

The Law of Consumer Protection and the Alienee or Transferee of Right of Occupancy Under the Land Use Act: Quo Vadis?

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Abstract

The steady growth of the law of consumer protection under the Nigerian jurisprudence has led to a much wider understanding and appreciation of the subject for what it stands for, that is, a subject which is all-encompassing and touches and concerns every person, nay every legal or juristic persona. Ralph Nader¹ who contended that the term “consumer” should be equated with the word “citizen” knew exactly what he was postulating and when viewed from that perspective, it would appear correct to suggest and rightly too that the alienee or transferee of a right of occupancy or other estate or interest in land comes within the context

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1 As referred to in Oughton, D. W Consumer Law, Text, Cases and Materials, Blackstone Press Ltd, London 1991 PI and also adopted by Kanyip, B.B. Consumer Protection in Nigeria Law, Theory and Policy, Reckon Books Ltd, FCT Abuja, 2005 pp 11-12.

of a consumer with respect to the applicable services expected to be rendered to him for the purpose of properly perfecting his title and achieving a secure and indefeasible title therein. And when reviewed from the point of view of the services professionally or officially rendered or renderable to him in the process of the acquisition of title there will be seen to be the need to examine the state of the law to see if he has any form of protection as a consumer of such services under the law. This piece sets out to probe the position of the alienee or transferee of an estate in land within the context of the requirement of consent to alienation of right of occupancy under the Land Use Act.

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Introduction

Under and by virtue of the provisions of sections 21 and 22 of the Land Use Act² the securing of the consent of the Governor or the approval of the Local Government is a condition *sine qua non* to any valid alienation of a right of occupancy. Section 21 provides as follows:

“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, sublease 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 and Civil Process Law or ;

(b) In other cases without the approval of the Local Government.”

Section 22 provides inter alia as follows:

“22. 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 howsoever without the consent of the Governor first had and obtained ...”

What is obvious from the above provisions is that as long as the requisite consent or approval is obtained as the case may be, the transaction in question is valid and as such

2. The Land Use Act 1978, is now Cap L5, Laws of the Federation of Nigeria 2004, hereinafter referred to simply as the Act.

achieves a valid and effective transfer or conferment of title in the nature of right of occupancy on the alienee or transferee thereof. However, where there is failure to comply with the provisions of the two sections depending on which one is applicable to the transaction in question, the damnable effect of such a breach is eloquently provided for by section 26 of the Act as follows: “26 Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void” Other effects are contained in S.28(2) and S.20 of the Land Use Act.

That is to say, where the requisite consent is not obtained, the transaction or instrument which purports to confer or vest that property in any person shall be null and void. Judicial stamp of confirmation of the effect of section 26 on a transaction effected without the requisite consent or approval was first handed down by the Supreme Court in *Savannah Bank of Nigeria Ltd & Anor v. Ammel O. Ajilo & Anor*³ and followed in subsequent cases including *NIDB v Olalomi Industries Ltd.*⁴

Union Bank of Nigeria Plc v. Ayodare & Sons Nig Ltd,⁵ *Olalomi Industries Ltd v. NIDB Ltd.*⁶ and *Pharmatek Ind. Proj. Ltd v. Trade Bank Nig Plc.*⁷ just to mention a few, and the trend of judicial approach towards the effect section 26 on any transaction effected in contravention of the consent provisions has been consistently in consonance with the first decision of the Supreme Court on the subject in *Savannah Bank v. Ajilo*⁸ and as it would appear, there is no glimmer of possibility that the Supreme Court is in any hurry to depart from that trend of judicial interpretative approach.

Given this scenario, the need arises to examine the position of the alienee or purported alienee whose interest cannot be effectively, validly or effectually vested by reason of the consequence of the breach of the consent provisions in the course of the transaction under which he had intended to acquire title to the land. Such alienee or purported alienee, is by the general, broad or functional definition of the consumer under the law of consumer protection⁹ the consumer of the professional and or official services rendered by his Legal

3 *Savannah Bank of Nig Ltd & Anor v. Ammel O. Ajilo & Anor* (1989) 1 NWLR part 97 of p 305.

4 *NIDB v Olalomi Industries Ltd* (2002) 5 NWLR part 761 p 532 (CA)

5. *Union Bank of Nigeria Plc v. Ayodare & Sons Nig Ltd* (2007) 13 NWLR part 1052 p 567

6. *Olalomi Industries Ltd v. NIDB Ltd* (2009) 39 WRN 1 (SC)

7. *Pharmatek Industrial Projects Ltd vs Trade Bank Nig Plc* (2009) 41 WRN 65

8. *Savannah Bank v. Sjiilo* Supra

9. See generally; Dr. Mrs. N. J. Obumneme-Okafor; *Understanding the Consumer in Proper Perspective* (2012) ESUT LAW Journal vol.1 No 1. p 77 for the broad and functional approaches to the definition of the consumer.

