. *Lasisi v. Tubi* (op.cit) *Taiwo v. Akinwunmi* (supra).
16. *Chukwu v. Gbiche* (1976) NMLR, p. 266.
17. *Ochonma v. Unosi* (1965) 1 All NLR, p.321.
18. *Agbenghen v. Waghoregor* op.cit; See further Yomi Dinakin vol. 6 & 7, JPPL 91-95.

By virtue of Section 1 of the Act, and the judicial interpretation thereof in *Nkwocha v. Governor of Anambra State*.[19] all lands in the territory of each state are vested, since the enactment of the Act, in the Governor of each state to hold upon trust for the common benefit of all Nigerians. The only exception are lands held by Federal Government and it's parastatals.[20]

However, this is not to suggest nationalisation of all lands in the country;[21] but conversion of the existing interests from freehold to right of occupancy which is the highest available interest under the Act.[22] The issue now is whether it is still possible for the traditional institution to continue existence under the Act. Without hesitation, it is submitted that since Section 1 of the Act said to be 'subject to' to other provisions of the Act; then the burden is lightened once provision or provisions can be found accommodation such existing interests. To this end, Sections 34 and 36 of the Act seem to be conforting as they are to the effect that such existing interest shall continue their lives as if they are expressly granted.[23] Thus, it is asserted that such existing interests in customary tenancy are protected by these provisions. But does the status of the parties, that is, the overlord and the customary tenant still remain the same under these provisions?

Position of the Overlord and Customary Tenant Under the Act.

We intend to subdivide the viz:- (1) Position in respect of developed land in both urban and non-urban areas; and (2) Position with regard to undeveloped land in urban and non-urban centres.

---

19. (1984) 6 SC. p. 362, Aniagolu, J.S.C. in *Dzungwe v. Gbishe* (1986) 2 NWLR. Pt.8, 528 at 541.

20. Section 49

21. See R.W. James, Land Use Act: Policies & Principle, p.

22. *L.S.D.P.C. v. Foreign Finance Corporation* (1987) 1 NWLR (Pt.50) p.413.

23. *Savannah Bank Ltd. v. Ajilo* (1989) 1 NWLR, p.305 at p.348.

I. Developed Land in Urban and Non-Urban Areas

This calls for examination of Sections 34(2) and 36(4) of the Act; and for easy comprehension, Section 34(2) which is substantially the same as section 36(4) except for the former being in urban area, and the later in non-urban area, is as follows?

Section 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 Decree as if the holder of the land was the holder of a statutory right of occupancy issued by the Military Governor under this Decree".

The question here is, as between the overlord and the customary tenant of this land, who is entitled to the right of occupancy?. In response to this question, we have had several arguments put up by various writers,[24] but the consensus appears to be that it is the overlord who is entitled to the right of occupancy. The bases of this conclusion appear to be diverse. There is the suggestion that although the word *vested* used in the provision could mean vested in ownership or vested in possession,[25] which implies that either of them is entitled to the right of occupancy, the applicable meaning appears to be that of vested in ownership, if the Supreme Court interpretation of the word in *Nkwocha v. Governor of Anambra State*[26] is to be reckoned with. Thus, it is undoubtable that the overlord, in whom the land was so vested in ownership before the commencement of the Act is the person entitled to the right of occupancy. This however does not mean that the interest

---

24. Professor J.A. Omotola Essays on the Land Use Act 1979 pp.9-10
Dr. A.A. Utuama, Nigerian Law of Real Property p.146.
Mr. Yomi Dinakin Customary Right of Occupancy and the Land Use Act (1967) 6 & 7 JPPL p.91.

25. See A.A. Utuama (supra) and See Black's Law Dictionary, 5th Edition, p.1400.

26. *Op.cit.* See also *Savannah Bank Ltd. v. Ajilo, op.cit.*

of customary tenant can no longer exist. Infact, the interest is protected in Section 34(4) where provision was made for the continued existence of such encumbrances,[27] although with a qualification that such can be removed if it offends the intendment of the Act or any provision of the Act in the opinion of the Governor. It is our view that this proviso need be defined or, infact removed, as it is hypocritical. This is based on the fact that all the overlord needs to do in removing the encumbrance, that is, the customary tenant's interest, is to complain to the Governor that he now requires the land for his personal use which is one of the intendment of the Act. The Governor there and then, is expected to remove, as contradicting the intendment of the Act, the interest of the customary tenant. Hence, it's retention or continuous retention seems to be superflous.

