



The consent provisions under the Nigerian land use act: The equal and unequal scale of justice

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Abstract

This article intends to examine the purports and the effect of the consent provisions under the Nigerian Land Use Act of 1978. No doubt, since alienation is one of the incidents of ownership, one can therefore alienate his interest in Land without the consent of anybody. Prior to the commencement of the Act a Nigerian owners of Land in Southern Nigeria could freely alienate it by way of sale, mortgage, grant of right occupancy or usufructuary rights to another Nigerian without the need to obtain consent from the Government or its agencies. The only consent needed was consent of the family head if it was a family property or consent of the landlord if it was a leasehold land with assignment covenant. In Northern Nigeria where the Land Tenure Law of 1962 applied holders of rights of occupancy there were free to alienate them. But consent was required by statute only when alienation was to an alien who include a Nigerian of southern origin, or by one alien to another. The aim of the colonial government then by this arrangement was to protect the then unsophisticated natives from the speculative tendencies of the growing number of aliens in Northern Nigeria. However, with the introduction of the Land Use Act, and the abolition of private ownership and its conversion to a right of occupancy under the Act, no alienation of a right of occupancy by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever could be validly made without the consent of the government. With the introduction of the Act, the radical title in all lands comprised in every state became vested in the Governor as a trustee for all Nigerians and the erstwhile absolute owner of rights and interests in the land retained a limited right which he can no longer alienate or dispose of as he wishes contrary to the contents of ownership. Any alienation without the Governor's consent was null and void. Lastly, the article examines critically the development of the consent requirements since the decision in the case of Savannah Bank v Ajilo and the emerging equities by weighing the pendulum effect on the equal and unequal scale of justice for the purpose of knowing whether there has been a triumph over the pains of crocodile tears since that decision by the highest court of the Land.

Keywords: land, consent, alienation, discretionary powers, emerging equities, null and void

Introduction

The Land Use Act as a piece of legislation sets out a sound framework for a National Land Policy in this country. This of course represents a major significant shift from the colonial *lassie-faire* attitude that existed before the promulgation of the Land Use Act (Decree) in 1978.

Thus the Land Use Act was promulgated with an intention to vest all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely in the Governor of the State who could hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the state and to organizations for residential, agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on Local Governments.

The rationale for the consent provision in the Land Use Act, 1978 has been explained to be "premised on the fact that since the radical title in Land is vested in the State as grantor, any subsequent dealing by the grantee must be with the consent of the grantor". It is also the purport of the consent requirement to bring all land comprised in the territory of each state under the supervision of the State Governor or the Local Government as the case may be.

It is proposed in this paper to examine the justification for Governor's consent, the absolute and discretionary powers of the Governor and limitations on consent powers thereof.

Finally, a new suggestive approach as to the consent provisions in the Land Use Act would be proffered in this discourse.

Basis for Governor's Consent

The Act requires the consent of the Governor to any alienation of the right of occupancy, by mortgage or transfer of possession, e.g. by pledge ^[1] requirement for consent applies to all "Rights of Occupancy", both deemed and granted ^[2]

Consent of the Governor to alienation of interest in land in Nigeria has its philosophical basis in the concept of ownership. Since alienation is one of the incidents of ownership, one can therefore alienate his interest in land without the consent of anybody ^[3] It is noteworthy to point out that with the introduction of the Land Use Act, the radical title in all lands comprised in every state became vested in the Governor as a trustee for all Nigerians ^[4] and the erstwhile absolute owner of rights and interests in the land retained a limited right, which he can no longer alienate

¹ SS. 21, 22, 23 and 26 of the Land Use Act.

² Savannah Bank (Nig) Ltd. v. Ajilo (1989) NWLR (Pt. 97) P. 305.

³ This was the position of the Southern Nigeria before the promulgation of the Land Use Act 1978. The only consent needed was consent of the family head if it was a family property or consent of the Landlord if it was a lease hold land with assignment covenant.

⁴ Onwuka and Others V. Ediala & Ors (1989) NWLR (Pt. 96) P. 182

or dispose of as he wishes ^[5] contrary to the contents of ownership.

Ownership consists of an innumerable number of claims, liberties, powers and immunities with regard to the thing owned ^[6] However, some jurisdiction has argued that land cannot be owned. What can be owned is an interest in land since the Land Use Act has placed some restrictions before one can exercise his right of ownership over land.

The basis for jurisdiction of consent requirement dates back to the customary jurisprudence of consent of the family head ^[7] before alienation of family property and

(1) Consent of the Landlord in a leasehold relationship before the transfer of interest by the tenant where there is a covenant to that effect ^[8]

Alienation is the power of an owner of property to voluntarily transfer or dispose his interest in the property. It was not the practice in the past to alienate land because land was considered to be held by its present owner in trust for future generations. Thus, Land belongs to vast family of which many are living and countless members are yet unborn. Elias further writes, “there is perhaps no other principle more fundamental to indigenous land tenure system throughout Nigeria than the theory of inalienability ^[9]

The idea inalienability of land under indigenous land tenure system has been given judicial recognition in a number of cases. In *Lewis v. Bankole* ^[10] Osborne C.J. observed that “the idea of alienation of land was undoubtedly foreign to native ideas in the olden days”.

The consent principle has been the law and practice in the alienation of family land. In *Lukan v. Ogunsusi* ^[11] the Supreme Court held with reference to consent in the alienation of family land as follows:

1. The head of the family cannot alienate family property without the consent of the family, if he does, the sale will be voidable.
2. On the authority of *Adewunyin v. Ishola* ^[12] it must not be taken to mean that every member of the family has to give his consent. It is enough if majority give their consent.
3. Where the head of the family as against all the principal members of the family, refused the alienation of the family property, the head of the family cannot unreasonably withhold his consent for such a sale as against all members of the family.
4. The joint effort of *Expendu v. Erika* ^[13] *Esan v. Faro* ^[14] and *Agblo v. Sappor* ^[15] is that alienation of family land by the head of the family, without the consent of the principal members of the family is voidable whilst

sale by principal members of the family in which the head does not consent is void *ab-initio*.

