

THE OPERATIONAL FRAMEWORK OF THE POWER OF THE GOVERNOR TO REVOKE LAND FOR PUBLIC PURPOSES

¹Rosecanna G. Ankama, ²John Nma Aliu & ³Auta Maisamari

¹Department of Legal Studies, Casss

²Department of Banking And Finance

^{1&2}Kaduna Polytechnic, Kaduna

³Auta Maisamari & Co, Legal Practitioner and Consultant

No 33 Borno Road, Marafa Estate Kaduna, Kaduna State.

Abstract

The 1978 land use Act CAP L5 L.F.N. 2004 granted unfettered power to the Governor of the state (i.e. any governor in power) to grant and revoke Statutory Right of Occupancy. As a result of this he is acknowledged as the chief custodian of land under his domain who can revoke land from an individual or corporate person for public purpose. The exercise of this power does not operate in vacuum. This study investigated the exercise of such power using doctrinal analysis and case of law to identify the qualifications, duties, limitation and privileges in discharging such power. This was necessitated by the obvious presumption that the governor can override any interest of land acquisition under the clog of public purpose. Review shows that cases of revocation by the Governor must follow a laid down procedure and fulfill the grounds thereof. It is therefore suggested that payment of compensation for revocation of land for public purpose should not only be sufficient in the eyes of the law but adequate to sustain the holder.

Keywords: *Governor, Power, Public, Purpose, Land, Operation and Framework, Revocation or Compulsory Acquisition.*

Background to the Study

The Land Use Act, 1978, is a product of the inherent contradictions of the colonial and no-colonial dependent, pseudo-capitalist economic structures established in Nigeria since colonial times. From time immemorial to information technology stage, land still remains the most valuable property in the life of man and his development. The importance of land and its usefulness to man cannot be overemphasize. Therefore the need to make land available to all and ensure that its acquisition is put to proper use for needed development becomes imperative. Prior to the enactment of the Land Use Act in 1978. There were three main sources of Land Law which are Customary Law Received English Law and Legislation. In practice these was duality of Land Use System in the southern part of one hand and northern part on the other hand. The parliament of the then Northern Nigeria passed the Land Tenure Law 1962 governing all interest affecting land. This law vested all land in the governor who was to hold it in trust for the people and any right of occupancy could be granted to the people in the then Southern Nigeria Customary System of Land Tenure governed land interest and land was owned by communities, families and individuals in freehold.

Notwithstanding the existence of laws regulating land, the problems of land tenure and land administration witnessed by both Northern and Southern part of the country made land acquisition by government and individuals almost impossible to break the barrier and monopolies of landlords, the then Federal Military Government set up some panels to consider solving the problems associated with land tenure and administration in Nigeria. The report of Land Use Panel of 1977 formed the basis of the Land Use Act No. 6 of 1978.

The Land Use Act 1978 (hereinafter referred to as “the Land Use Act” or “the Act”) has no doubt revolutionised the land tenure system in Nigeria. One of (if not) the most profound changes introduced by the Act is the vesting of the radical title in land in every state of the Federation on the Governor of the state with a mandate to hold the land in trust and to administer it for the use and common benefit of all Nigerians in accordance with the provisions of the Act. Several other sections of the Act have equally conferred extensive powers of control and management on the Governor over such land including the power to grant right of occupancy to any person for all purposes and to issue certificate of occupancy to evidence same, to fix and demand rent including penal rent in respect of land, to enter upon and inspect land comprised in any statutory right of occupancy, to grant license for the extraction from land of building materials not being a mineral within the meaning of the Minerals Act and to grant consent for the alienation of any statutory right of occupancy or part thereof by assignment, mortgage, transfer of possession, sublease or otherwise. Alienation of such right of occupancy without the Governor's consent would render the alienation null and void.

One of the most far reaching powers of control and management of land conferred on the Governor by the Act is the power to revoke a right of occupancy over land or to compulsorily acquire land for public purpose under section 28 of the Act. Not surprisingly, in view of the tremendous importance of land to people and their sentimental attachment to it, the exercise by the Governor of his power to compulsorily acquire land has over the years generated a lot of interest and controversies. This has been particularly so in view of the fact that the exercise of such power has on many occasions not been transparent or free of abuse. Aside from numerous suits by individuals, companies and communities against Governments and their agencies challenging the revocation of their right of occupancy for public purpose, in some cases, the exercise of such power by the Governor had precipitated demonstrations and riots. Due to the fact that the power of the Governor to compulsorily acquire land is expropriatory in nature in that it deprives a title holder of his proprietary interest in land, the Land Use Act and the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as “the 1999 Constitution”) and indeed, other constitutions before it have sought to clearly delineate the purposes and procedure for its exercise and the rights of a title holder whose land is compulsorily acquired thereby subjecting it to certain conditions, qualifications and limitations. This Paper examines the import of this power of the Governor to compulsorily acquire land under the Land Use Act and the extent of the conditions, qualifications and limitations attaching to it as well as the rights of the title holder whose property is compulsorily acquired. Effort is made to critically assess the propriety and adequacy or otherwise of the relevant provisions on compulsory acquisition and compensation in the Land Use Act and the 1999 Constitution. In the end, some suggestions are proffered to ensure a fair and equitable exercise of the power.

Meaning and Philosophical Basis of Conceptual Framework

A governor is a person directly elected by the people and in most cases have considerable practical powers. He heads the executive branch in each state depending on the individual jurisdiction with considerable control over government budgeting and the power of appointing many officials, including judges.