Furthermore, it must be added that the word 'person' used in the provision of the sections under consideration envisages? corporate ownership.[28] With the above analysis, and submission that the overlord is the person entitled to the right of occupancy; where a customary tenant attempts to apply for it, it may earn him forfeiture.[29]

II. Position Under Undeveloped Lands in Urban and Non-Urban Ares

Two provisions of the Act, Sections 34(5) and 36(2) are relevant for discussion here. As regards section 34(5) which governs existing interest in undeveloped land in urban area, the same analysis and conclusion reached in respect of developed land in urban area is applicable. To this end, by virtue of the word 'vested' adopted in the person entitled to the right of occupancy on such lands.[30]

However, the issue of who is entitled, as between the overlord and the customary tenant, to the right of occupancy under Section

---

27. See Yomi Dinakin - supra at p.99.
28. See sections 29(3) and 50 of the Act.
29. *Salami v. Oke* (1987) 4 NWLR at 63 p.1
30. See our earlier discussion in respect of Developed Land.

36(2), that is undeveloped land in non-urban area has not been free from controversy. In fact, three diverse views now seem to exist on the issue.

However, before we start considering this views, it is apt to reproduce verbatim the provision of Section 36(2) which is to the effect that:

Section 36(2): "*Any occupier or holder* of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this Decree being used for *agricultural purposes* continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate local government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the custom of the locality concerned; allowed to lie fallow for purposes of recuperation of the soil".

The words that are of functional and practical importance in the provisions are *'occupier or holder'* and *'agricultural purposes'*. Section 50(1) defines 'holder' in relation to a right of occupancy to include any person to whom a right of occupancy had been validly assigned *or had* validly passed on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, or a mortgage, sublease or sub-underlease. And also, an "occupier" to mean any person lawfully occupying land under customary law and any person using or occupying land in accordance with customary law and includes a sub-underlessee of a holder.

Now the first view to which we subscribe, is that following the clear meanings of the provision, it is beyond doubt that the intention of this Act vis-a-vis this provision is to entitle the customary tenant the right of occupancy over such land. This view

was first propounded by learned writers such as Professor J.A. Omotola and Dr. A.A. Utuama,[31] and it is already judicially recognised in decisions such as *Akinloye v. Ogungbe,*[32] *Kasali v. Lawal.*[33] The view is promised on the following grounds:

First, the use of the aforementioned functional words like "Occupier" or "holder" as opposed to the word 'vested' adopted in all other provisions is deliberate. These words are further qualified by the usage proviso 'agricultural purpose'. Hence, since under the institution of customary tenancy, it is usually the customary tenant that is in occupation, it follows naturally that he is the only person capable of being regarded as an 'Occupier'. Moreover, in as much as it is conceded that it is possible for the overlord to qualify as a 'holder', the requirement for entitlement to right of occupancy does not end there. It should be recalled that it is not enough only for the person, to be either an 'occupier' or 'holder' he must further be engaging the land for agricultural purpose in order to be entitled to the grant. Hence, it is submitted that it is not even all customary tenants that are entitled to the right of occupancy by virtue of their occupation or holding. Such entitled customary tenant are those using such land for agricultural purposes.[34] The question may however be asked as to what happens where a customary tenant who has obtained a right of occupancy by virtue of his use of such land for agricultural purposes, later on change the user of the land?. To this, it is our further submission that where such happens, such right of occupancy could be revoked at the instance of the overlord, and the land made to revert to the overlord. However practically speaking, the operation of this submission might be difficult especially where the customary tenant was still able to partly continue the use of such land for agricultural purposes. Hence, it

---

31. See J.A. Omotola, Land Use Act 1978 and Customary System of Tenure (1982) N.C.L.R.W. 58 at 60; A.a. Utuama: Power to sue for Forfeiture *Akinolye v. Ogungbe* N.J.C.L. Vol. 13 p. 78 at 84.