5. The principal members of a family cannot give any title in the conveyance of the family property without the head of the family joining in the conveyance even though he may be in agreement ^[16]

The principles illustrated above, may have informed the wisdom or rationale behind the requirement of Governors consent under the Land Use Act 1978 as the Governor is regarded as the sole custodian of authority in land transfer matters.

No doubt consent and alienation are offshoots of covenants in a lease. The object of covenant against alienation is the protection of the Landlord in respect of the rents and other obligations under the lease. It is also right to control a person in occupation of his property. Alienation in this sense must be a voluntary legal assignment of the entire residue of the tenant’s interest ^[17]

It is pertinent to point out that, the right of occupancy under the Land Use Act has some resemblance of a lease, the right of occupancy under Land Use Act may not be transferred without the written consent of the Governor or Local Government first had and obtained ^[18]

The requirement of Government consent was so widespread with its devastating effects that most Nigerians feel that the consequence of the Act was to bar completely any transfer of land right. Nevertheless, the Land Use Act retained the cardinal principle of transferability of right over land subject only to the need for obtaining consent ^[19] and this issue of consent came to a climax in *Savannah Bank (Nig) Ltd v. Ajilo* ^[20] In this case, the Plaintiffs (the Respondent) had executed a deed of mortgage dated 5th September 1980 in favour of the 1st Defendant (the Appellant) upon default by the plaintiffs, the 1st defendant sought to sell the property involved by advertising the Auction Sale. The plaintiffs sued for declaration that the Deed of Mortgage was void and also that the Auction Notice was also void. The ground of the action, were that:

- (a) The property involved was situated in an urban area in Lagos.
- (b) The property was already vested in the 2nd plaintiff before the Land Use Act, 1978 came into force.
- (c) By Section 22 of the Land Use Act, the Consent of the Governor of Lagos State ought to be first sought and also the Public Auction.
- (d) As no consent was sought as aforesaid, both the deed of mortgage and the Auction Notice were void.

Thus, in the *Ajilo* case the Supreme Court observed that the

⁵ See *Savannah Bank Nig. Ltd. v. Ajilo* (supra).

⁶ Onuoha, R.A. “Governors Consent under Section 22 of the Land Use Act; the position since *Savannah Bank v. Ajilo*. “In: Smith, I.O. (ed) *The Land Use Act Twenty Five Years After*. Folar Prints, Lagos 2003, P. 199.

⁷ Smith, I.O. *Practical Approach to Law of Real Property in Nigeria*. Ecowatch Publication Limited, Lagos, 1999, p. 43.

⁸ *Ibid*, P. 203 see also, *Cook v. Shoes Smith* (1957) IKB p. 952; *Stenning v. Abraham* (1931) 1 ch. P. 470.

⁹ Elias, T.O. *Nigerian Land Law*. Sweet & Maxwell, London, 4th Edition, 1971, P. 147.

¹⁰ (1904) 1 NLR 1020

¹¹ (1972) 5 S.C. 40.

¹² (1988) WNLR 110

¹³ (1959) 4 FSC 75

¹⁴ (1947) 12 WACA 136

¹⁵ (1947) 12 WACA 187

¹⁶ *Adejumo v. Ayantegbe* (1989) 6 SCN J (Pt. 1) 76 the Supreme Court held that where there has been alienation of family land by the head of the family with some important members of the family, then the transaction is voidable and those members who should have consented to the transaction but did not can take an action to have the transaction set aside.

¹⁷ Onuoha, R.A. *Op cit*. P. 202.

¹⁸ *Omotola, J.A. Essays on the Land Use Act 1978*, p. 23. See further the Land Use Act 1978 SS. 21 and 22 which prohibits alienation of Customary Right of Occupancy and Statutory Right of Occupancy without the requisite consent from Local Government or Military Governor respectively.

¹⁹ SS 22, 23, 34(7) which expressly permit transfer subject to consent. The only exception to the principle of transferability under the Act can be found in S. 36 dealing with customary right of occupancy which is deemed granted.

²⁰ (Supra)

consent must be prior. But there, the view of the Supreme Court in the case was *obiter* because since the issue before the Court was not the stage at which consent should be obtained but rather whether a deemed grantee of Statutory Right of Occupancy also requires consent to alienate; full arguments were therefore not taken nor did the Supreme Court address the issue directly and fully ^[21] In the circumstance, Ajilo's case may not be taken as having settled the issue as to whether consent must necessarily be prior. In fact, in Ajilo's case, consent was neither sought nor obtained at any stage of the transaction ^[22]

The Consent Requirement

The rationale for the consent provision in the Land Use Act, 1978, has been explained to be "premised on the fact that since the radical title in land is vested in the State as grantor, any subsequent dealing by the grantee must be with the consent of the grantor". It is also the purport of the consent requirement to bring all land compromised in the territory of each state under the supervision of the State Governor or the Local Government as the case may be ^[23]

One pervasive feature in the Land Use Act is the requirement of governmental consent or approval to any security in real estate. The Act provides:

"Section 21. It shall not be lawful for any Customary Right of Occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever:-

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.

(b) In other cases without the approval of the appropriate local Government.

Section 22. It shall not be lawful for the holder of a Statutory Right of Occupancy granted by the Government to alienate his Right of Occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease, or otherwise however without the consent of the Governor first had and obtained".

Section 21 thus requires the approval of the Local Government for mortgages and pledges (i.e. "transfer of possession") of all customary rights of occupancy, while section 22 requires the consent of the governor for the same. As regards consent to an equitable mortgage, section 22(a) provides that the Governor's consent:

"(a) shall not be required to the creation of legal mortgage over a Statutory Right of Occupancy in favour of a person in whose favour an equitable mortgage over the Right of Occupancy has already been created with the consent of the ... Governor".