The Land Use Act was promulgated as Decree No. 6 of 1978 by the then Federal Military Government and came into effect on 29th March, 1978. It is now Cap. L5 Laws of the Federation of Nigeria 2004

Section 1, Land Use Act Cap 202 Laws of the Federation of Nigeria, 1990

Section 2, 5(1)(a) and 9 Ibid

Section 5(1)(c), (e) & (f) Ibid

Section 11 Ibid

Section 12 Ibid

See section 21, 22 and 26 of the Land Use Act Op. cit. and SAVANAH BANK v. AJILO (1989) SCNJ 169; (1989) 1 NWLR (Pt.97) 305

For example, the demonstrations at Jaji and Bakori cited in Yakubu, M.G. Land Law in Nigeria. Macmillian Publisher, London and Basingstoke (1985) pp. 210 & 222

Cap. C22 Laws of the Federation of Nigeria, 2004

See for example section 31 of the 1963 Constitution and section 40 of the 1979 Constitution Cap. 62 Laws of the Federation of Nigeria, 1990

www.legislation.sa.gov.au.

www.ngrguardiannews.com

Power is the legal authority to act in a specified capacity for another. It is the ability or capacity to perform or act effectively. Section 4 of the 1914 South Australian Lands and Public Purposes Acquisition Act provides that: The governor may declare any purpose to be a public purpose namely:

- (i) The providing of offices and other building premises for carrying on the government of the said state or any department or departments of the government of the state.
- (ii) Any work or undertaking which the government of the said state are by any Act or law empowered to carry out, but for which there is no power (except this Act) to acquire land.
- (iii) Any purpose which both Houses and Parliament during the same or different session of any parliament resolve shall be a public within the meaning of this Act; and thereupon such purposes shall be declined to be an undertaking within the meaning of the Compulsory Acquisition of Land Act 1925 and the Act amending that Act as if it were an undertaking authorized by Act of parliament provides for power to acquire lands required for purpose thus;

When the governor by proclamation declared any purpose, the promoter of the undertaking may take and acquire either by agreement or compulsorily, any land which is required for the said purpose provided that;

- a. No land shall be taken or required under this Act unless the governor has in writing directed that the same shall be so acquired; and
- b. All land acquired under this Act shall be conveyed to and shall vest in the person or officer if any nominated in that behalf by proclamation as provided by section 5 or if no person or officer is so nominated then to and in His Majesty the King.

Webster's New Dictionary defines public purpose as a governmental action or direction that purports to benefit the populace as a whole.

Under the Law of Florida, the phrase public purpose carried with it several different meanings and when used as a standard for determining the limits of governmental actions, it offers different levels of protection of property and money of private individuals.

Under the Nigerian Law, "Public Purposes" include:

- (a) For exclusive Government use or for general public use;
- (b) For use by anybody corporate directly established by law or by anybody corporate registered under the Companies and Allied Matters Act as respects which the Government own shares, stocks or debentures;
- (c) For or in connection with sanitary improvements of any kind;
- (d) For obtaining control over land contiguous to any part or over land the value of which will b e

enhanced by the construction of any railway, road or other public work or convenience about to be undertaken or provided for by the Government.

- (e) For obtaining control over land required for or in connection with development or telecommunications or provision of electricity;
- (f) For obtaining control over land required for in connection with mining purposes;
- (g) For obtaining control over land required for or in connection with planned urban or rural development or settlement;
- (h) For obtaining control over land required for or in connection with economic, industrial or agricultural development;
- (i) For educational and other services.

The definition of public purpose as contained in the Land Use Act like its counterpart the Florida Law; carries with it several different meanings and in using it as a standard for determining the limits of governmental actions; offers different levels of protection of property and money of private individual. The "Public Purpose Doctrine" as it relates to sports, venues, finds its root in *State v. Daytona Beach Racing and Recreational Development Facilities District* where the court held that if an undertaking is for public purposes Art. 1 & 10 of the constitution is not violated, even though some private parties may be incidentally benefited ... The fact that some are engaged in private business for private gain will be benefited by every public improvement undertaken by the government.

In essence it does not matter if a private business made private gain from acquisition for private purpose; all that matters is that the public must be beneficial to all. In real Property Law, Land is generally defined to include the earth surface, the sub-soil and all appurtenances and improvements attached to it. Such as building, minerals resources, crops, streams and other intangible rights like easement as well as profits and rents enjoyed by one person over the land of another. By this definition, the common law principle of *qui qui plantatur solo solo credit* is applicable to the definition of land. The power of the Governor to revoke a statutory right of occupancy for public purpose is what is normally referred to as "compulsory acquisition" or www.ngrguardiannews.com

Compulsory Acquisition of Land Act 1925 South Australia

Webster's New World Dictionary, Copyright © 2010 Wiley Publishing Inc.

