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THE REALITY OF THE CONCEPT OF HOLDING LAND IN TRUST BY STATE GOVERNOR FOR THE USE AND COMMON BENEFIT OF ALL NIGERIAN UNDER THE LAND USE ACT, 1978

By

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Introduction

The Philosophy behind the Land Use Act, 1978 (hereinafter called "the Act") is that all the land in the territory of each state is vested in the Governor of the state who shall hold the land in trust and administered it for the use and common benefit of all Nigerians in accordance with the provisions of the Act.¹ The discussion in this paper is to examine how State Governors have exercised the power vested in them, whether it can truly be said that the Governors have held Land in their States as trustees and administered it for the use and common benefit of the citizens as prescribed by the Act.

In the effort to understand the idea of holding land in trust, Customary land tenure system will be examined with a view to see whether the concept of holding land in trust is foreign to our native ideas or not. Judicial pronouncements that shed light on the idea of holding land in trust would also be cited while suggestions would be made of some areas that are deemed necessary to improve upon to assist in achieving the set objectives of holding land in trust by state governors for the use and common benefit of all Nigerians which is the aim of the Act.

DEFINITION OF CERTAIN TERMS

Certain words would feature repeatedly in the discussion and ought to be defined:

Land: is defined as "the surface of the earth, together with all the subjacent and superjacent things of a physical nature such as buildings, trees and minerals."²

Professor Nyabueze (SAN) in his book defined land as follows:

*"The legal concept of land goes beyond the ground and its subsoil, but also includes all structure and objects, like buildings and trees standing on it."*³

Black's Law Dictionary define land as "an immovable and indestructible three dimensional areas consisting of a portion of the earth surface, the space above and below the surface, and everything growing on or permanently affixed to it."⁴ From the above definitions, Land can be said to be the earth surface; the subsoil the surface above soil and

¹ Section 1, Land Use Act, 1978

² Burn, E. H. Cheshire's Modern Law of Real Property, 12th Edition (Butterworths: London, 1967) 136, quoted at page 6 of "the Nigerian Land Law" by Adewole Taiwo, Published by Ababa Press Ltd, 59 Oyo Road, Coca-Cola Area, Sango, Ibadan.

³ Nyabueze B. O. Nigerian Land Law (Nwamife Publishers Ltd. Enugu, 1974) 3.

⁴ Black's Law Dictionary, Eight Edition by Bryan A. Garner page 892.

all that permanently attached.

Governor is a person elected as the head of a state who stirs the affairs of the state.

Trust, means charge or care, responsibility, task or arrangement by which something is given to a person to use in a particular way and that such things will be done.⁵

Underhill, defines trust as follows: "A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may himself be one, and anyone of whom may enforce the obligation."⁶

The above definitions of trust conform with the idea of holding land in trust as contained in the Act.

HISTORY OF LAND POLICY IN NIGERIA

Before the advent of British idea of Land tenure System, Customary Land tenure was in practice all over the area now called Nigeria.⁷ Customary Land Law can be described as the native idea, norm usages and practices of the indigenous people of Nigeria relating to land.

The Customary Land tenure system like other native law and customs varies from place to place, its main features includes: Community, village or family ownership, inalienability and management by the community, village or family head as trustee for the community, village or family. This concept of community, village or family head holding land in trust for the community, village or family received judicial approval in the famous case of *Amodu Tijani Vs. Secretary, Southern Nigeria*⁸ wherein *His Lordship Viscount Haldane* held that land belongs to the community, the village or the family and not individual that the chief or head of the community, village or family had charge of the land as trustee for the use of the community, village or family. This simply shows that the idea of holding land in trust is part of our native law and custom, it is not a foreign idea and it is not imported by the British. Part of the essential elements of holding land in trust under Native Law and Custom is that head of Family though can spend money from family fund on matter incidental to his position and duties but must also give account to members of the family upon demand.⁹ This explains that as head of family, village or community under native law and custom he is not the sole owner of the family land, he manages it for the over all interest of the family, village or community, he represents and as such a trustee, for the family, over the family land.