This provision appears to give discretion whether to ask for consent to an equitable mortgage since it seems to contemplate the possibility that an equitable mortgage might be created without consent ^[24] Again, section 50(1) of the Act defines a mortgage to "include" a second and subsequent mortgage and an equitable mortgage while section 22(a) contemplates the possibility that, for an

equitable mortgage by deposit of title deeds only, the Governor's consent may not be necessary, probably because this type of mortgage is characterized by informality and is generally created in circumstances of urgency and so it would be impossible to wait till the Governor's consent is obtained before it is created.

Consent, at what stage of the transaction?

The question of the stage at which the requisite consent should be obtained particularly as relates to alienation of Statutory Right of Occupancy appears to be clearly and convincingly answered by the first arm of section 22 of the Land Use Act itself which says, in part:

22(1) It shall not be lawful for the holder of a Statutory Right of Occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease, or otherwise however without the consent of the Governor first had and obtained...

A combination of the word "shall" and the phrase "first had and obtained" in section 22 appears, on first thought, to lead to the irresistible conclusion that the consent must mandatorily be sought and obtained before any alienation ^[25]

As far as the consent requirement is concerned, we have two major areas for concern. The first is where the consent is sought or obtained subsequent to entering into the security agreement. The second is where the consent is not obtained at all whether prior or subsequent to the transaction.

A new dimension to the consent provisions since savannah bank v. Ajilo.

There have been giant developmental strides from the Nigerian Courts since the decision in Savannah Bank v. Ajilo concerning Governor's consent.

In Ajilo's case, the Supreme Court observed that consent must be obtained prior to the mortgage. The decision was however, arrived at *obiter dictum* as the stage of obtaining consent was really not an issue before the Court. Thus, in subsequent cases the courts have consistently adopted a liberal approach so as to give business efficacy to business transactions.

Thus, despite the mandatory statutory stipulation that the security "shall not be lawful" unless Governor's consent is "first had and obtained", the Court have in their wisdom held that this "means no more than that the (security) agreement entered into will remain inchoate until the Governor's consent thereon is sought and obtained ^[26]

In Awojugbagbe Light Industries Ltd v. Chinukwe & NIDB ^[27] In that case the Appellant was granted a loan facility of N215,000.00 on the 11th October, 1979 by the second Respondent to establish a nail factory. As security for the loan, in 1980 the Appellant's Managing Director mortgaged his property at Ibadan to the second Respondent. The Governor's consent was not obtained to the mortgage until 1985. As a result of the Appellant's default, the mortgagee appointed the first Respondent as its receiver and the later took over the mortgaged property *viet armis* (by force and arms). The Appellant sued the Respondents for trespass to land and sought a declaration that the mortgage was void,

²¹ Essien E.E. "A new Dimension to the Consent Provisions in the Land Use Act", University of Uyo Law Journal (1997) Vol. 1, P. 2.

²² Ibid.

²³ Ndukwe, O. U.Cases and Commentaries on the Land Use Act Cap 2002 LFN, 1990.Foresight Inc; calabar, 2001, p. 33.

²⁴ See Ezejofor, G.: "The Consent Requirement of the Nigerian Land Use Act" (1998) Vol. 42 JAL 101 – 109 at 103.

²⁵ Essien, E.E. Op. Cit. P. 2

²⁶ Essien, E.E. "Land Use Act and Security in Real Estate in Nigeria". In Smith, I.O. (ed), The Land Use Act twenty five years after. Folar Prints, Lagos, 2003, p. 291.

²⁷ (1993) 1 NWLR (Pt. 270) 485.

not having complied with the consent provisions of the Land Use Act. The contention was that the Governor's consent ought to have been obtained prior to the execution of the mortgage deed. Reliance was placed on section 22.

The Supreme Court was unanimous in holding that notwithstanding the phrase "without the consent of the Governor first had and obtained", parties can lawfully execute a deed of mortgage. So long as the understanding is that the Governor's consent shall subsequently be obtained. Iguh JSC said:

Section 22(i)... does not cover purported alienation or alienation which the parties did not intend to become immediately effective until necessary approval by the Governor is obtained. It does however cover and strike at transactions which effectively purport to enable (a) mortgagee of the right of occupancy to exercise his rights thereunder without the prior consent of the Governor^[28]

Legal draftsmen, are wise to inset a clause in mortgage deeds (indeed all instruments transferring an interest in land) that expressly provide that the transaction is subject to the consent of the provisions of the Land Use Act^[29]

But even where this is absent, it is submitted that the transaction should be deemed to be subject to consent since parties are presumed to intend that their transaction shall be covered by the law and governed by it^[30] The courts are however, advised to read the special statutory requirement into the agreement^[31]

However, *Awojugbagbe Light Industries v. Chinukwe*^[32] represents a mean moderating the excesses of the wisdom in *Savannah Bank v. Ajilo*^[33] One of the main issues in the case was whether the Land Use Act^[34] forbids some form of agreement to alienate? Reliance is placed on the case of *Dennings v. Edwards*^[35] and the views and submissions of eminent scholars who were invited as amici curae^[36] the Supreme Court held that the holder of a statutory right of occupancy is certainly not prohibited by section 22(i) of the Land Use Act 1978, from entering into some form of negotiations which may end with a written agreement for presentation to the Governor for his consent or approval. No doubt, the Act does not prohibit a written agreement evidencing an intention to transfer or alienate land.

Thus, to hold that a contravention of or non-compliance with section 22 of the Act occurs at the time when the holder of a statutory right of occupancy executes or seals a deed of mortgage will be contrary to the spirit and intendment of section 22 of the Act^[37]

In *Denning v. Edwards*^[38] the Privy Council reasoned that some form of acknowledgement was inescapably necessary before the Governor was approached for his consent, since otherwise, negotiations would be impossible; and that the

agreement remained inchoate until the consent was obtained and upon obtaining the consent the agreement became complete and effective. What this means is that the security transaction is upheld while the consent requirement is retained but as a "routine affair"^[39] for to act otherwise would greatly inhibit landed security transactions.