Florida University Law Review. Vol. 30:529

Section 51(1) Land Use Act Cap. L52 Fro 2004

89 SO 2d 34 (Fla. 1956)

Chijioke Ikpo, (2005) *Issues and Principles in Land Law*. DIMATHS LAW SERIES

simply, "taking". The word, "acquisition" has been defined in Black's Law Dictionary as "the gaining of process or control over something". The other word in the concept, "compulsory" is defined in the same Dictionary as "mandated by legal process or statute". The word "compulsory" is derived from the verb "compel" which means "to cause or bring about by force or overwhelming pressure". The concept of compulsory acquisition therefore connotes some measure of force or involuntariness. In the words of B. A. Mban, Compulsory acquisition is a situation in which the seller and the buyer of land are forced into the market to effect land transaction, against the wish of the former. In a compulsory acquisition situation, the land owner is compelled by law to surrender and part with the ownership of his land together with all rights and privileges attaching to such land in favour of the acquiring authority on terms dictated by the law. The prior consent of the land owner is neither sought nor obtained to the acquisition transaction even when, as

often happens, such acquisition apart from dispossessing the owner imposes very severe hardships on him such as the total extinguishment of his business or means of livelihood.

Land is the greatest asset of any nation or private individual. Indeed, it is the utility to which a nation puts its land that determines whether it will be a wealthy and developed nation or a poor undeveloped or third world country. Therefore every nation or state is normally concerned with the use and management of its land resource. A state or government will therefore not only seek to exercise some control over the use and management of the land and resources within its territory but reserves for itself some power to acquire or access land for agricultural, industrial and social-economic development. Therefore, "as part of the social contract, the individual surrenders to the sovereign authority part of his absolute right over land for development, provision of social amenities, health and education, in return for protection from foreign aggression through its air space and foreshore" and if one may add, also for protection from internal insecurity. Herein lies the philosophical basis of the concept of compulsory acquisition.

However, in a democracy the right of government to compulsorily acquire its citizens' property has always been balanced with a due recognition of the individuals right to own property and therefore for government to pay reasonable compensation where such property is compulsorily acquired by it. This right has found expression in many constitutional instruments dating hundreds of years back like the great Magna Carta of 1215, the Bills of Rights 1668, through the American Constitution to the Universal Declaration of Human Rights Article 17, and our own section 31 of the 1963 Constitution, section 40(1) of the 1979 Constitution and presently section 44(1) of the 1999 Constitution. Hence even in a state of war and/or emergency, a citizen is entitled to reasonable compensation where his property is compulsorily acquired or requisitioned.

It is to be noted that other than compulsorily acquiring on individual's or community's land, Government may acquire land for its purposes by a negotiated purchase transaction of the land required by it or by way of donation or gift, with or without conditions. In view of the constitutionally guaranteed rights of citizens to private property and respect for the Individual's right to acquire and own property, most modern Governments rarely invoke the power of compulsory acquisition. Thus a humane government should only resort to compulsory acquisition as a matter of last resort.

Revocation or Compulsory Acquisition of Land under the Land Use Act

Having acquainted ourselves with the meaning, philosophical and historical background of compulsory acquisition in Nigeria, we shall now examine in some details the power of the Governor to revoke a right of occupancy or to compulsorily acquire land under the Land Use Act¹ From the provisions of the Land Use Act highlighted in the introductory part of this Paper, it is not in doubt at all that the powers of the Governor over the control and management of land in his State are quite enormous and pervasive. These powers show clearly that the Governor is truly in charge of all land comprised in his State. Aside from section 1 of the Land Use Act vesting radical title in land on the Governor, perhaps no other provision of the Land Use Act better demonstrates the enormity of these powers as that of section 28 of the Act.

Section 28 of the Land Use Act provides as follows:

- (1) It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest.
- (2) Overriding public interest in the case of a statutory right of occupancy means-
 - a) The alienation by the occupier by assignment, mortgage, transfer of possession, sub-lease or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made thereunder;

Aboki, Y. Introduction to Statutory Land Law in Nigeria. (Unpublished Lecture Notes on the Land Use Act,

1978) Dept. of Public Law, Faculty of Law, A.B.U., Zaria (2001) p.21

Gardner, B.A. (ed.), Black's Law Dictionary, 7th Edition, West Publishing Co. St. Paul, Minn (1999) p.24

Ibid p.281

Ibid p.276

Mban, B.A. The Problems of Land Acquisition and Administration in the Public Sector. In: Adigun O. (ed.),
The Land Use Act, Administration and Policy Implication, University of Lagos Press, Lagos (1991) p.94

Onalaja, M.O. The Courts and Problems of Compensation for Land Rights. In: Adigun O. (ed.) Loc. Cit. p.
157

Op. Cit

Op. Cit

See ATTORNEY GENERAL v. DKEYSERS ROYAL HOTEL (1920) AC 505 and CHAIRMAN LEDB v.
WILLIAMS (1963)

1 ALLNRL 267

Aboki, Y. Loc. Cit. p.22

a) The requirement of the land by the Government of the State or by a Local Government in the State, In either case for public purposes within the state, or the requirement of the land by the Government of the Federation for public purposes of the Federation;

b) The requirement of the land for mining purposes or oil pipelines or for any purposes connected therewith.

Overriding Public interest in respect of a customary right of occupancy includes all the above in addition to the requirement of the land for the extraction of building materials. By virtue of section 28(4) of the Act, the Governor shall revoke a right of occupancy in the event of the issue of a notice by or on behalf of the President if such notice declares such land to be required by the Government for public purposes. Section 28(5) further provides that:

The Governor may revoke a statutory right of occupancy on the ground of-

a) A breach of any of the provisions which a certificate of occupancy is by section 10 of the Act deemed to contain;

b) A breach of any term contained in the certificate of occupancy or in any special contract made under section 8 of this Ad; and

c) A refusal or neglect to accept and pay for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Governor under sub section (3) of section 9 of this Act.