CONTACT WITH BRITISH SYSTEM OF LAND POLICY

Costal areas like Lagos, Benin and Calabar among other communities within the territories that now constitute Nigeria had early contacts with British traders.¹⁰ In 1861, Lagos was ceded to the British Crown by a Treaty of Cession dated August 6th 1861 signed between King Docemo of Lagos and representatives of Her Majesty the Queen of England.¹¹

Part of Article 1 of the Treaty reads: "I Docemo do, with the consent and advise of my council, give, transfer and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors forever, the Port and Island of Lagos, with all the rights, profits, territories and appurtenances whatsoever thereunto belonging....."¹²

The treaty of cession 1861 marked the beginning of British Administration in Nigeria, it is the first time that management of land in any part of Nigeria is vested in non native and it is the first land acquisition by Government Administration in Nigeria.

Sequel to the Treaty and the British Government having assumed control over lands in Lagos, title documents termed Crown Grant were issued over land in Lagos to individual

⁵. Chambers Universal Learners Dictionary, Edited by E. M. Kirkpatrick.

⁶. Underhill's Law Trusts and Trustee, page 3. quoted by J. O. Fabunmi in his book: Equity and Trusts in Nigeria Second Edition Pages 194 to 195.

⁷. See: The Nigerian Land Law by Adewale Taiwo published by Ababa Press Ltd pages 2-3

⁸. (1921) 2 AC 399 at pages 404-408

⁹. See: *Balogun Vs. Balogun* (1935) 2 WACA 290 at 299

¹⁰. The Nigeria Land Law by Adewale Taiwo Published by Ababa Press Ltd; 59 Oyo Road, Coca-Cola Area, Sango, Ibadan Page 2.

¹¹. See: Nigerian Land Law by T. O. Elias, Fourth Edition London Sweet & Maxwell 1971 pages 2-3.

¹². Ibid Page 8.

as evidence of title. Controversy arose between the king of Lagos and the whitecap chiefs on the right of the king to have ceded Lagos land. The contention of White Cap chiefs were that they were the customary owners of the land as chiefs/heads of the various land owning families and not the king and that the king only held sway as trustee and cannot give away what he does not have.

This brought up the legal effect of the treaty over the land in Lagos and in **Amodu Tijani Vs. Secretary, Southern Nigeria**,¹³ it was held further that the Treaty only passed the sovereign right that the ceding King possessed as trustees of the Land but does not affect the rights of the natives to their lands which were to be fully respected.

All along the idea that the British Government held the Land in Lagos as trustee for the natives prevailed and the rights of the customary land owners to the use and enjoyment of their land was preserved. I must quickly add that the letter and spirit of the opening part of the Treaty which reads, "I Docemo do, with the consent and advise of my council...." show that the King was not acting in autocratic capacity, this buttress the fact that he is a trustee.

The British Administration gradually extended all over Nigeria and in 1900, the Protectorate of Northern Nigeria was proclaimed while the Protectorate of Southern Nigerian was merged with the Colony of Lagos in 1906 to form Southern Nigeria. The Protectorates of Northern Nigeria and the new Southern Nigeria was amalgamated in 1914 into the Colony and Protectorate of Nigeria.¹⁴

By virtue of the British rule English idea of land policy crept into the country which was practiced along side with the existing Customary Land System. Various Laws were made either as Ordinances or Acts. Some of them are: Native Lands Acquisition Proclamation, 1900, Native Lands Acquisition Proclamation, 1903, the Crown Lands Management Proclamation, 1906, the Native Acquisition Ordinance, 1917 and the State Lands Act, 1959 all applicable to Southern Nigeria. The Crown Lands Proclamation, 1902, the Lands and Native Rights Proclamation No. 9, 1910, the Lands and Native Rights Ordinance No. 1, 1916 and the Land Tenure Law, 1962 all in the Northern Nigeria. The common basic feature of the laws is that they impose the obligation on the Government that land is to be held and administered for the use and common benefit of the natives and at the same time regard is been had to the native law and customs of the people.¹⁵ In fact Section 4 of the Land Tenure Law, 1962 declared that the whole lands in the former Northern Nigeria whether occupied or not are native land with a few exception. All these show that while Government is in control of land, it does so in trust for the benefit of the people.