32. (1979) 2 L.R.N. p.282.

33. (1986) 2 N.W.L.R. Pt.28, p.286.

34. See Section 50(1) for definition-Although it is our assertion that the use of the word "include" still subject it to the general meaning of agriculture. See *Nafiu Rabiu v. State* (1980) 11 SC 130 196 per Idigbe,JSC.

is our submission that this area need be re-examined in the review of the Act. However, it is the assertion of this school that the Act, through this provision seeks to protect possession as against ownership. Possession as recognised in law is singular and exclusive,[35] hence the overlord could not in any way be said to be sharing possession with the customary tenant. Thus, this school believes in the enlargement of the interest of a qualified customary tenant from that of his possessory right to a person entitled to a right of occupancy. However, although some writers deny the control of the Local Government over this grant,[36] it is submitted that such assertions have no basis in view of the Supreme Court decision in *Savannah Bank v. Ajilo*[37] on the unity of right of occupancy. Hence, it is our humble submission that such entitled customary tenant holds subject to the control of the local government. Again, the view that the local government cannot forfeit such interest, is, with due respect, erroneous. Although, it is only in respect of revocation that an express power exists,[38] Section 18 of the Act also impliedly confers them with power of forfeiture where there is an implied breach of any covenant. Finally, it is the submission of this school that customary tenancy in respect of agricultural lands before the Land Use Act can not thrive further under this position, hence, the termination of any relationship of customary tenancy between the parties. Hence, the decision in *Ojemen & Ors. v. Momodu II & Ors.*[39] must be read outside this provision or construed within it's peculiar facts.

On the contrary, however, are those who believe that the Act has not come to wrest or transfer possession from the overlord to the customary tenant.[40] This view has been severely, and rightly

---

35. Lord Denning in *Strand Securities v. Caswell* (1905) ch, p.958.

36. Finine Fekumo: Is the Customary tenant now the tenant of the Local Government or Military Governor? JPPL Vols. 8 & 9, p.115. A.A. Utuama, NJCL p. 78.

37. *Op.cit.* See also J.A. Omotola Vols. 6 & 7, JPPL, p.1.

38. Section 28 Land Use Act.

39. (1983) 3 SC 173 at p. 187.

40. Obaseki J.S.C. (as he then was) in *Salami v. Oke* (1987)4NWLR at 63 p.1.

in our opinion, criticised by A.A. Utuama[41] on the basis that the assertion amounts to an improper grasp of the institution of customary tenancy. This is premised on the fact that no possession is being transferred, it has always resided in the customary tenant and the rule is *nemo dat quod non habet*. So what possession is the overlord transferring? Similar dangerous view was also expressed in *Onwuka v. Edïala*[42] by the Supreme Court when it opined that the Act has not come to enlarge the interest of the customary tenant beyond what he had prior to the Land Use Act. This cannot however be taken seriously as the point did not arise for decision in the case, hence it should be regarded as obiter dictum.[43]

The third view appears in two forms:

(a) There is the view put forth by a learned writer[44] that since it has been agreed that the overlord and customary tenant have existing interests in the land subject to customary tenancy; then either of the two under this provision can apply, and be deemed entitled to the right of occupancy over such land, but with the qualification that whoever applies first, must indicate and protect the interest of the other in the Application, and such must also be reflected in the grant. This implies that where the customary tenant is applying for the entitlement, he must do so in the name of the overlord, although with indication of his own interest, and vice versa.

The view could be likened to the observation of his Lordship J.F. Gbadeyan, J. sitting at the High Court in *Yakubu v. Abioye,*[45] when he said:

> "Neither section 34 nor section 36 of the Land Use Act is intended to rob Peter to pay Paul. It is not intended to rob a Landlord to pay a Tenant."