Section 10 of the Land Use Act above referred provides that every certificate of occupancy is deemed to contain provisions to the effect that the holder binds himself to pay to the Governor the amount found to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation; and the rent fixed by the Governor and any rent which may be agreed or fixed on revision in accordance with section 16 of the Land Use Act. A critical examination of Section 28(2)(a) above will reveal that although its provision (i.e. revocation due to a violation of the provisions of the Act) is presented as one of the grounds that constitute overriding public interest, it is submitted that revocation pursuant to it cannot strictly speaking be properly regarded as a revocation on ground of overriding public interest.

Revocation under the said ground is in reality a penalty imposed for default. In other words, it amounts to a forfeiture of a right of occupancy due to a breach of the provisions of the Act. To this extent, the provisions of section 28(5) of the Act which empower the Governor to revoke a statutory right of occupancy on the ground of breach of a provision of the certificate of occupancy (express or implied) ought to be interpreted as being complementary to the said section 28(2)(a).

In the circumstances, the combined effect of the provisions of section 28(2)(a) & (5) of the Act can present some problem. Although it has been suggested in some quarters that the said provisions may only be invoked by the Governor to revoke or forfeit a right of occupancy for a breach of fundamental terms such as alienation without the consent of the Governor or Local Government or making use of the land contrary to the purpose for which it was granted, it is submitted that the provisions have a much wider effect. Given their ordinary meaning, they would entitle the Governor to forfeit or revoke a right of occupancy on breach of any term contained in the certificate of occupancy including for example failure to pay annual ground rent for just one year. Similarly, where for example it is provided in a certificate of occupancy (and it is usually so provided) that a holder shall, within two years from the date of commencement of the right of occupancy, erect and complete on the land granted to him, the buildings or works specified in detailed plans or to erect and complete on the land, buildings and works up to the value of N2 million, it will be lawful for the Governor to revoke the right of occupancy if such buildings and works are not erected and completed on the land within the two years specified.

It is submitted therefore that the strict application of the said provisions may on certain occasions cause undue hardship or produce unintended results. The provisions present the Governor a veritable opportunity to abuse his power of revocation. The power to revoke for breach of the provisions of the Act or terms of the certificate of occupancy should be strictly limited to breach of fundamental terms like use for unapproved purpose or alienation without consent and even then only after the title holder has been given adequate opportunity to remedy the breach.

Procedure for Compulsory Acquisition under the Land Use Act

In addition to spelling out the public purposes or overriding public interest for which land can be compulsorily acquired, the Land Use Act has prescribed the exact procedure and manner in which the Governor can exercise the power. Thus section 28(6) & (7) of the Act provides as follows:

- (1) The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Governor and notice thereof shall be given to the holder.
- (2) The title of the holder of a right of occupancy shall be extinguished on receipt by him of a notice given under subsection (6) of this section or on such later date as may be stated in the notice.

The mode of service of such notice is spelt out in section 44 of the Act as follows:

Any notice required by this Act to be served on any person shall be effectively served on him-

- a) By delivering it to the person on whom it is to be served; or
- b) By leaving it at the usual or last known place of abode of that person; or
- c) By sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode; or
- d) In the case of an Incorporated company or body, by delivering it to the secretary or clerk of the company or body at its registered or principal office or sending it in a prepaid registered letter addressed to the secretary or clerk of the company or body at that office; or

See section 28(3), Land Use Act Op. cit.

See for example Aboki, Y. Loc. Cit. p.21

a) if It is not practicable after reasonable inquiry to ascertain the name or address of a holder or occupier of land on whom it should be served, by addressing it to him by the description of “holder” or “occupier” of the premises (naming them) to which it relates, and by delivering it to some person on the premises, or if there is no person on the premises to whom it can be delivered, by affixing it, or a copy of It, to some conspicuous part of the premises, It is well settled that compulsory acquisition being expropriatory in nature, provisions relating to it must be construed fortissime contra preferentes, that is, strictly against the acquiring authority and sympathetically in favour of the citizen who is being deprived of his property rights. Hence any non compliance by the Governor with the formalities prescribed for the revocation of a right of occupancy will invalidate the revocation. As Nnaemeka - Agu J.S.C, (as he then was) succinctly put it in *DIN V. AG. OF THE FEDERATION*, Now it is an accepted principle of interpretation of statutes that statutes which encroach on the rights of a subject, be them personal or proprietary rights, attracts strict construction by the courts. The implication of that principle is that they are construed forissime contra proferentes - if possible, so as to respect such personal or proprietary rights.

Consequently, by virtue of the principle of delegatus non potest delegare, where We Governor has delegated the power of signifying the revocation of a right of occupancy to an official pursuant to section 26(6) of the Act, that official cannot delegate the power to another official. Effective service of a notice of revocation is a condition precedent to any valid acquisition of land by Government. Accordingly, an acquisition of land does not vest or take effect until the notice of acquisition is in fact served in the manner prescribed by law. Publication of the notice of acquisition in a newspaper or gazette instead of service In accordance with section 44 of the Land Use Act, for example, by delivery same to the holder or leaving it at his usual or last known place of abode will not be recognized as proper service and will therefore invalidate the acquisition.