The system continued until the country was divided into Regions and later into states, each state adopted the land law as applicable to its mother Region, from the former Northern or Southern Region respectively.

LAND POLICY UNDER THE MILITARY RULE

When the Military took over power in 1966, the existing crisis relating to Land matters such as problem of acquiring land or to rent a building by both the Government and individual, high cost of rent, soaring amount of compensation, scarcity of guarantee land and a host of others continued and even were on the increase. To find solution to the problems the then Military Government Promulgated Decrees and Edicts which either modified the existing Property Laws or introduced new dimensions to it.

Among the Decrees are; the State Lands (Compensation) Decree,¹⁶ the Public Land Acquisition (Amendment) Decree¹⁷ and the Public Lands Acquisition (Miscellaneous Provisions) Decree¹⁸. The Decrees laid down processes of acquiring land by Government and mode of assessing compensation to be paid in respect of land acquired for public purposes. It must be mentioned that though the Military Government created States, each State adopted Land Law of its parent region, while few other Edicts were enacted.

In a drastic effort to unify Land tenure in Nigeria, the Military Government set up

¹³ 3 NLR 21 at 55, (1923) 4NLR 18

¹⁴ See: Nigerian Land Law by T. O. Elias Fourth Edition London Sweet & Maxwell 1971 page 4

¹⁵ See: Sections 3 & 4 of the Land and Native Rights Ordinance No. 1 of 1916 (as amended by 1918 Ordinance)

¹⁶ Decree No. 38, 1968

¹⁷ Decree No. 4, 1970

¹⁸ Decree No. 33, 1976

the Land Use Panel in June, 1977 with the following terms of reference:

- a. To undertake an in-depth study of the various land tenure, land use, and land conservation practices in the country and recommend steps to be taken to streamline them.
- b. To study and analyze all the implications of a uniform land policy for the country.
- c. To examine the feasibility of a uniform land policy for the entire country and made necessary recommendations and proposed guidelines for implementation.
- d. To examine steps necessary for controlling future land use and also opening and developing new land for the needs of Government and Nigeria's population in both urban and rural areas and to make appropriate recommendations.¹⁹

Upon the report of the Panel the then Federal Military Government in 1978 promulgated the Land Use Decree²⁰. On October 1st, 1979 the Military Government handed over power to a democratically elected Government, and in 1980 the Decree was adapted as Land Use Act²¹ and has since remained the principal law regulating land policies in Nigeria.

THE LAND USE ACT

The Land Use Act (hereinafter called "the Act") comprises of 52 Sections, it is divided into eight parts. The objective of the Act as contained in its preamble read as follows: "WHEREAS it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law: AND WHEREAS it is also in the public interest that the right of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them provide for the sustenance of themselves and their families should be assured, protected and preserved".

Following the preamble is section one of the Act which vest all land in a state in the Governor to hold it in trust and administer it for the benefit of every Nigerian in accordance with the provision of the Act. One may say that from the combine reading of the preamble and section one of the Act, the objective of the Act which is to hold land in trust is similar with such idea under Customary Land Law. The idea under the Act is to ensure that every Nigerian has access to Land; the objective is also in consonant with the Constitutional Provision²².

Notwithstanding the Constitutional Provisions as well as the provision of the Act, the question is whether in reality State Governors hold land in their States in trust and for the benefit of every Nigerian? This among others are questions begging for answer, which our further discussion would throw more light on.

To start with, in interpreting section one of the Act, Court has in *Savannah Bank (Nig) Ltd. & Anor. Vs. Ajilo & Anor.*²³ held that absolute ownership of land by families, communities and individual had, by the Land Use Act 1978, abolished, while all the land within a state is vested in the State Governor. It is important to note that despite the decision in *Savannah Bank* case the power of State Governor over Land in a state is not absolute, it is qualified by the prefix and suffix clauses of section one of the Act which reads: "Subject to the provisions of this Act" and "in accordance with the provisions of this Act." These are twin qualifications, one, if by any provision of the Act power of State Governor is ousted over the control of any parcel of land in a state, so it be. Example of such provision is section 49 of the Act which exempt land held by Federal Government or any of its agencies from the control of the Governor of the State where the land situates. The other leg of the qualification is that in exercising control over land in a state, Governor must do so in tandem with letter and spirit of the provisions of the Act. Otherwise such an act of the Governor may be declared null and void of challenged in court of law.