Practitioner or Estate Agent and the Lands Registry or Ministry of Lands which handles the processing of the grant of consent or approval as the case may be. The extent to which such a consumer is protected or is bereft of the requisite protection under the law is the subject and focus of this enquiry.

Meaning of Consumer?

Strictly speaking and for the purpose of this enquiry, a consumer is a juristic personality, whether natural or artificial at whose disposal is placed the services whether professional or official aimed at achieving or actualizing the compliance with the requisite consent provisions of the Act for the purpose of achieving the valid and effective conveyance or conferment of title or interest over land subject matter of the transaction. Viewed from this perspective, the question of who the consumer is within the context of this exercise is admittedly straight forward, clear and unambiguous and thus the question of “spilling much ink” in the process of attempting to define the consumer does not arise.¹⁰ The principal statute in Nigeria on the Law of Consumer Protection which is the Consumer Protection Council Act¹¹ defines a consumer as an individual who purchases, uses, maintains or disposes of products or services. This definition of the Act is very similar to that given by the Black's Law Dictionary¹² as one who consumes, individuals who purchase, use, maintain and dispose of products and services. Under the Fair Trading Act of the United Kingdom¹³ a consumer means any person who is either:

- (a) A person to whom goods are supplied or are sought to be supplied (whether by way of sale or otherwise) in the course of business carried on by the person supplying or seeking to supply them or;
- (b) A person for whom services are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them and who does not receive or seek to receive the goods or services in the course of a business carried on by him.

From the above few definitions it can be surmised without expending much energy, that it is generally understood that a consumer is an individual or a person either natural or artificial. The consumer is “living person” whether a physical natural person in the sense of

10. Street, Harry. *The Law of Torts* 6th Ed Butterworth & Co (pub) Ltd London 1979 p. 3.

11. Consumer Protection Council Act, Cap C25, Laws of the Federation of Nigeria 2004, sec 32

12. Black, H.C. *Black's Law Dictionary*, 5th Ed. West Publishing Co. Minn 1979 p 286.

13. The Fair Trading Act, 1973 (UK) sec. 137 (2)

man or woman or a corporate legal entity or association or body of persons and indeed any such characterization of persons to which the law ascribes juristic personality. And when narrowed down to the object of this enquiry, such a personality must be one which is capable in law of acquiring or holding interest or estate in land so as to be in the position of a transferee or alienee of interest or estate in land which will require consent under the provisions of the Land Use Act.

The Juridical Basis for Consumer Protection

The expression “consumer protection” has been defined as “legislation which protects the interests of consumers”¹⁴ and a scholarly description of the expression has been given as “the act of safe guarding the interest of the consumer in matters relating to the supply of goods and services, fraudulent and hazardous practices as well as environmental degradation”¹⁵ It should thus be understood to mean the prevention of or reduction of injuries, losses and wrongs from occurring to the users of goods and services and the provision of remedy to the consumer in a situation where there has been such occurrence.

Several reasons exist as justification for the protection of the consumer, chief amongst which is the exploitation theory which locates the *raison d'etre* in the vulnerability of the consumer to exploitation by the providers of goods and services.¹⁶ There is also the paternalistic view which encourages state intervention to protect the consumer against himself or to exercise discretion which it is felt the consumer is not enlightened enough to exercise¹⁷ or where he is even enlightened enough, he may still lack the requisite orientation to exercise due care and circumspection in engaging the services from which he may suffer avoidable injury. There is also the moral justification to protect the consumer against fraudulent or dangerous practices.¹⁸ Surely, the nature of protection to be accorded the consumer depends largely on the nature of the goods and services and the obtainable practices against which protection should be availed him. Form the point of view of Land Registry practices and the provision of professional services by the conveyancers it would appear that the element of negligence, whether professional or otherwise and the question of contributory negligence perhaps form the consumer/alienee or transferee may be in

14. Bird, R. *Osborn's Concise Law Dictionary* 7th Ed. Sweet & Maxwell, London, 1983 p. 90.

15. Monye F. *Law of Consumer Protection*, Spectrum Books Ltd, Ibadan, 2003 p 20

16. Kanyip, BB, *Consumer Protection in Nigeria*, OR Cit. p 29.

17. Ajai O. “Caveat Venditor, Consumer Protection Decree No 66 of 1992, Arrives no Nigeria Market Palce” (1992/93) *Nigerian Currency Law Review* p. 24.

18. Kanyip, B.B. *Op Cit* p. 30

contention, but how those may arise and the extent to which they could play a role will be seen anon.