In *PROVOST, LAGOS STATE COLLEGE OF EDUCATION & ORS. v. EDUN* the Lagos State Government purportedly acquired the Respondent's land compulsorily and served the notice of acquisition by publication in the official gazette. The Supreme Court held that where an acquiring authority seeks to acquire private property, before the private property is acquired, the authority must give notice of intention to acquire the property to the holder before publishing same in the gazette. Similarly, in *OBIKOYA & SONS LTD. v. THE GOVERNOR OF LAGOS STATE*, the Lagos State Commissioner for Economic and Physical Planning, acting on behalf of the Governor of Lagos State, issued an instrument dated 2nd November, 1983 and published in the State Gazette. The instrument was stated to have been made pursuant to the powers vested on the Governor by section 28 of the Land Use Act.

The instrument which purported to revoke the Respondent's right of occupancy over the land in dispute was never served on the Respondent. The revocation was declared null and void. Service of the revocation notice by addressing same to the holder or occupier of the premises and delivering same to a person in the premises or affixing it to a conspicuous part of the premises pursuant to section 44(e) can only be resorted to if it is not practicable to ascertain the name or address of the holder to serve him personally. In *A.G., LAGOS STATE v. SOWANDE*, the notice of revocation was published in the Lagos State Gazette and served by pasting on the fence of the land in dispute when the name and address of the Respondent, the title holder was known to the Government or its officials. The Court of Appeal held that while section 44(a) of

the Land Use Act contemplates personal service, section 44(b), (c) & (d) of the Act contemplates service by substitution; and although there is no requirement that section 44(b) & (c) can be invoked only when personal service is not possible, such requirement is in section 44(e) which provides for leaving the notice with some person in the premises or by affixing it to some conspicuous part of the premises. Consequently, the acquisition was declared null and void.

Similarly, in *NITEL AND ORS. v. OGUNBIYI* the Kwara State Government purportedly acquired the Respondent's land by compulsory acquisition

See A. G., *BENDEL STATE v. AIDEYAN* (1989) 4 NWLR (pt.188) 164; *OBIKOYA v. GOVERNOR OF LAGOS STATE* (1987) 1 NWLR (pt.50) 385 at p.398; *NITEL v. OGUNBIYI* (1992) 7 NWLR (pt.255) 543 at pp.557-558.

(1988) 4 NWLR (pt.97) 147 at p.148

See *UMARALI v. COMMISSIONER FOR LANDS AND SURVEYS, BORNO STATE* (1983)

NCLR 57; *MAIYAGEBE v. ATTORNEY GENERAL* (1957) NRNL 158.

See *ONONUJU v. A.G. ANAMBRA STATE* Loc. Cit. p. 321; *NITEL v. OGUNBIYI* Loc. Cit. 557

See *ARE v. ADISA* 1967 NMLR 304; *OKAFOR v. A.G., RIVERS STATE* (1998) 7 NWLR (pt.556) 38 (2004) 6 NWLR (pt.870) 476

Op. cit.

(1992) 8 NWLR (pt.2610) 589

Supra for overriding public purpose. The purported notice of compulsory acquisition was not served on the Respondent who was known by the Government officials to reside in Lagos. In an action by the Respondent challenging the validity of the acquisition, the trial Judge held that the purported acquisition was null and void in that it failed to comply with the provision of the Land Use Act with regard to personal service of the acquisition notice. On appeal, the Court of Appeal upheld the decision of the trial court. The Court held that paragraph (e) of section 44 of the Land Use Act which provides for leaving notice with some person in the premises, the subject of revocation, or by affixing it to some conspicuous part of the said premises can only be invoked where it is not practicable to ascertain the name and address of the title holder. In the instant case, the 1st and 3rd Appellant having admitted knowing that the Respondent was resident in Lagos, there was no warrant to serve him by any substituted means or to serve him at his last known place of abode under section 44(b) or (c) of the Land Use Act. As stated by Achike J.C.A. (as he then was),

It will be quite invidious to accept any substituted service as a proper service of notice of revocation when the residence and whereabouts of the holder are within the knowledge of the party serving the notice. This will hardly accord with good sense or common sense. That will be erecting an imminently dangerous precedent at the hands of mischief makers outside the contemplation of the combined effect of sections 28(6) and (7) and 44. From the foregoing, it will seem that the decision of the Court of Appeal in *NITEL v. OGUNBIYI* went further than that in *A.G., LAGOS STATE v. SOWANDE* in that the decision in the latter case does not subject the applicability of the substituted mode of service provided for under paragraphs (b), (c) and (d) of section 44 to the non practicability of effecting personal service under paragraph (a) of the

section as the Court of Appeal seem to suggest in *NITUL v. OGUNBIYI*. While the decision in *A.G., LAGOS STATE v. SOWANDE* accords more with the literal interpretation of the provisions of section 44, the decision in *NITEL v. OGUNBIYI* which is obviously a manifestation of judicial activism should be preferred taking advantage of the maxim *fortissime contra preferentest*o prevent the abuse to which the substituted modes of service provided for in paragraphs (b), (c), (d) of section 44 may be subjected to. Although not expressly provided for in the Land Use Act, the courts have consistently held that particulars of the actual public purpose for revoking a person's right of occupancy must be stated in the Notice of Revocation. This is in consonance with the provisions of section 36(1) of the 1999 Constitution which guarantees the right of every person to a fair hearing within a reasonable time by an independent and impartial court or tribunal in the determination of his civil rights and obligations. It is particularly necessary that such purpose is stated in the Notice of Revocation as otherwise it will be impossible for the person affected by the revocation to know when and on what grounds to object to the revocation.