This latter arm of the qualification gives ample opportunity to individual to challenge the validity or otherwise the exercise of Governor's power under the Act in a Law court. This operates to check any perceived ultra vires act of State Governor in his dealing with Land in a state as trustee of the people. This I submit strengthen the idea that the Governor is a

¹⁹. See: Handbook on The Land Use Act by Niki Tobi (As he then was) published by Ahmadu Bello University Press Ltd PMB 1094, Zaria at page 6.

²⁰. Decree No. 6, 1978

²¹. Section 10 and 13 of the Adaptation of Laws, (Re-designation of Decree, etc.) Order, 1980.

²². Sections 43 and 44 of 1999 Constitution of Federal Republic of Nigeria (as amended)

²³. (1987) 2 NWLR Pt 57 Pg. 421, (1989) 1 NWLR Pt 97 Pg 305

mere trustee who must act in accordance with the trust vested in him.

Section two of the Act classified land in a state into Urban Areas and those not in Urban Areas. It gives the Governor absolute control and management of land in urban areas while land in areas not classified as urban is under the control and management of both the Governor and Local Government where the Land falls²⁴.

For easy administration section 2 (2) of the Act provides for the establishment of Land Use and Allocation Committee to advise the Governor on management of land classified as Urban Areas. Section 2 (5) equally provides for the establishment of the Land Allocation Advisory Committee to advise the Local Government on land that do not fall within urban areas. As to what land is Urban Area, it is only those Areas of Land within the state that is so designated by the Governor and published in the state Gazette that are termed land in Urban Area.²⁵ Section 3 of the Act reads, "Subject to such general conditions... the Governor may for the purposes of this Act by order published in the state Gazette designate the parts of the area of the territory of the state constituting land in an urban area".

The above provision give a State Governor power to name any part of the land in a state as urban area notwithstanding the locality in which the land falls. From the Law it is not enough that a piece of land is situate in what ordinarily amount to urban areas to qualify as land in Urban Area for the purpose of the Act or that a land is situate in a location that in ordinary language not urban area to disqualify it from been designated Land in Urban Area. The determinant factor is the decision of State Governor as published in state Gazette. Once the Governor has published in the State Gazette designating an area as Urban Area, irrespective of the location, it becomes Land in urban area subject only to the control and management power of the Governor as spelt out in the Act.

What form the basis of designating land as Urban area is not defined in the Act save that the Governor's decision must be for the purposes of this Act. Section 3 of the Act gives unfettered discretion to the Governor to so decide. An examination of some State Gazettee designating Land as urban area will explain more the manner in which the power of the Governor is been exercised.

In Kwara State the first attempt at designating some part of the state as urban area is contained in Kwara State Legal Notice 2 of 1978 published in Kwara State of Nigeria Gazette Extraordinary No. 11, Volume 12, 19th July, 1978-Supplement Part B. It is titled the Land Use (Designation of Urban Area, fees and forms) Regulations, 1978. Section 1 of the Legal Notice reads, "The areas described in the first Schedule hereto are hereby declared as urban areas for purposes of the Land Use Decree, 1978.