The Scheme of the Land Use Act and the Nature of the Right of Occupancy

Against the backdrop of fraudulent practices over land by land speculators, governments both at the federal and state levels became hamstrung and were unable to obtain land for public purposes and in any acquisition so undertaken the government was made to pay huge sums of money as compensation to land owners which most often arose from fraudulent collusion between government officials and land speculators as to the proper value of such land.¹⁹ In the words of Nnamani JSC, *“this anomalous situation led to a thinking in government circles on measures to be adopted to stem the tide. The government adopted a policy that would make land more readily available at reasonable rates for individuals, corporate bodies and government, a policy that would break the stranglehold of the land speculators and finally a policy that would steer the country away from the growth and perpetuation of a landed gentry.”*²⁰

The foregoing was the situation in the country against which the Act was promulgated, as a military decree and later became an Act with the transition to democratic governance²¹ The scheme of the Act was to vest all land comprised in the territory of each state in the federation in the Governor of each state for him to hold same in trust and administer for the use and common benefit of all Nigerians in accordance with the provisions of the Act.²² This provision of section 1 of the Act had generated a climate of controversy as to whether it amounted to the nationalization of all lands in the country and vesting its ownership in the state leaving the private individual with an interest in land which is a mere right of occupancy as declared by Eso. JSC in *Nkwocha v. Governor of Anambra State*²³ and on his own part, Obaseki JSC²⁴ stated that it was an understatement to say that the Act abrogated the right of ownership of land hitherto enjoyed by all Nigerian because whereas a Nigerian could own land absolutely anywhere in the Southern States of Nigeria, the Act took away from him that right of ownership, limited the area of land he could acquire for his residence and farming and

19. Nnamani, JSC; Lecture Titled; 1978 Land Use Act: The Act is Humane but the Deed is Rancorous; delivered at the Annual Dinner of the NBA, Ikeja Branch on 3rd March, 1989 and Published in the Guardian of March 29, 1989.

20. Ibid.

21. Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978

22. Sec 1 of the Land Use Act

23. *Nkwocha v Governor of Anambra State* (1984) 6 SC 362 404.

24. His Lecturer titled: The Judicial Impression of the Nigerian Law of Real Property: Any Need for Reform? Delivered at the 26th Annual Conference of Nigerian Association of Law Teachers on 28th March, 1988.

limited the interest he could acquire to a mere right of occupancy either statutory or customary.

However, it should be noted that the letter and spirit of the Act do not suggest the abolition of existing titles and possession in land in favour of the State as against the individual citizen. It was in line with this postulation that Nnaemeka Agu JSC, stated rightly in our view in *Ogunleye v. Oni*²⁵ that;

The Land Use Act never set out to abolish all existing title and rights to possession of land rather, when such rights or titles relate to developed land in urban areas, the possessor or owner of that right or title is deemed to be a statutory grantee of a right of occupancy under sec 34 (2) of the Act. Where this is non-urban land, the holder or owner under customary law or otherwise is deemed to be a deemed grantee of a customary right of occupancy.

Similar conclusions regarding the subsistence of the title of the owners of land under native law and custom were reached by the Supreme Court in *Abioye v. Yakubu*²⁶ and Balgore JSC²⁷ as he then was declared in *Ogunleye v Oni* that the Land Use Act was not the magic wand it was being portrayed to be or a destructive monster that at once swallowed all rights on land.

Thus, the scheme of the Act was not the abrogation of pre-existing rights in land or the nationalization of all lands, but a reshaping of land tenure by which the nature and quantum of interest over land were redefined by the creation of a right of occupancy characterized as statutory²⁸ and customary²⁹ both of which could be acquired by express actual grant³⁰ or by deemed grant³¹ all of which have been judicially recognized in various decisions of the courts.³² By reason of the fact that the right of occupancy is quantified in terms of duration, particularly where it is an actual or express grant, or where it is a deemed grant in respect of which a certificate of occupancy is issued in evidence thereof under section 9 of the Act, it has

25. *Ogunleye v Oni* (1990) 2 NWLR part 135 p 745 @ 784.

26. *Abioye v. Yakubu* (1991) 5 NWLR part 190p 130 @ 136

27. *Ogunleye v. Oni* (1990) 4 NWLR part 135 p 745 @ 772

28. Sec 5 (1) (a)

29. Sec 6 (1) (a)

30. Sec 34 (2)

31. Sec 36 (2)

32. *Savannah Bank v. Ajilo*, *Supra*, *Adisa v. Oyinwola* (2000) 10 NWLR part 674 p 116, *Kyari v. Alkali* (2001) 11 NWLR part 724 p 412.

been argued that a right of occupancy is in the nature of a lease and particularly as the Act uses the expression sublease under the consent provision of sections 21 and 22. In *Savannah Bank v. Ajilo*³³ Obaseki JSC approached the matter thus;

While the interest vested in the Governor is unstated in the Act, the interest a Nigerian can lawfully acquire from the Governor is scaled down to statutory right of occupancy. In terms of known interests in land, the quantum of statutory right of occupancy remains unclear. To the extent that it can only be granted for a specific term (see section 8 of the Act) it has the semblance of a lease. Also, to the extent that a holder has the sole right to and absolute possession of all the improvements on the land during the terms of a statutory right of occupancy, a holder does not enjoy more rights than a lessee under common law. When therefore section 34(2) of the Act converted the interest held by an owner to a statutory right of occupancy the Act reduces him to the position of a tenant subject to the control of the state through the Governor. As tenant he is bound by the implied and express terms of the tenancy. As one of the terms stated in the Act is that a holder requires prior consent in writing of the Governor to any alienation a person who is deemed to be the holder of a right occupancy pursuant to section 34 of the Land Use Act requires the consent of the Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy.