Similarly, in *Adedeji v. National Bank of Nigeria Ltd & Anor*^[40] the appellant had by deed of legal mortgage dated 7/3/80 mortgaged his property for a loan from the first Respondent. The second Respondent was an auctioneer who threatened to sell the property under the terms of the mortgage. The appellant urged that the deed of legal mortgage was null and void because the Governor's consent was not obtained. Rejecting this contention, the Court of Appeal held that the duty of obtaining consent was on the appellant and so he could not be allowed to rely on his failure to declare the mortgage void. As Akpata, JCA put it, "apart from the principle of law involved - it is morally despicable for a person who has benefitted from an agreement to turn round and say that the agreement is null and void"^[41]

It may therefore be said that the consent requirement in the Land Use Act has in principle done no harm to security transactions. The problem lies first in the delay by Governors in granting consent when sought. This problem is compounded by the fact that the grant of consent by the Governor cannot be assumed; it is not automatic^[42]

In *Oil Field Supply Centre Ltd v Joseph Lloyd Johnson*^[43] Justice Kayode Eso observed that "certainly equity will not permit the company to benefit from their own illegality". The above cases represent a direct opposite of what happened in *Savannah Bank v. Ajilo*^[44].

Again, in *International Textile Industries (Nig) Ltd v. Aderemi*^[45] the issue was whether section 22 of Land Use Act precluded agreement to alienate interest in Land. The Supreme Court held that the position of section 22 of the Land Use Act is that the holder of a right of occupancy may enter into an agreement or contract with a view to alienating his said right of occupancy to enter into similar agreement or contract, he does not need the consent of the Governor. He merely operates within this first stage of a transfer on sale of an estate in land which stage ends with the formation of a binding contract for sale constituting an estate contract at best. But when he comes to embark on the next stage of alienating or transferring his right of occupancy which is done by a conveyance or deed culminating in vesting the said right in the purchaser, he must obtain the consent of the Governor to make the transaction valid. If he fails to, then, the transaction is null and void under section 26 of the Act. Note that the Governor in giving consent may delegate his powers under the Act to a State Commissioner^[46] this includes power to grant consent to a mortgage. In the absence of such delegated power, the transaction will be

²⁸ Ibid, P. 348.

²⁹ Chianu, E. Law of Securities for Bank Advances (Mortgage of Land). Ambik Press Ltd, Benin, 2nd edition, 2004, p. 60.

³⁰ Ibid.

³¹ Agbaje V. Bankole (1971) 1 ALL NLR 275.

³² (1995) 4 NWLR (Pt. 390) SC

³³ (Supra)

³⁴ S. 22 of the Land Use Act.

³⁵ (1991) AC 245

³⁶ Such as Chief F.R.A. Williams (SAN) and Prof. Jelili Omotola (SAN), respectively.

³⁷ This ratio was adopted by the Court of Appeal in *Okonwo v. CCR (Nig) Plc* (1997) 6 NWLR (4507) 480 C.A. *Doherty v. Ighodaro* (1997) 11 NWLR (Pt. 530) P. 694 CA.

³⁸ (Supra)

³⁹ Omotola, J.A. "Interpreting the Land Use Act" Vol. 1. The Journal of Nigerian Law, (1992) p. 108

⁴⁰ (1989) 1 NWLR (Pt. 96) 212.

⁴¹ Ibid at pp.260 -227, See also *A.G. of Federation v. Sode* (1990) (Pt. 28) 500.

⁴² Essien, E.E. Law of Credit and Security in Nigeria. Golden Educational Publishers, Uyo, 2000, pp. 175-177

⁴³ (1986) SC 30

⁴⁴ (Supra)

⁴⁵ (1997) 6 SC (Pt. 1) See also *UBN Plc v. Ishola* (2001) 15 NWLR (Pt. 735) P. 47.

⁴⁶ See *Ugochukwu v. C.C. Ltd* (1996) 6 NWLR (Pt. 456) P. 524 S.C.

void. Hence in *Rockonoh Property Co. Ltd v. NITEL*^[47] the Supreme Court held that the absence of the necessary ministerial approval for consent in an instrument requiring prior ministerial approval or consent is a second defect which vitiates the title sought to be conferred by the relevant instruments. Such instrument is null and void even if registered with the Land Registry.

Much later, in *Jacobson Engineering Co. Ltd & Anor v. United Bank for Africa Ltd*;^[48] the issue on appeal was whether prior consent of the Governor is needed to create an equitable mortgage. After quoting the first arm of section 22 of the Land Use Act the Court concluded that:

After the commencement of the Land Use Decree, whatever was created upon delivery of the Title Deed, whether equitable or legal mortgage, the Law is the same and that is to the effect that the Bank cannot sell nor an order be made that the Bank should sell without the consent of the Minister first had and obtained^[49]

In this case however, there was no consent obtained at all, whether prior or subsequent to the equitable mortgage. So the issue of the stage of consent never arose frontally as it did in the Chinukwe case.

Finally, on this point, is the recent case of *Union Bank of Nigeria Limited v. Adeuya*^[50] one of the issues for determination here was whether a mortgage deed executed on 28th March, 1983 could be security for an overdraft granted much earlier since 1981^[51] Governor's consent to the mortgage was obtained on 10th September, 1980. It may be in this case that though Governor's consent was obtained before the execution of the mortgage deed, the priority or otherwise of the consent was not an issue.

The Effect of Failure to Obtain Consent

No doubt, by virtue of Section 22 of the Land Use Act, the holder of a Statutory Right of Occupancy granted by the Governor cannot alienate his right of Occupancy or part thereof without the Governors Consent first had and obtained^[52] Thus, it is opined that lack of appropriate consent where consent is required may lead to revocation of the right of occupancy. Where alienation is carried out without consent of appropriate authority, the Governor may revoke such right of occupancy^[53]. Lack of consent may also make the transaction unlawful and illegal^[54]. It also makes it an offence punishable with fine or imprisonment^[55] Again section 26 of the Land Use Act provides that: *"any transactions 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 provision of this Act shall be null and void."*^[56] Thus in *Savannah Bank of Nigeria Ltd. V. Ajilo*^[57] the Supreme Court held that all

transactions under which an interest in land is being transferred require the Government's approval for their validity. It is submitted that the duty to procure consent for the transfer of statutory or customary right of occupancy is that of the holder of such rights^[58]