In the first schedule of the 1978 Legal Notice, Ilorin had five parts designated as Urban Areas. The areas are: Ilorin, Asa Dam and Environ, International Airport and Environ, Sobi Hill and Environ and University Site and Environ with the demarcation of the area shown on a survey plan deposited in the office of the Surveyor-General, Ilorin. Other parts of the state had their urban areas specified with their identifying survey plan contained in part 6 to 16 of the first schedule of the 1978 Legal Notice.²⁶

The effect of the 1978 Legal Notice is that all other Lands in Kwara State not so designated are not land in urban areas for the purpose of Land Use Act notwithstanding the location of the land. The 1978 Kwara State Legal Notice was in operation until year 2009 when another Legal Notice was published²⁷, which repealed the 1978 Legal Notice. Unlike 1978 Legal Notice the 2009 Legal Notice designate every part of Kwara State as Urban Areas. Section one of the 2009 Legal Notice reads; "The places enumerated in each Local Government Area provided in the Schedule hereto are hereby designated as urban areas in Kwara State". In the schedule of the 2009 Kwara State Legal Notice each Local Government with all towns and communities under it are listed as urban areas. No part of the state is left as land not in urban areas. Obviously there were public outcries against the 2009 Legal

²⁴ Sections 2(1a & b) and 5 (1a-h) of the Land Use Act, while section 2 (1b) gives control and management of land not classified as urban areas to local government, section 5 (1a-h) gives the governor power to grant statutory right of occupancy and make other ancillary orders thereto in respect of any land whether in urban areas or not.

²⁵ Section 3 of the Land Use Act.

²⁶ See: The Land Use (Designation of Urban Areas, Fees and Forms) Regulations, 1978, Kwara State Legal Notice No. 2 of 1978.

²⁷ Land Use Act Designation of certain places as urban areas order, 2009, published in Kwara state of Nigeria Gazette No. 17 Volume 43.

Notice. Its perceived negative effects are among others.

- (1) It robs the Local Government in Kwara State the power to grant Customary right of occupancy guarantee under section 6(1) of the Act.
- (2) Local Government can no longer enter upon, use and occupy for public purposes any land within its area of jurisdiction as prescribed under section 6 (3) of the Act.
- (3) The order negates the provision of section 36 of the Act which guarantee the deemed Customary Right of Occupancy of the citizen in land not in urban areas.
- (4) The order ousted the jurisdiction of Area Court set out in section 41 of the Act to try land matters throughout Kwara State as there is no more in existence Land in respect of which Customary right of Occupancy can be claimed by the citizen or granted by Local Government thereby limiting access of the citizen to court as land cases can only be before High Court.
- (5) It outrightly abolishes Customary right of occupancy as defined under section 51 (1) of the Act.

Looking at the 2009 Order of Kwara State Government the question is can the Governor be said to be acting as trustees holding land in the state in trust and administering same for the use and common benefit of all Nigerians. To me it is not. The order as published created more problems on the ways of the citizens in their quest to use and derive benefit from land within Kwara State which is against the spirit and letter of the Land Use Act, 1978.

However Kwara State Government being a listen government that is ready to accede to the yearnings of the citizens had, sequel to the public outcry and demands, reversed its step by publishing another order titled Kwara State Legal Notice No. 6 of 2013²⁸. Section 1 of the 2013 Order reads, "The Designation of Certain Places as Urban Areas Order No. 17 of 2009 is hereby repealed". With the repeal the status quo ante which is the 1978 Regulations remain the existing order designating specified areas of the state as Urban Area. With the repeal all the anomalies of the 2009 Order is gone while the citizens and Local Governments in the State can continue to use and enjoy their Customary Right of Occupancy over Land which are not designated as urban Areas.

It is my observation that with the unrestricted power of the Governor to designate the entire land in a state as Urban Areas, the Governor on that score alone cannot in real sense be said to be holding the land in trust for the people. If truly in trust, it ought not be exercised in such manner that has such adverse effects on the citizens.

Considering other provisions of the Act it can be said that the power of Governor in respect of Land under the Act can not be said to be that of trustee. Section 5 (1a) of the Act allow the Governor to grant statutory right of occupancy to any person for all purposes over land whether in an urban area or not.

While it is conceded that the power of the Governor to grant a Statutory right of occupancy under section 5 (1) is wide, in granting the title document public interest ought to be considered, if the Governor is to act truly as trustee for the citizen. The purpose for which an individual intended to put the land into vis-à-vis public interest ought to be considered before the issuance of the title document so that it does not affect the public adversely. This is because in Law of Trust the trustee must not allow the trust property to be used in a manner that will adversely affect the beneficiary of the trust.