Section 5 (2) Of the Land Use Act

One provision of the Land Use Act that has caused very anxious moments with respect to the power of the Governor to revoke a right of occupancy is section 5(2) of the Act which provides that "upon the grant of a statutory right of occupancy under the provisions of subsection (1) of this section, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished." At a time, it was thought that by virtue of this provision, any existing rights to the use and occupation of a land including an existing statutory or customary right of occupancy over it will cease or become extinguished once a new statutory right of occupancy is granted to another person over the land notwithstanding the fact that the previous right of occupancy subsisting on the land was not formally revoked under section 28 of the Act. The Supreme Court's decisions in *SAUDE v. ABDULLAHI*, *DABUP v. KOLO* and *TENIOLA v. OLOHUNKUN* were often cited in support of this proposition. Gratefully, the Supreme Court has cleared any doubt on the correct legal effect of the provision of section 5(2) of the Act in two recent decisions namely *DANTSOHO v. MOHAMMED* and *IBRAHIM v. MOHAMMED*. In both cases, the Supreme Court held that the opinion expressed in the said earlier cases were largely obiter and could not be regarded as authority for the above proposition. In both cases, the Supreme Court came to the conclusion, that whereas, by virtue of section 5(2) of the Land Use Act, upon the grant of a statutory right of occupancy under section 5(1) of the Act, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy are extinguished, in respect of a land on which a right of occupancy (whether customary or statutory is already granted or deemed granted to a person), that can only be so if and only if that existing right of occupancy is properly revoked pursuant to section 28 of the Act. As stated by Uwaifo J.S.C. in *DANTSOHO v. MOHAMMED*.

Where a right of occupancy is invoked, either in the nature of a statutory or customary right of occupancy upon the issuance of a right of occupancy or through a deemed right of occupancy by operation of section 34(2) and 36(4) of the Act, a later grant of a right of occupancy under section 5(1) cannot ipso facto, by operation of section 5(2), extinguish the earlier right already vested. It will be necessary first to revoke the earlier right of

See *OBIKOYA v. THE GOVERNOR OF LAGOS STATE* Op. cit.; *LAGOS STATE DEVELOPMENT AND PROPERTY CORPORATION v. FOREIGN FINANCE CORPORATION* Loc. cit. p.413; *010 v. ADOJA* (2003) 2 NWLR (pt.820) 636 at pp.668-669. *PROVOST/LAGOS COLLEGE OF EDUCATION v. EDUN* Loc. cit. p.508

(1989) 4NWLR (pt.116) 387

(1993) 9NWLR (pt.317) 254

(1999) 5NWLR (pt.602) 280

(2003) 6NWLR (pt.817) 457

(2003) 6NWLR (pt.817) 615

Loc. cit. pp.493-494

occupancy for overriding public interest or for any of the other reasons as specified under section 28.

One cannot but agree entirely with the Supreme Court's decisions in the above two cases as to hold otherwise would have rendered useless the entire provisions of sections 28 and 29 of the Act for it would then meant that the Governor can ignore the provisions of sections 28 and 29 of the Act and surreptitiously revoke a title holder's right of occupancy over land without complying with the requirements of the said two sections by simply issuing a fresh right of occupancy to a third party in respect of the same land. If that was to be the case, a right of occupancy will be very worthless and the title holder will be exposed to untold hardship and loss in the event of such revocation. Certainly, the law makers could not have contemplated such a clearly absurd result.

Compensation

The issue of compensation in respect of a compulsory acquired land is both constitutional and statutory.

By virtue of section 44(1) of the 1999 Constitution:

No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right or interest in such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things-

- (a) Requires the prompt payment of compensation therefore; and
- (b) Gives to any person claiming such compensation a right of access for the determination of interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

According to Aboki, Y.:

Compensation, prima facie means recompense. The purpose of compensation is to place in the hands of the property owner equivalent amount of money which he was deprived. The object is to find the money equivalent of the loss and making good of it. Compensation should not be less than the money value which the owner might wish to collect from the property, had the law not deprived him of it.

Similar views have been expressed by B. A. Mban who posits that generally, the principle of compensation under the Act should be based on the notion that a dispossessed land owner should as far as practicable be paid such monetary compensation as would put him in exactly the same position as he would have been had his property not been acquired. Black's Law Dictionary similarly defines just or adequate compensation as "a fair payment by the government for property it has taken under eminent domain, the property's fair market value, so that the owner is no worse off after the taking". For this reason, it was argued that the absence of the word "adequate" from the 1999 Constitution, does not intend similar import or intendment of the 1963 Constitution which provided for "adequate compensation". Against this background, how adequate are the provisions for compensation under the Land Use Act? The relevant provisions can be found in section 29 of the Act. Under section 29(1) of the Act, if a right of occupancy is revoked for the cause

set out in section 28(2)(b) or (3)(a) or (c) of the Act, the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements. The said section 28(2)(b) & (3)(a) refers to requirement of the land for public purpose by the State Government, Local Government or Federal Government while section 28(3)(c) refers to requirement of land covered by a customary right of occupancy for the extraction of building materials.