Failure to Obtain Consent and Emerging Equities

The crux issue is whether the grantor of a right of occupancy whose duty is to obtain consent to alienate should be allowed to invalidate the transactions he entered into by raising the issue of lack of Governors' consent. In other words, can the equitable principle that a grantor cannot be allowed to rely on his own wrong be invoked in dealing with the consent provisions of the Land Use Act. This issue came up in *Ajilo's* case at the trial court but was not canvassed further in the Court of Appeal and the Supreme Court. Belgore, JSC (as he then was) noted this when he said:

"The feature of this appeal is that the issue based on the grounds of appeal has been confined within narrow limits of interpretation of section 34 and section 22 of the Act. This is unfortunate in this court must confine its decision to the argument of the parties. To do otherwise will amount to raising issue, suo motu for the parties. Otherwise, all the equities were not canvassed"^[59]

Obaseki, JSC who read the lead judgement in Ajilo's case appeared to hold a different view when he said:

"Although the 1st Plaintiff/Respondent by the tenor of the Land Use Act committed the initial wrong by alienating his statutory right of occupancy without prior consent in writing of the Governor the express provisions of the Land Use Act, make it undesirable to invoke the maxim ex turpi causa non oritur actio and the equitable principle enshrined in the case of Bucknor – MacLean Inlaks Ltd. (1980) 8 – 11 SC. 1"^[60]

No doubt, subsequent judgments of both the Supreme Court of Appeal are now in support of equities of a case rather than strict interpretation of Land Use Act which may lead to injustice. In *Adeleji V. National Bank of Nigeria Ltd*^[61] the Court of Appeal refused a mortgagor who sought to rely on the provisions of the Land Use Act to invalidate a mortgage to which no Governors' consent had been obtained. The court distinguished the case from *Ajilo's* case by noting that the issue was not raised in *Ajilo's* case when it came before it.

Akpata JCA (as he then was) who read the lead judgment held as follows:

"Apart from the principle of law involve in this case, it is morally despicable for a person who had benefitted from an agreement to turn round and say that the agreement is null and void."^[62]

In *Attorney General of the Federation & Ors V. Sode & Ors*^[63] the same issue (the maxim "ex turpi causa non oritur actio") was raised at the Supreme Court but could not be argued because the court lacked Jurisdiction to hear the

⁴⁷ (2001) 7 S.C. (Pt. 111) 154. See also *Adetuyo v. Agbajo* (1997) 1 NWLR (Pt. 484) 705, *Mainage v. Gwamana* (1997) 11 NWLR (Pt. 525) 191 C.A.

⁴⁸ (1993) 3 NWLR (Pt. 283) 586

⁴⁹ *Ibid*, at page 601. The Use of "Minister" must be a slip; the Court must have intended to say "Governor"

⁵⁰ (1993) 6 NWLR (Pt. 299) 375

⁵¹ *Ibid*, at p. 382

⁵² *Federal Mortgage Bank of Nigeria Dr. Elisha Bamiolele Babatunde* (1999) 12 NWLR (Pt. 632) at 689.

⁵³ See S.28(2) (a) & (3) (d) of the Act.

⁵⁴ Taiwo, A.; *The Nigerian land law*, Princeton & Associates Publishing Ltd, Lagos, Revised Edn, 2016, pp 241-242

⁵⁵ Ss 21, 22, 23, 34(5) (6) & (7) (8) and Sec 36(2), (4) & (6) of the Act

⁵⁶ *Olalumi Industries Ltd. V. Nigerian Industrial Development Bank Ltd.* (2009) 16 NWLR (Pt. 1167) 266 at 292 – 293 & 301 SC.

⁵⁷ *Supra*.

⁵⁸ Ss 14 & 22 of the Land Use Act. See also section 50 of the Act on the definition of holder of right of occupancy.

⁵⁹ *Savannah Bank Ltd. V. Ajilo* (*Supra*) at 354.

⁶⁰ *Savannah Bank Ltd. V. Ajilo* (*Supra*) at 324; See also *Federal Mortgage Bank of Nigeria V. Elisha Bamidele Babatunde* (1998) 12 NWLR (Pt. 632) 683.

⁶¹ (1989) 1 NWLR 212.

⁶² At 226 – 227.

⁶³ (1990) 1 NWLR 500

case. But again, Belgore JSC, repeated his earlier views on this point^[64] Belgore was more vocal on the applicability of the principle.

Indeed, he felt it could have been applied in Ajilo's case if it had been canvassed and he would have applied it also in Sode's case but for the ouster provisions in the statute governing the matter before the court. The view held by Obaseki, JSC in Ajilo's case on the non-applicability of the maxim "*ex turpi causa non oritur actio*" has been criticized by Professor Omotola. He argued thus:

"There is nothing in the relevant provision of the Act which necessarily prohibits the application of the principle. The consent provisions of the Act especially sections 22 and 26 are all traceable to similar provisions in the Land Tenure Law 1962 (See sections 28 and 32 thereof) and section 11 of the Land and Native Rights Act, 1916. The latter was considered by the Federal Supreme Court in Solanke V. Abed (1962) 1 ALL WLR 320 (a decision not referred to by his Lordship, probably over looked) Unsworth F.J., delivering the judgement of the court, with which Ademola, C.J.F and Taylor, F.J, concurred, held that the grantor could not be heard as against the grantee to put forward his own wrongful act and say that the agreement was unenforceable because he himself had failed to get the necessary consent under section 11 of the Land and Native Rights Act."^[65]

It is strongly submitted and firmly so that equity inclines itself to conscience, reason and good faith. It implies a system of law disposed to a just regulation of mutual rights and duties of a man in a civilized Society. It does not envisage a sharp practice or undue advantage of a situation, or a deliberate refusal to honour reciprocal liability arising therein^[66] It is therefore unfathomable that the Supreme Court which is the Pinnacle of Justice in Nigeria could find itself so handicapped and would refuse to raise an equitable point *suo motu* even when the point was present in the mind of the Justices simply because it was not canvassed by the appellant^[67]

The Court should do more than that and move forward to do substantial Justice and provide answer to social problems to enable the law to grow^[68]

Nevertheless there is a wave of change and Nigerian Court are now inclined to doing substantial Justice rather than relying on technicalities.