It is thus clear that implicit and explicit in the rights created by and appurtenant to a right of occupancy is the covenant by a holder thereof not to alienate the same without first securing the requisite consent or approval as the case may be.

Raison D'etre for the Requirement of Consent

The requirement of consent to alienation of land under state control and administration is of historical significance dating back to the enactment of the Native Lands Acquisition Proclamation of 1903 by the Colonial Administration. The law which was subsequently repealed and re-enacted in 1917 as the Native Lands Acquisition Act was re-enacted by the various regions and resulted in the Native Lands Acquisition Law of the former Western

33. *Savannah Bank v. Ajilo* (1989) 1 SC pt II p. 90 @ 110-111

Region and the Acquisition of Land by Aliens Law of the then Eastern Region. It was a cardinal requirement under these statutes for the requisite consent of the appropriate authority under them (mostly the Governor) to be obtained before any one could obtain any interest in land thereunder. This was justified or rationalized by the need to ensure that with the attractions offered by cash, the as yet unsophisticated natives would not be deprived of their heritage and means of livelihood and subsistence through ill-advised alienation of their lands.³⁴ The governments had since 1903 maintained a consistency with respect to the requirement of consent over every land it had under its control and management. This was further explained to be premised on the fact that since the radical title in land was vested in the state as the grantor, any subsequent dealing or transaction on the land by the state grantee must be with the consent of the grantor.³⁵ It has been argued, and rightly in our view that quite apart from making the grantor aware of any dealings in land, the consent provision also enables the government to streamline the use to which a particular portion of land is to be placed.³⁶

The consent requirement has also been justified on the ground that it would enhance the security of title as it would be possible for the government to control and regulate transfers and with proper records of all transfers being kept, it would operate as another form of registration of title³⁷ Added to the above is the need to ensure that the use to which the land is put does not derogate from the spirit, scheme and the intendment of the Act.

The Duty to Secure Consent or Approval

It is all too obvious that even from the wording of the relevant provisions of the Act on consent that the ability to alienate a right of occupancy is part and parcel of rights of occupancy held under the Act. Clear from the way sections 21 and 22 are framed is the conclusion that the Act does not prohibit the sale or alienation of interest in land.^{37[a]} It is thus beyond conjecture that the ability to alienate a right of occupancy is a statutory incident of the right of occupancy whether expressly granted or deemed granted, but the right of occupancy is alienable only with the requisite consent or approval under sections 21 and 22.

34. Nwabueze B.O. *Nigerian Land Law*, Nwamife Publishers, Enugu 1972 pp 496-497.

35. Kasunmu, AB. *The Question of Consent to Alienation Effect on Development in Omotola* (Ed) *The Land Use Act: Report of a National Workshop*, Lagos University Press 1982 p 93.

36. Elujekor O.E.M: *The Effect of the Consent Requirement for a Mortgage under the Land Use Act 1978: (1990)* 3 *Calabar Law Journal* p. 84 @ 85-86.

37. Omotola J. A *Essays on the Land Use Act. 1978*, Lagos University Press, 1980 p 26

37[a] Chianu E. *Law of Sale of Land*. Law Lords Publications Abuja, 2009 p 195.

of the Act.³⁸ By reason of the nature of our enquiry here, it is desirable to find out the position of the law regarding whose duty it is to secure the requisite consent to the alienation. Surely, by the provision of section 22, there is a clear indication that it is the holder of the right of occupancy who is thus the seller, or transferor or the alienor, of the right whose duty it is to obtain the consent. The Section opens with the expression: “22 *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 part thereof..... without the consent of the Governor first had and obtained.*”

This is quite clear and unarguable as to the person who has the statutory duty to obtain consent under section 22. It is however section 21 that makes it unclear as to whether the duty is fixed on any particular party and thus subjects the requirement to a conjecture as the section provides in part as follows;

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“21 It shall not be lawful for any customary right of occupancy or any part thereof to be alienated.....without the consent of the Governor..... or in other cases without the approval of the appropriate Local Government.”

Thus, the provision of section 21 simply prohibits the alienation of a customary right of occupancy or part thereof without the requisite consent or approval as the case may be without expressly stating whose duty it is to do so as was done by section 22 of the Act. The judicial interpretative approach has however provided some guide. As rightly pointed out by a learned author³⁹ until the recent decisions in *Ayodare*⁴⁰ and *Ekpo*,⁴¹ all the cases had held that it was the duty of the right holder to apply for and obtain the consent and where he fails to do so, he is estopped from challenging the validity of the transaction. Such cases which held as such include *Owoniboy's Tech. Serv. V. UBN*, *Savannah Bank v Ajilo*, and *Ohiwerei v Okosun*.⁴² Even though Professor Chianu⁴³ seriously doubted the correctness of the positions taken by the Supreme Court in *Ayodare* and *Ekpo* cases to the effect that it was not only the holder of the right of occupancy who has the duty to ensure the securing of the requisite consent, as according to him, the Act did not actually or expressly foist that duty on

38. *Savannah Bank v. Ajilo*, *Supra*, *FMBN v. Babatunde* (1999) 12 NWLR part 632 p 683, *Ogunola v. Eiyekole* (1990) 4 NWLR pt 146 p 632 and *UBN Plc v. Ayodare & Sons Nig Ltd* (2007) 13 NWLR part 1052 p 567.