Nowadays many people obtained title document from the Governor to site petrol station, poultry, shopping complex and many others like that in an area that is purely residential. Once the title document is issued by the Governor, the holder is less concern about the effect of what he uses the land for on the neighbouring citizens. This example can be seen in some areas where motorist queue at filling station do block access road or that land is made use of in a manner that is so noisy, that disturbed the peaceful enjoyment of other residence, or that endanger the security of life and property of others or that affect the hygienic condition of the environment where the land is used for poultry or drinking sport.

Another issue is where the governor had acquired land for public purpose as set out in the Act and the land is not used again for the purpose. Can the Governor grant Statutory Right of Occupancy over such Land to individual for whatever purpose? This issue is

²⁸ Land Use Act Designation of Certain Places as Urban Areas (Repeal) Order, 2013

Common nowadays when many public institutions are folding up or privatized and the unused land for such institutions are allocated to individuals by the Governor.

The Supreme Court had in *Ukwa Vs. Awka Local Council* (1996) NMLR 41 held that when the public purpose for which the land is acquired fails, the land in question by operation of law automatically revert to the person who owned it before the acquisition. Notwithstanding the Supreme Court decision there are Court of Appeal decisions to the effect that once land is acquired by government in accordance with the provision of the Act that is by serving proper notice of acquisition and compensation had been paid the original land owner do not possessed any reversionary interest over the land again. The Government is free to use the land for any purpose even though the public institution to be cited or already cited has collapsed or fold up.²⁹ The Court of Appeal has in these two cases refused to follow the Supreme Court decision in *Ukwa Vs. Awka Local Council* (Supra), but by doctrine of judicial precedent the Supreme Court decision remains the order of the day. Since the other two decisions are that of Court of Appeal, it is not settled until the Supreme Court re-pronounce on it. However in my humble view if the Governor is acting as trustee of the people such unused land ought to revert back to the original land owners even for a token.

This I state will meet the decision of the Court of Appeal in *Ogbuefi Vs. ASEC* (supra) per Lokulo-Sodipe at 1923 that "...payment and acceptance of compensation would then have obliterated whatever right of ownership that hitherto existed over the land... save perhaps the compensation paid is refunded and accepted by the authority that initially acquired the land". If the original land owners could not meet up or are not interested then the Governor can allocate it to others. If this step is taken it will meet the concept of Law of Trust that the Trustee can not dispose the trust property against the interest of the beneficiary of the trust.

CONCLUSION AND RECOMMENDATIONS

The discussion has made us to know that the idea of holding land in trust for the use and benefit of the community is part of our native law and custom. Even upon colonization the idea still subsist notwithstanding the alleged ceding of Lagos land to the British Crown. Subsequent legislations in Nigerian, before the Land Use Act, have, as their features, the idea that land in Nigeria is been held and administered in trust for the people by successful Government.

The Land Use Act incorporated the concept of holding land in trust for the people as its basis but in practical term the Governor in exercising the Power vested in him go beyond that of trustee. Some of the decisions taken by the Governor in dealing with land in the state can not in reality be said to be holding the land in trust or administering it for the use and common benefit of all the people in the state as governor actions many times adversely affect the public particularly the masses who are the beneficiaries of the land (the Trust Property) which the Governor ought to protect save the few bourgeoisies who can meet the dictate of the government.

In addition if the Governor is to be seen as holding land of a state as trustee of the people, when any land acquired for public purpose is no more used for the purpose for which it is acquired such land ought to revert back to the original owner rather than allocation of such land to different person. This will be in line with the Supreme Court decision in *Ukwa Vs. Awka Local Council*.

Finally, in exercising the power vested in him by the Land Use Act, State Governor cannot *stricto sensu* be said to be holding the land in trust or administering same for the benefit of the people.

²⁹ See *Adeniyi Vs. Oroja* (2006) All FWLR Pt 324 pg. 1839 per Salami (JCA as he then was) at 1864, *Ogbuefi Vs. A.S.E.C* (2011) All FWLR Pt 603 Pg. 1873 Per Lokulo-Sodipe (JCA) at 1922 to 1924.