In *Chief Belonwu Ugochukwu V. Co-operative Commerce Bank Nigeria Ltd*^[69] The Supreme Court frowned at conducts similar to that in Ajilo's case. The S.C in dismissing the Appeal of the Appellant held as follows:

"The holder of a right of occupancy evidenced by a Certificate of Occupancy is the one to seek the consent of the Governor to alienate, transfer, mortgage etc. There is no doubt the consent given in Exhibit 3 was at the instance of the Appellant who was in need of fund from the Respondent by way of mortgages. It is not from him one must hear that the consent he obtained was void..... The appellant being the holder of the right of Occupancy over the house i.e No. 239 Cameroun Road, Aba was to seek consent and it is

unconscionable for him to turn roundabout and maintain that the consent of the Governor he obtained was flawed having received valuable consideration i.e. the loan from the Respondent."^[70]

The decision in *Awojugbagbe Light Industries Ltd. V. P. N. Chinukwe & ors*^[71] has given a legal impetus to transformation in judicial decisions on the application of the maxim "*ex turpi causa non oritur actio*" and in subsequent cases courts have been more assertive on the applicability of the maxim.

In the same vein, in *First Bank of Nigeria Plc. V. May Medical Clinic and Diagnostic Centre Ltd. & Ors*,^[72] the Court of Appeal commented as follows:

"... the law can be lenient to applicants who unwittingly through acts of commission or omission though innocently commit procedural irregularity ... but certainly the law does not favour those who for selfish reasons circumvent the real issue in order to draw benefit from their own misdeeds...."

It is a settled principle of law expressed in the Latin maxim, "*nollus commodum capere potest de juria sua propria*" that no one should be allowed to benefit from his own wrong. Thus position was taken further by the court in the case of *Buswell V. Goodwin*^[73] where *Widgery, L.J* said:

"The proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one which the court would wish to endorse."

In *Ibekwe V. Maduka*^[74] the (Court of Appeal Jos Judicial Division) condemned such a fraudulent act and held that apart from being morally despicable for a person who has benefitted from an agreement to turn round and say that the agreement is null and void, no court of law should allow a person to benefit from his wrong doing^[75]

This position was taken further by the Court of Appeal in *Eboni Finance and Securities Ltd. V. Wole Technical Services & 2 Ors*^[76] In that case, the court, as per Pats – Acholonu, JCA held as follows:

"As the 1st and 2nd Respondents have received the money, might equity not come to their rescue for unjust enrichment? I think the principle of unjust enrichment which unfortunately is not well developed in English Law as both in United State and Scotland should of necessity be nurtured to grow in a new and complex Society, like ours where people can easily at a whiff of breach resort to law to ward off debtor other enrichments they have had, at the expense of other. This is specie of constructive trust which is an instrument which the court of equity may employ to prevent undue enrichment. I believe that when a person is holding tight that which is subject of equity he should not be allowed to hold it firmly. Therefore where a party unjustly enriches himself at the expense of the plaintiff he must be made to disgorge it. The premise behind the doctrine of restitution and unjust enrichment is that Justice be done... In this case, the Respondents must be made to vomit out what they have

⁷⁰ Per S. M. A. Belgore JSC at 540.

⁷¹ (1995) 4 NWLR (Pt. 390) 379.

⁷² (1996) 9 NWLR (Pt. 471) 195.

⁷³ (971) 1 ALL ER 418 at 421; See also *The Administrators/Executors of the estate of General Sani Abacha (deceased) Vs. Samuel David Eke-Spiff & 3 ors* (2009) 7 NWLR (Pt. 1139) 97 at 132.

⁷⁴ (1995) 4 NWLR (Pt. 392) 716 at 725.

⁷⁵ *Raymond Inyang & 2 Ors V. Engineer Maurice A. Ebong* (2002) 2 NWLR (Pt. 751) 284 At 333 – 334.

⁷⁶ (1996) 7 NWLR (Pt. 461) 464.

⁶⁴ AGF V Sode (supra) at 519

⁶⁵ See also *Rufai V. Olugbeja* (1986) 5 NWLR 162.

⁶⁶ Taiwo A: *The Nigerian Land Law*, (O. P. Cit, P. 244)

⁶⁷ See Omotola, J.A "Interpreting the Land Use Act" (1992) 1 (1) *Journal of Nigerian Law* 108 at 110."

⁶⁸ See Yakubu, J.A. "The Equal and Unequal scale of Justice" (2002) 3 *Journal of private & Business Law* (194 – 210 at 206 & 210).

⁶⁹ (1996) 6 NWLR (Pt. 456) 524.

taken unjustly.”^[77]

The above decision accords with sound sense of justice. A person should not be allowed to profit himself or another person from his or her crime. Thus, it has been said that there is a jurisdiction by which a court of Equity proceeding on the ground of fraud, can convert the party who had committed fraud into a trustee for the party who was injured by the fraud. In *Schobelt V. Barber*,^[78] it was held that where one of two joint tenants murdered the other, the murderer took by survivorship, but that public policy prevented him from profiting from his wrong and so imposed on him a constructive trust as to one half in favour of the victims next of kin. The rule is that a man shall not slain his benefactor and thereby take his booty^[79]

Thus in *Alhaji Ayotunde Seriki V. Sefiu Olukorede*,^[80] it was held that no person involved in any form of immoral or illegal act or transaction should be allowed to come to court to seek redress. No polluted hand shall touch the pure foundation of Justice. One cannot have a right of action when he or she comes to a court of Justice in an unclean manner. It goes on to say that equity will not allow a person to benefit or profit from his own crime, fraud, immorality or illegality as in the case of failure to obtain the Governors’ consent to alienate his/her or rights, courts should readily intervene and should not allow a defaulting party to benefit from his/her own wrong^[81] Thus in the case of *Lodge V. National Union Investment Co. Ltd.*^[82] B. borrowed money from M, an unregistered money lender and mortgaged certain securities to him. The contract was illegal and void under the Money Lender Act, 1900. B sued M for delivery up except upon the terms that B should repay the money which had been advanced to him.