39. Chianu E. Op Cit p. 206

40. *Union Bank of Nigeria Plc v. Ayodare & Sons* (2007) 13 NWLR pt 1052 p 567

41. *Calabar Central Co-operative & Credit Society Ltd v. Ekpo* (2008) 6 NWLR pt 1083 p 362,

42. *Owoniboy's Technical Services Ltd v. UBN Ltd* (2003) 19 NWLR part 844 p 545. *Savannah Bank v. Ajilo supra* *Ohiwerei v. Okosun* (2003) NWLR pt 832 p 463

43. Chianu E. Op Cit. pp 206 -208.

the alienee of the right of occupancy, yet, the same strict position was taken by the Supreme Court in *Olalomi Industries Ltd vs NIDB Ltd*⁴⁴ which obviously was decided later in time than the two cases and as a matter of fact took cognizance of its earlier decisions in *Savannah Bank and Ayodare* and stated that in spite of the unconscionable conduct of the holder in failing to ensure that proper and valid consent to the alienation was obtained and yet turned round to impugn the transaction, it was not permissible to invoke the principle or maxim of *exturpi causa non oritur actio* on the authority of *Bucknor Macleans v. Inlaks Ltd*⁴⁵ to avoid the transaction because the provisions of section 26 of the Land Use Act made it undesirable to invoke the maxim. Along the same line of reasoning in *Ayodare* the Supreme Court held per Fabiyi JSC⁴⁶ as follows;

The letter of approval does not suffice for the purpose of the mortgage deed and has therefore negatively affected the validity of the mortgage even though it was the respondents who facilitated the approval/consent and who now want to benefit from that act. It is indeed not morally right but then, one cannot circumvent the position of the law and the legal authorities settled by this court. The case of Savannah Bank (Nig) Ltd v Ajilo has laid to rest a similar situation that is almost on all fours with the instant case. In short, I agree that the maxim ex turpi causa non oritur actio is not applicable and as well the equitable principle enshrined in Buknor - Macleans case is not evocable in the face of the provision of section 26 of the Land Use Act 1978.

The above position of the Supreme Court appears to suggest that even though sec 22 of the Act clearly vests the duty of obtaining consent on the holder of the right of occupancy who thus is alienating the same, yet even though in that case (*Olalomi Industries case*) Section 21 of the Act was not directly under consideration (but it was in *Ayodares's case*) the open-ended and non-specific nature of the section with respect to who has the duty to obtain the consent and the general manner in which it firmly prohibits the alienation of a customary right of occupancy without the requisite consent or approval makes it most possible for the court to import the meaning that both parties to the transaction of alienation have the duty not to go through with the transaction and effect the conveyance of the estate without first

44 *Olalomi Industries Ltd NIDB Ltd* (2009) 39 WRN 1 @ 25-32.

45 *Bucknor Macleans v Inlaks Ltd* (1980) 8 11 SC1, (1980) All NLR 184

46 *Olalomi Industries v. NIDB Ltd* Supra pp 25-27

obtaining the requisite consent or approval. Would it then be right to argue that whereas under section 22, the holder of a statutory right of occupancy bears the burden of obtaining the requisite consent, under sec 21, which deals with customary right of occupancy both the holder and the intended alienee have the statutory duty not to effect the alienation without securing the requisite consent or approval as the case may be?

Quite apart from this trend of argument, the focus of the Supreme Court in its rigid interpretative approach does not appear to be the colouration or characterization of the right of occupancy purportedly alienated in violation of the consent requirement, but rather the overriding consequential effect of section 26 of the Act which governs all acts of alienation contrary to the provisions of the Act as well as the document or instrument by which the transaction is purportedly undertaken. This was made very clear when in *Ayodare's case* *Oguntade JSC*⁴⁷ emphatically stated that by virtue of the provisions of sections 21, 22 and 26 of the Land Use Act, a holder of a statutory right of occupancy who wishes to mortgage the property by assignment must first obtain the consent of the Governor of the State where the land is situate before carrying out the mortgage transaction and the holder of a customary right of occupancy of land not in an Urban area must obtain the (approval) of the Local Government where the land is situate and where the requisite consent is not obtained, the transaction or instrument which purports to confer or vest the property in any person shall be null and void. Similarly in *Olalomi Industries Case*⁴⁸ *Fabiya JSC* stated that the maxim *ex turpi causa non oritur actio* was not applicable and as well the equitable principle enshrined in *Bucknor-Macleans case* is not evocable in the face of the provision of section 26 of the Land Use Act 1978.