Under section 29(2) of the Act, if a right of occupancy is revoked for the cause set out in section 28(2)(c) or (3)(b) the holder and the occupier shall be entitled to compensation under the appropriate provisions of the Minerals Act or the Petroleum Act or any legislation replacing same. The said sections 28(2)(c) or (3)(b) refer to requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith. No provision is made for compensation in respect of a right of occupancy revoked for the cause set out in section 28(2)(a) or (3)(d) (i.e. revocation or forfeiture for breach of a condition of the grant). For the assessment or determination of the value of compensation, section 29(4) sets out the compensation payable in respect of the following items:

In respect of the land (i.e. the bare land), the compensation payable is an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupancy was revoked. Although it has been suggested that because section 29(4)(a) mentions "occupier" only, the holder

Infra pp.16-17

Op. cit

Loc. Cit. p.27

Loc. Cit. p.97

Loc. Cit. p.97

Now Minerals and Mining Act Cap. M12 Laws of the Federation of Nigeria 2004

Cap. P10 Laws of the Federation of Nigeria, 2004

(a) of the right of occupancy will not be entitled to compensation if he is not the occupier, this writer is of the considered opinion that in this context, the word occupier should include the holder of the right of occupancy whether or not he is in actual occupation of the land. This is because in most cases, the rent is paid by such holder; not the occupier or tenant/lessor in possession. It will be unreasonable to suggest that the holder of a right of occupancy who paid his annual rent to Government will not be entitled to receive same as compensation in the event of the revocation of his right of occupancy simply because he is not in personal occupation of the land.

From the tenor of the Land Use Act and the specific provisions of section 29, it is manifest that the philosophy behind the Act is not to compensate for bare or undeveloped land apparently on the basis that all lands in the state are vested in the Governor in trust for Nigerians such that if the title holder has not developed the land, the Governor has nothing to pay for. The assumption seems to be that requiring the Governor to pay for it will amount to asking the Governor to pay for his own land. Thus there should be something of value brought to the land by the holder before he can be entitled to some compensation. With due respect, this argument is untenable, inequitable and bound to cause hardship to property owners. For example, if a person were to procure a bare land from the holder of a right of occupancy in January, 2005, for N1 million and he paid N5,000.00 as the ground rent charged by Government for the year, and the land was

compulsorily acquired by the Governor, sometime in April, 2005 before he could develop it, it would mean that he would only be entitled to compensation for N5,000.00 only being the rent he paid. This cannot be a fair and just sacrifice to be expected by Government from its citizen. This will be particularly so where the title holder duly purchased the land with the consent of the Governor under section 22 of the Act.

(b) In respect of buildings, installation or improvements on the land, the compensation payable is the amount of the replacement cost, that is, such cost as may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer less any depreciation, together with interest at bank rate for delayed payment of compensation. In respect of any improvement in the nature of reclamation works, the compensation will be such cost thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer. The term, "appropriate officer" is defined in section 51(1) of the Act to mean "the Chief Lands Officer of a State and in the case of the Federal Capital Territory, Abuja means, the Chief Federal Lands Officer".

(c) In respect of crops on the land, the compensation payable is an amount equal to the value as prescribed and determined by the appropriate officer.

Again, the provisions for compensation under (b) and (c) above are inadequate and bound to produce inequitable result just like in the example earlier given. The provisions do not take account of other losses like damages resulting from loss or disruption of business, relocation cost, emotional trauma, etc. that may flow directly from the revocation. Moreover, the Chief Lands Officer who is to make the assessment, as a Government official, is likely to be biased in favour of the Government in his assessment if for nothing else, to please his employers and keep his job. In the event that his assessment is unreasonable or unacceptable to the occupier or holder of the right of occupancy, there is very little the occupier or holder can do to reverse it particularly if the Land Use Committee, another Government agency required to settle disputes on the adequacy of compensation proceeds to accept it.

By virtue of section 33(1) & (3) of the Land Use Act, where the right of occupancy revoked is in respect of any developed land on which a residential building has been erected, the Governor or the Local Government as appropriate may in his or its discretion offer in lieu of compensation payable under the Act, resettlement in any other place or area by way of a reasonable alternative accommodation. Where a person accepts resettlement pursuant to section 33 (1) above, his right to compensation shall be deemed to have been duly satisfied and no further compensation would be payable to him. Payment of compensation upon revocation of a right of occupancy is a condition precedent to the validity of the revocation. Non-payment of compensation would render the compulsory acquisition of land by the Governor (except on ground of breach of the conditions of grant of the right of occupancy) invalid. Our reference to the Land Use Committee above should naturally bring us to a discussion of the role of the Committee in respect of compensation. The Committee is established by section 2 (2) of the Land Use Act. It is comprised of such number of persons as the Governor may determine provided that the membership shall include:

- a) Not less than two persons possessing qualifications approved for appointment to the civil service as estate surveyors or lands officers and who have had such qualifications for not less than five years; and
- b) A legal practitioner.

By the combined effect of sections 2(2)(c) and 30 of the Act, the Committee is saddled with the responsibility of determining disputes as to the amount of compensation payable under the Act or calculated in accordance with the provisions of section 29 of the Act. No right of appeal exists in respect of any decision of the Committee on the issue of quantum or adequacy of compensation payable under the Act. This is because by virtue of the provision of section 47(2) of the Act, no court has jurisdiction to inquire

into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under the Act. It has been argued that the provision of section 47(2) of the Act is ultra vires or contrary to section 44(1) of the 1999 Constitution earlier highlighted. It is also argued that the said section is inconsistent with or contrary to section 36(1) & (2)

Aboki, y. Loc cit. p.28

IBRAHIM v. MOHAMMED. Loc. Cit p.644

Aboki, Y. Loc. Cit. p.30

of the same Constitution which guarantees fair to every person in the determination of his legal right by any court or tribunal and requires that the determination by any government or authority shall not be made final and conclusive. This writer subscribes to these arguments and contend, further that the determination of disputes regarding the adequacy of compensation payable to an occupier or holder of right of occupancy by a committee whose members are appointed solely by the Governor, the very person who revoked the right of occupancy in the first place and who has the responsibility to pay the compensation to be determined by the Committee, seriously offends one of the two pillars of natural justice namely, *nemo iudex in causa sua* meaning that one cannot be a judge in his own cause. It should be crystal clear that the impartiality of a Committee so appointed by the Governor cannot in the circumstances be guaranteed.