In the same dimensions, in *Haigh V. Kaye*^[83] James L. J stated that statute of fraud was never intended to prevent the court of equity from giving relief in a case of plain, clear and deliberate fraud. Also in *Nigerian Industrial Development Bank Ltd. V. Olalomi Industries Ltd.*^[84] the court admonished as follows: “... It is my view that it will be in the interest of Justice to do so rather than allowing the Mortgagee to eat his cake and still have it back. The court should resist at all cost the attempt at using it as an engine of fraud or cheating or dishonesty.”^[85]

Flowing from the discourse above, it is strongly submitted and rightly opined by Professor Taiwo thus:

“The literal interpretation of the provisions of the Land Use Act should always be departed from where it could result in injustice and wrongful self-benefit. Where a Court of Law is to give effect to the provision of this law, it should see to it that its decision also enhance Social Justice as they conform to legal Justice. Strict interpretation of sections 21 and 22 of the Land Use Act or any provision of the law, which may lead to antithesis of Justice, should not be

⁷⁷ *Pharmatek Industries Projects Ltd. V. Trade Bank Nigeria Plc. & 4 Ors* (2009) 13 NWLR (Pt. 1159) 577 at 627 – 628 & 641.

⁷⁸ (1967) 1 Q. R 349

⁷⁹ See also *The Estate of Hall* (1914) LPL 7; *Re Giles* (1972) Ch. 544.

⁸⁰ (1999) 3 NWLR (Pt. 595) 469 at 480 – 481.

⁸¹ Akintola, S. O.: Examination of Constructive Trusts as a remedy for Unjust Enrichment” (2002) 3 Journal of Private & Business Law 130 at 140.

⁸² (1907) 1 Ch 300.

⁸³ (1872) 7 Ch. App. 469.

⁸⁴ (2002) 5 NWLR (Pt. 761) 532.

⁸⁵ At 548

employed.”^[86]

In this context, the words of Kayode Esq., J.S.C to the effect that “It is the functions of judges to keep the law alive, in motion and to make it progressive, without being inhibited by technicalities to find every conceivable but acceptable way to avoiding narrowness that would spell injustice” ... is very instructive.

Conclusion

In the light of the foregoing, one is bound to adopt the liberal, humane interpretation of consent provision given by the Court of Appeal in the Chinukwe case wholistically. So far, as the law evolves, it is the only case wherein the issue, as raised by subsection 2 of section 22 of the Land Use Act, has been given full judicial attention.

No doubt, the view of the Supreme Court in the Ajilo case that consent should be prior was *obiter* because the issue of priority or otherwise of consent never arose for determination by the apex court in that case. Therefore, going by the maxim “equity will not suffer a wrong without a remedy”, there is every likelihood that if the issue were to present itself before the Supreme Court, that court would also tow the same liberal, humane interpretative approach as did the Court of Appeal in the Chinukwe case.

Hence, it will be wrong to assert that there is a triumph over the pains of crocodile tears, rather we have witnessed in the past 23 years after Savannah Bank v. Ajilo’s case a demonstration by the Courts what could be referred to as “sympathy without relief which is like a mustard seed without beef”, and it has never helped to realize the objective of the Land Use Act 1978.

Consequently, it is the considered view of this writer that the Land Use Act be amended to remove the consent provision totally. This removal will no doubt assist for easy transferability of Land like Shares under the Companies and Allied Matters Act.

Reference

1. SS. 21, 22, 23 and 26 of the Land Use Act.
2. Savannah Bank (Nig) Ltd. v. Ajilo NWLR (Pt. 97) P. 305, 1989.
3. This was the position of the Southern Nigeria before the promulgation of the Land Use Act. The only consent needed was consent of the family head if it was a family property or consent of the Landlord if it was a lease hold land with assignment covenant, 1978.
4. Onwuka and Others V. Ediala & Ors NWLR (Pt. 96) P. 182, 1989.
5. See Savannah Bank Nig. Ltd. v. Ajilo (supra).
6. Onuoha RA. Governors Consent under Section 22 of the Land Use Act; the position since Savannah Bank v. Ajilo. In: Smith, I.O. (ed) The Land Use Act Twenty Five Years After. Folar Prints, Lagos, 2003, P. 199.
7. Smith IO. Practical Approach to Law of Real Property in Nigeria. Ecowatch Publication Limited, Lagos, 1999, p. 43.
8. Ibid P. 203 see also, Cook v. Shoes Smith (1957) IKB p. 952; Stenning v. Abraham, 1931. 1 ch. P. 470.
9. Elias TO. Nigerian Land Law. Sweet & Maxwell, London, 4th Edition, 1971, P. 147.

⁸⁶ See Taiwo, E. A: “The Effect of the Failure to obtain consent to Alienate Rights under the Land Use Act and the Emerging Equities” (2006) 5 Journal of Private and Business Law 171 – 185 at 185.