So, the question does not really appear to be whose duty it is to obtain the requisite consent or approval, but that of the failure to do so and the statutory effect of that failure regardless of whose duty it was in the first place. The above position of the law as strictly applied by the Supreme Court was admirably brilliantly reviewed by the Court of Appeal per *Nweze JCA* in *Pharmatek Industrial Protects Ltd vs Trade Bank Nig Plc*⁴⁹ and came to the inescapable conclusion that where attempts were made to dispose of the property covered in a mortgage transaction without the consent of the Governor, from a conspectus of the authorities the inflexible position is that non-compliance with the prohibitive prescription in section 22 attracts the absolute consequences ordained in section 26 of the Act. The learned Justice of the Court of Appeal explained that section of 22 (1) of the Act does not intend to

47. *Unoin Bank of Nigeria Plc v. Ayodare & Sons Nig Ltd* Supra p 584

48. *Olalomi Industries Ltd v. NIDB* Supra p 27

49. *Pharmatek Industrial Project Ltd vs. Trade Bank Nig Plc* (2009) 41 WRN 65 @ 106

become immediately effective until necessary approval by the Governor is obtained, that it strikes at the transactions which effectively purported to enable an assignee, mortgagee, or sub-lessee of the right of occupancy to exercise his rights thereunder without the prior consent of the Governor.

On the question as to whether the holder/alienor of the right of occupancy who seeks to rely on the failure to secure the requisite consent to avoid the transaction should be denied the opportunity upon the invocation of the equitable maxim of *exturpi causa non ortur actio*, the erudite jurist, Nweze JCA, after an exhaustive review of the Supreme Court pronouncements on the issue declared that the hegemony of equity over the unconscionable conduct of the mortgagor (i.e. the holder/alienor of the right of occupancy) would appear to have been consigned to its untimely grave and in doing so placed reliance on the conclusion reached by the Supreme Court per Mukhtar JSC (as she then was) in *Union Bank v. Ayodare & Sons Nig Ltd*⁵⁰ where she stated as follows quoting the trial judge in the case...

“I feel tempted to invoke the maxim against the plaintiff in this case. He obtained consents which turned out to be non-events. But I am bound by the authority in Ajilo's case. It appears as if equity must remain silent on the reserve bench while the Land Use Act is actively at play”

and at page 603 she concluded as follows;

The maxim ex turpi causa non oritur actio though evocable in some cases that have similar irregularities, that attracts, such equitable reliefs, is definitely not evocable in this case. The principles in the Savannah Bank case have not been overruled as alluded by learned Counsel for the appellant.

Nweze JCA, in his leading judgment finally concluded that the letters of J.O. Dada, Chief Lands Officer conveying approval of the consent did not qualify as evidence of the consent required by section 22 read in conjunction with sec 45 (2) of the Act. He explained that in the Latin days of the law, the applicable maxim would have been *delegatus non potest delegare* and concluded that since the requisite consent had not been obtained before the consummation of the mortgage transaction in contravention of sec 22 he had no choice than to visit the stringent provisions of section 26 on the deeds in the case. The learned Justice of

50. *Union Bank of Nig Plc vs Ayodare & Sons Nig Ltd*, Supra @ 600 and 603

Appeal cautioned that secured creditors must painstakingly examine such consent letters purporting to convey approval of their mortgage transactions with the finery of a tooth comb as the new maxim in all secured credit transactions should be: Creditors beware!⁵¹

It is thus safe to conclude that the overriding effect of section 26 of the Act makes it absolutely necessary that both the holder of the right of occupancy and the alienee of the right of occupancy should bear the burden of ensuring that the requisite consent is secured to the transaction envisaged under the Act and the possibility of the invocation of the equitable maxim of *ex turpi causa non oritur actio* is not available for use in saving the faulty transaction.

Failure to Obtain Consent

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What emerges from the foregoing analyses is the position of the law to the effect that the alienation of a right of occupancy effected with the requisite consent had and obtained validates the transaction and effectively confers rights on the parties thereto and either party can competently and validly approach the court to enforce his right under the contract. The provision of section 26 of the Act will not affect or vitiate the transaction and the instruments executed in furtherance of the transaction will be valid and if it comes before the court, will be upheld as such and given effect to as appropriate.

On the other hand however, very dire consequences attend a transaction undertaken without obtaining consent or where consent was thought to have been obtained but it turned out to be invalid.