---

41. (1988) Vols. 8 & 9 JPPL, p.97.
42. (1989) 1 NWLR, Pt. 96, p.192.
43. See also *Ogunnola v. Eiyekole* (1990) 4 NWLR, Pt.146, p.692.
44. Yomi Dinakin: Customary Right of Occupancy and the Land Use Act (1987) 6 & 7 JPPL, p.91 at pp.100-101.
45. (1991) 5 NWLR, Pt. 190, p. 130.

With respect to the learned writer, it is submitted that the view is erroneous. It is another demonstration of an improper grasp of the provision of Section 36(2), especially the functional words earlier highlighted. The writer need remember that, as we said earlier, it is not merely occupation nor holding that forms the basis of entitlement, the use for agricultural purpose is still part, hence, in as much as it is conceded that the overlord has an interest, the interest is not possessory so as to entitle him to use the land for agricultural purpose, but only reversionary. This reversionary interest, unfortunately, is not recognised by the provision as a basis of entitlement. However, we must stress that our analysis relates to land which is subject to customary tenancy and used for agricultural purpose. This exclude lands, subject to customary tenancy, but used for any other purpose other than agriculture.

Hence, it is submitted that the view must be rejected as not complying or reflecting the import of the provision.

The other form of the view is that endorsed by the Supreme Court in *Yakubu v. Abioye*[46] which unfortunately, still represents the law as at the moment. The view originated from the decision in *Owoeye v. Adedara*[47] The reasoning here, just like in the first view which we subscribed to, is that it is the customary tenant who is entitled to the right of occupancy; but with the qualification, (wrongly in our view) that he would still be continuously obliged to his overlord for the covenants which had earlier on bound them together, For example, he continues to pay tribute.

This view, in as much as it tends to conform with the provision of section 36(2) derailed alongside decisions in *Salami's Onwuka's and Eiyekole's Cases,* in view of the qualification read into the entitlement. Infact, it is our submission that the decision seems to put the customary tenant in a precarious situation by subjecting him to two systems of tenures, rather than the one he was used to prior to the Land Use Act. On one hand, he is responsible to the overlord, while on the other hand, he is responsible to the local government. In other words, his grant is now subject to both the

---

46. (1991) 5 NWLR, Pt. 190, p. 130.

47. Suit No. HCR/3A/80 of Ikere-Ekiti High Court of 24/2/81 (Unreported).

customary law (which is not recognised)[48] and the Land Use Act. The danger, inherent in this type of situation is so grave that it should not be hurriedly discussed in a write-up of this nature, but suffice to say that such problems may rear their heads in situation where, for instance, the customary tenant commits a breach which would earn him revocation under the Act. Would this affect the overlord or not?[49] Again, what happens where the overlord forfeits the interest of the customary tenant, does it imply that the right of occupancy must be withdrawn by the local government? These problems could be perpetually multiplied.

Now, would it be the intention of the Act to deny the customary tenant that had been using the land for agricultural purpose for ages the right of occupancy to it? Moreso, when it purports in it's preamble to make land available to the generality of the people, and to preserve their interests in such lands? Considering this decision along with the right of the overlord to still forfeit the customary tenant's interest on the basis of refusal to pay rent or acknowledge title, it appears antithetical of the intendment of the Act? All these and several others of their sort reveal the danger in the decision. Furthermore, the decision appears to be based on morality but unfortunately, legally unjustifiable. Hence, the need for urgent review of the decision if the lofty objective of the Act is to be realised. Infact, a decision which now subjects the customary tenant to more burden than he was bearing before the Act is unpalatable and highly disturbing. Thus, it is herein asserted that the Supreme Court would have been on a good stead if it had limited itself to the first leg of the decision which is a confirmation of the first view. Thus, it is herein advocated that the view in *Akinloye v Ogungbe's case* should be the governing view. Moreover, the need to make this explanatory enough in the awaited new Land Use Act is crucial hence, the committee charged with the review, or the draftsman should take note. This, in our humble view, will put an end to the seemingly perpetual controversy surrounding the provision.

---

48. Section 4 of the Act.

49. Yomi Dinakin, *op.cit.*, p. 96.