10. 1 NLR 1020, 1904.
11. 5 S.C. 40, 1972.
12. WNLR 110, 1988.
13. 4 FSC 75, 1959.
14. 12 WACA 136, 1947.
15. 12 WACA 187, 1947.
16. Adejumo V. Ayantegbe, 6 SCN J (Pt. 1) 76 the Supreme Court held that where there has been alienation of family land by the head of the family with some important members of the family, then the transaction is voidable and those members who should have consented to the transaction but did not can take an action to have the transaction set aside, 1989.
17. Onuoha, R.A. Op cit. P. 202.
18. Omotola JA. Essays on the Land Use Act, p. 23. See further the Land Use Act 1978 SS. 21 and 22 which prohibits alienation of Customary Right of Occupancy and Statutory Right of Occupancy without the requisite consent from Local Government or Military Governor respectively, 1978.
19. SS 22, 23, 34(7) which expressly permit transfer subject to consent. The only exception to the principle of transferability under the Act can be found in S. 36 dealing with customary right of occupancy which is deemed granted.
20. (Supra)
21. Essien EE. A new Dimension to the Consent Provisions in the Land Use Act, University of Uyo Law Journal Vol. 1, P. 2, 1997.
22. Ibid.
23. Ndukwe, O. U.Cases and Commentaries on the Land Use Act Cap LFN, 1990. Foresight Inc; calabar, 2001, p. 33.
24. See Ezejofor G. The Consent Requirement of the Nigerian Land Use Act Vol. 42 JAL 101-109 at 103, 1998.
25. Essien EE. Op. Cit. P. 2
26. Essien EE. Land Use Act and Security in Real Estate in Nigeria. In Smith, I.O. (ed), The Land Use Act twenty five years after. Folar Prints, Lagos, 2003, p. 291.
27. 1 NWLR (Pt. 270) 485, 1993.
28. Ibid, P. 348.
29. Chianu E. Law of Securities for Bank Advances (Mortgage of Land). Ambik Press Ltd, Benin, 2nd edition, 2004, p. 60.
30. Ibid.
31. Agbaje V. Bankole 1 ALL NLR 275, 1971.
32. 4 NWLR (Pt. 390) SC, 1995.
33. (Supra)
34. S. 22 of the Land Use Act.
35. AC 245, 1991.
36. Such as Chief FRA. Williams (SAN) and Prof. Jelili Omotola (SAN), respectively.
37. This ratio was adopted by the Court of Appeal in Okonwo V. CCR (Nig) Plc 6 NWLR (4507) 480 C.A. Doherty v. Ighodaro (1997) 11 NWLR (Pt. 530) P. 694 CA, 1997.
38. (Supra)
39. Omotola JA. Interpreting the Land Use Act Vol. 1. The Journal of Nigerian Law, 1992, p. 108.
40. 1 NWLR (Pt. 96) 212, 1989.
41. Ibid at pp. 260 -227, See also A.G. of Federation v. Sode (Pt. 28) 500, 1990.
42. Essien EE. Law of Credit and Security in Nigeria. Golden Educational Publishers, Uyo, 2000, pp. 175-177.
43. (1986) SC 30
44. (Supra)
45. (1997) 6 SC (Pt. 1) See also UBN Plc v. Ishola (2001) 15 NWLR (Pt. 735) P. 47.
46. See Ugochukwu v. C.C. Ltd (1996) 6 NWLR (Pt. 456) P. 524 S.C.
47. (2001) 7 S.C. (Pt. 111) 154. See also Adetuyo v. Agbajo (1997) 1 NWLR (Pt. 484) 705, Mainage v. Gwamana (1997) 11 NWLR (Pt. 525) 191 C.A.
48. (1993) 3 NWLR (Pt. 283) 586
49. Ibid, at page 601. The Use of “Minister” must be a slip; the Court must have intended to say “Governor”
50. (1993) 6 NWLR (Pt. 299) 375
51. Ibid, at p. 382
52. Federal Mortgage Bank of Nigeria Dr. Elisha Bamiolele Babatunde (1999) 12 NWLR (Pt. 632) at 689.
53. See S. 28(2) (a) & (3) (d) of the Act.
54. Taiwo A. The Nigerian land law, Princeton& Associates Publishing. Ltd, lagos, Revised Edn, 2016, pp. 241-242
55. Ss 21,22,23,34(5) (6)& (7) (8) and Sec 36(2), (4) & (6) of the Act
56. Olalumi Industries Ltd. V. Nigerian Industrial Development Bank Ltd. (2009) 16 NWLR (Pt. 1167) 266 at 292 – 293 & 301 SC.
57. Supra.
58. SS14 & 22 of the Land Use Act. See also section 50 of the Act on the definition of holder of right of occupancy.
59. Savannah Bank Ltd. V. Ajilo (Supra) at 354.
60. Savannah Bank Ltd. V. Ajilo (Supra) at 324; See also Federal Mortgage Bank of Nigeria V. Elisha Bamidele Babatunde (1998) 12 NWLR (Pt. 632) 683.
61. (1989) 1 NWLR 212.
62. At 226 – 227.
63. (1990) 1 NWLR 500
64. AGF V Sode (supra) at 519
65. See also Rufai V. Olugbeja (1986) 5 NWLR 162.
66. Taiwo A: The Nigerian Land Law, (O. P. Cit, P. 244)
67. See Omotola, J.A “Interpreting the Land Use Act” (1992) 1 (1) Journal of Nigerian Law 108 at 110.”
68. See Yakubu, J.A. “The Equal and Unequal scale of Justice” (2002) 3 Journal of private & Business Law (194 – 210 at 206 & 210).
69. (1996) 6 NWLR (Pt. 456) 524.
70. Per S. M. A. Belgore JSC at 540.
71. (1995) 4 NWLR (Pt. 390) 379.
72. (1996) 9 NWLR (Pt. 471) 195.

73. (971) 1 ALL ER 418 at 421; See also The Administrators/Executors of the estate of General Sani Abacha (deceased) Vs. Samuel David Eke-Spiff & 3 Ors (2009) 7 NWLR (Pt. 1139) 97 at 132.
74. (1995) 4 NWLR (Pt. 392) 716 at 725.
75. Raymond Inyang & 2 Ors V. Engineer Maurice A. Ebong (2002) 2 NWLR (Pt. 751) 284 At 333 – 334.
76. (1996) 7 NWLR (Pt. 461) 464.
77. Pharmatek Industries Projects Ltd. V. Trade Bank Nigeria Plc. & 4 Ors (2009) 13 NWLR (Pt. 1159) 577 at 627 – 628 & 641.
78. (1967) 1 Q. R 349
79. See also The Estate of Hall (1914) LPL 7; Re Giles (1972) Ch. 544.
80. (1999) 3 NWLR (Pt. 595) 469 at 480 – 481.
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82. (1907) 1 Ch 300.
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85. At 548
86. See Taiwo, E. A: “The Effect of the Failure to obtain consent to Alienate Rights under the Land Use Act and the Emerging Equities” (2006) 5 Journal of Private and Business Law 171 – 185 at 185.