First, it would have been thought that the effect would be to render the transaction void against the holder/vendor/alienor who failed or neglected to secure the consent and as such violated the provision of the Act in line with the decisions in *Solanke v. Abed*, *Adedeji v. National Bank of Nigeria and Ugochukwu v. CCB*⁵² but the present position of the law on the subject based on the interpretative approach of the Supreme Court is that the transaction is null and void for all purposes and as against both parties irrespective of who ought to have obtained the consent but failed to do so. Section 26 of the Act operates to render the transaction null and void in line with the decisions of the Supreme Court in *Savannah Bank of Nig Ltd v. Ajilo*, *Union Bank v. Ajodare & Sons Ltd*, *Olalomi Industries Ltd v. NIDB* and the Court of Appeal in *Phamatek Industrial Projects Ltd v. Trade Bank Nig Plc.*⁵³ Another consequence of

51. *Phartek Industrial Projects Ltd v. Trade Bank* Supra @ 110 -113

52. *Solanke v. Abed* (1962) ISCNLR 137, *Adedji v. National Bank* (1989) 1 NWLR pt 96 212 and *Ugochukwu v. CCB Nig Ltd* (1996) 6 NWLR pt 456p 524

53. (1989) ISC pt II p 90, (2007) 13 NWLR pt 1052 p 567, (2009) 39 WRN p I. (2009) 41 WRN 65.

the failure to obtain consent is the possible revocation of the right of occupancy as a penal measure under the Act. In this light, the Governor is empowered to revoke a right of occupancy under and by virtue of the provision of section 28 of the Act for overriding public interest which has been defined within the revocation provisions of section 28 of the Act to mean -

“the alienation by the occupier by assignment, mortgage transfer of possession, sublease or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulation made thereunder.”⁵⁴

This is as it relates to statutory right of occupancy and as regards the customary right of occupancy, overriding public interest means -

“the transfer by the occupier by sale, assignment, mortgage, transfer of possession Sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval.”⁵⁵

It is all too obvious that the expression “contrary to the provisions of this Act” which appears in section 28 (2) (a) even though does not expressly talk about failure to obtain consent, will naturally include the provision of section 22 of the Act and as such any alienation which requires consent which is effected without the requisite consent under the section will come within the ambit of section 28 and therefore make the holder's right of occupancy liable to be revoked for overriding public interest. But with respect to customary right of occupancy, the provision is quite unequivocal as the reason “without the requisite consent or approval” is clearly stated in the provision.

However, even though the Governor has the power to revoke a right of occupancy where an attempt has been made to alienate without the requisite consent, the power of revocation in this instance is not of absolute requirement. This is because, instead of invoking his power of revocation against the holder who purports to alienate without the requisite consent, the Governor has a discretion under section 20 (1) of the Act to demand that the holder pays additional and penal rent for each day during which the land or building thereon is in possession, control or occupation of any person whomsoever other than the holder.

54. Sec 28 (2) (a) (3) and (9) (d) of the Land Use Act.

55. Sec 28 (3) (d) of the Land Use Act.

Any Remedy for the Consumer/Alienee Under a Transaction Bereft of the Requisite Consent?

It would appear correct to state that where an attempt to alienate a right of occupancy has been struck down by reason of the fact that it has been affected by the statutory vice of lack of the requisite consent, the transaction creates no rights in the parties which are enforceable in law.

This is because if such a transaction is null and void pursuant to the provision of sec 26 of the Act, it would appear that the intended alienee cannot stand on a void transaction to pursue a claim for redress of the wrong done to him so as to get the transaction validated for him to take benefit thereunder.

Thus, if as has been established as the reason d'etre for consumer protection, under the exploitation theory it is to provide the vulnerable consumer with protection from exploitation by the providers of goods and services, then the law should be expected not to leave the intended alienee whose attempt at securing interest in land has been scuttled by the incidence of lack of consent without any form of remedy. The problem becomes even more problematic if as provided under section 28 of the Act the Governor decides to visit the attempted alienation with the penal consequence of revoking the right of occupancy for overriding public interest instead of imposing penal and additional rent under section 20 of the Act. A revocation will foreclose the chances of the intended alienee ever acquiring any right over the land.

However, part of the remedy of the intended alienee could be to sue on the contract of sale which was validly entered into prior to the stage of consent being required. This is because it has been held in a long line of cases that a transaction requiring consent under the Act is in two stages and while the first stage which is the agreement or contract stage does not require consent to be valid and effective as at this stage, no alienation has taken place the second stage which involves the alienation or conveyance of title, requires consent as a legal pre-requisite. The applicable cases include; *Igbun v. Nyarinya*,⁵⁶ *Ozua v. Suleiman*⁵⁷ *International Textile Mills v. Aderemi*⁵⁸ and *Owoniboy Technical Services Ltd vs. Union Bank*⁵⁹ where the Supreme Court put the position thus;

56 *Igbun v. Nyarinya* (2007) 5 NWLR pt 707 p 554, also see *Agbiaka & Ors v Okojie* (2004) 15 NWLR pt 897 p 503

57 *Ozua v. Suleiman* (2009) 11 WRN 15

58 *International Textile Mills Nig Ltd vs Aderemi* (1999) 8 NWLR pt 614 p 268

59. *Owoniboy Technical Services v. Union Bank of Nig Ltd* (2003) 15 NWLR pt 844 p 545 @ 581 582.