Conclusion/Recommendations

From the foregoing discourse, we can safely conclude that though section 28(1) of the Land Use Act invests the Governor with power to compulsorily acquire land or to revoke a right of occupancy for overriding public interest or public purpose, the power being expropriatory in nature, is closely regulated by the Act itself and the provisions pertaining to it strictly construed by the courts particularly with regard to the public purpose for which it can be invoked, and the procedure for the exercise of the power. As a result, the exercise of the power, as we have seen, is subject to certain conditions, qualifications and limitations. Accordingly, any non-compliance with section 28(2) and 51(1) of the Land Use Act regarding the overriding public interest or public purpose for which the land is acquired will invalidate the acquisition. Similarly, non-service or improper service of the notice of acquisition on the holder of a right of occupancy contrary to sections 28(6) & 44 of the Act will invalidate the acquisition. Even where land is properly acquired by the Governor compulsorily, he is obligated by the provisions of section 44(1) of the 1999 Constitution and section 29 of the Land Use Act to pay reasonable compensation to the holder of the right of occupancy. Non-payment of compensation will render the compulsory acquisition of land by the Governor (except on ground of breach of the conditions of grant of the right of occupancy) invalid.

In spite of the above conditions, qualifications and limitations, the provisions of section 28 and 29 of the Land Use Act and other related provisions of the Act appear inadequate to guarantee fairness and equity in the acquisition process. In the first place, the items listed as constituting overriding public interest or public purpose under sections 28(2) & (3) and 51(1) of the Land Use Act are so extensive and flexible that a Governor can easily manipulate them to defeat the interest of a title holder for reasons that are largely not altruistic. It is therefore suggested that overriding public interest-or-public purpose as defined in the said sections should be further streamlined to reduce the propensity for abuse or arbitrariness on the part of the Governor. In this connection, a provision should be inserted in the Act to require hearing before a judicial or quasi judicial body to determine the justifiability of the public purpose adduced by Government for a proposed acquisition and the actual extent of land required for the purpose before the Governor can invoke his power of revocation under section 28(1) of the Act.

The provisions of section 44 of the Land Use Act regarding the modes of service of notices ought to be amended to make the Intention of the law makers clearer. Construing the section in its ordinary sense, it is clear that although the modes of service provided for in paragraphs (b), (c) and (d) of the section are substituted means, service under the said paragraphs has not been expressly made subject to non-practicability of effecting personal service under paragraph (a) of the section as it was done in respect of substituted service under paragraph (e). This, as we have seen, has resulted in somewhat conflicting decisions by the Court of Appeal in *NITEL v. OGUNBIYI and A.G., LAGOS STATE v. SOWANDE*. It is recommended that the section should be amended to also make substituted service pursuant to paragraphs (b), (c) and (d) of section 44 subject to non-practicability of effecting personal service under paragraph (a) of the section.

The provisions of section 29 of the Land Use Act on compensation in respect of a revoked right of occupancy are grossly inadequate. Their application, as we have seen, is bound to produce very unfair and inequitable result particularly where the land acquired is undeveloped. It is recommended that the section should be amended to include a provision for compensation for bare land as a bare land has value of its own sometimes running into millions of naira. Notwithstanding the fact that the radical title in land has been vested in the Governor, a person who lawfully acquired a piece of land say by way of a purchase with the consent of the Governor should be entitled to a refund of the purchase price or compensation equal to the value of the land at the date of the compulsory acquisition. Provisions should also be made to allow compensation to a title holder in respect of other losses directly flowing from the compulsory acquisition (outside the value of actual development or improvement on the land) for example, compensation for loss of business and relocation cost.

Furthermore, sections 2(2) and 30 of the Land Use Act requiring disputes as to the amount of compensation payable under section 29 of the Act to be referred to the Land Use Committee whose entire membership is determined by the Governor being contrary to the rule of natural justice to wit *nemo iudex in causa sua*, should be amended by substituting the Land Use Committee provided for therein with the regular Magistrates Court or High Court. This will help to guarantee the independence and impartiality of the body saddled with the responsibility of determining the quantum or adequacy of compensation assessed payable under the Act.

In the same vein, section 47(2) of the Land Use Act which has the effect of making the decision of the Land Use Committee on the adequacy of compensation paid or payable under the Act final (i.e. not subject to appeal or review by any court) should be amended. If the Land Use Committee is retained, then appeals against the decisions of the Committee should be made to lie to the High Court. On the other hand, if the Land Use Committee is substituted with the regular Magistrates Court or High Court as suggested above, appeals from the Magistrates Court or High Court so substituted should like in other cases before the said courts lie to the High Court and Court of Appeal respectively. This, it is submitted will be in *Aboki, Y. Loc. Cit. p.30*

Supra pp. 12&13

Supra p.12

consonance with the provisions of sections 36(1) & (2) and 44(1) of the 1999 Constitution.

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