A 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 such agreement or contract he does not need the consent of the Governor. He merely operates within the first stage of a transfer or sale of an estate in land which stage ends with the formation of a binding contract for a 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. It is necessary to bear the two stages clearly in mind.

The Court of Appeal followed this already established state of the law in its recent decision in *Akpadiaha vs Edukere & Anor*⁶⁰ that the law recognizes that in an arrangement for the sale or transfer of an estate, there are two stages which are the contract stage and the conveyancing stage. The court explained that the parties are expected to have reached some basic agreement or conclusion before finally putting them into concrete documents that will be submitted for the Governor's consent in respect of a parcel of land covered by a certificate of occupancy. It was the court's decision that to obtain the Governor's Consent is therefore not the beginning, but the conclusion or end point of the sale transaction. It can thus be correctly surmised that since the transaction is severable in formation, it is also severable in terms of the effect of a lack of consent. Thus, where the requisite consent is not obtained, the effect of section 26 of the Act will be limited to the conveyancing stage for which consent was required but not to the contract stage which did not require consent. Therefore, the consumer can sue on the contract of sale or the estate contract particularly where the breach of the consent requirement has not already resulted in the final revocation of the right of occupancy.⁶¹ The alienee can sue to take possession under the estate contract and then proceed with the repeat of the conveyance stage and ensure that consent is obtained as appropriate for nothing in the Act prohibits a person whose transaction was rendered null and void from subsequently applying for consent over the same transaction. Again based on the action on the estate

60. *Akpadiaha v. Edukere & Anor* (2012) 35 WRN 106 @ 120. The court placed reliance on *Awojugbagbe Light Industries Ltd v. Chinukwe* (1995) 4 NWLR pt 390 379 and *Qrossette Manufacturing (Nig) Ltd v. M/S Ola Ilemobola Ltd* (2007) All FWR pt 379 p 1340.

61. *Akpadiaha v. Edukere* (2012) 35 WRN 106 @ 119 120. *Enyibros Foods Processing Co Ltd v. N91C* (2007) 9 NWLR pt 1039 p 216 *Ohiaeri v. Yusuf* (2004) 1 NWLR part 855 p 548

contract, an order of court could be sought for and obtained for specific performance which will include an order to ensure the securing of the requisite consent to the transaction.

Also based on the statutory duty of the holder of the right of occupancy to obtain consent, the alienee could also sue for damages for the breach by the holder of the statutory duty to obtain consent to the transaction and by reason of which the conveyance became nullified. It would however appear that where, as in *Union Bank of Nig v. Anyodare & Sons Nig Ltd*, *Olalomi Industries v. NIDB* and *Pharmatec Industrial Projects Ltd v. Trade Bank* the requisite steps were taken to obtain the consent but the same was purportedly given but by the wrong authority which vitiates the purported consent, the alienee who ought to have secured the services of a competent legal practitioner to follow up on the processing of the consent may be fixed with contributory negligence on the principle of Caveat Creditor or let the Creditor Beware as enunciated by Nweze JCA of the Court of Appeal in *Pharmartec Industrial Projects* case which it is believed will receive the approval of the Supreme Court when and if the case comes before it as the principle was formulated based on the decisions of the Supreme Court in *Ajilo*, *Ayodare*, and *Olalomi Industries* cases.

Sure enough, the principle of caveat creditor in the sense of a mortgagee being the alienee of the right of occupancy also means the same as Caveat emptor that is, let the buyer beware. It then means that in line with the principle with respect to transactions requiring consent, the duty is cast on both the vendor and the buyer to beware. It is thus caveat venditor, and caveat emptor

Conclusion

It is safe to conclude that the law of customer protection does not leave the consumer without any remedy in respect of a transaction for the purchase of interest in land under the Land Use Act even though no specific provision would appear to have been made with the alienee of an interest in land in focus. This is so because, admittedly, there is no all-encompassing and all embracing statute dealing with consumer protection as a subject except the one dealing with the establishment and functions of the Consumer Protection Council,⁶² which cannot be said to be a full and standard statute on the subject.. Therefore, the Law of contract will of necessity provide the bulk of legal remedies for the consumer whose attempt to acquire an estate in land is scuttled by the failure to obtain the requisite

62. The Consumer Protection. Council Act, Cap C5, Laws of the Federation of Nigeria 2004. For a critique of the Act see N.J. Obumneme-Okafor Ph.D. *The Consumer Protection Council Act: Hiccups Against Effective Protection in Nigeria* (2011) vol. 1 ESUT Public Law Journal p. 49

consent. Where the consumer in the context in which it is used here includes a mortgagee which invariably is always a bank or other financial institution, then it is always hoped that there will be other legal avenues open to such a consumer to secure effective legal protection regarding the mortgage transaction with respect to the recovery of the money advanced to the holder of the right of occupancy with which the land subject matter of the transaction was intended to be used as security but which failed by reason of the lack of the requisite consent.