REQUIREMENT OF CONSENT IN THE ALIENATION OF INTERESTS IN LAND IN THE FEDERAL CAPITAL TERRITORY, ABUJA: THE CASE OF *UNA V ATENDA* REVISTED*

Abstract
The Land Use Act, 1978, has streamlined the interest one may hold in land in Nigeria to an occupational interest for a term of years. The Governor of each of the states of the Federation holds land in trust for the people and may grant a statutory right of occupancy to an applicant which would be evidenced by a Certificate of Occupancy. The same applies to the Local Government in respect of land in the non-urban areas of each state. An alienation of this grant would be invalid without the consent of the Governor or the Local Government as the case may be. The Federal Capital Territory came into existence in 1976 prior to the promulgation and subsequent deemed enactment of the Land Use Act. It would appear from an examination of the Federal Capital Territory Act, the Land Use Act itself and the decision in Una v Atenda (2000) 5 NWLR (pt.656) 245, that the Land Use Act is not applicable in the Federal Capital Territory. Since the requirement for consent are contained in the provisions of the Land Use Act, it is the focus of this paper to inquire into the validity or otherwise of the current practice of obtaining the consent of the Minister of the Federal Capital Territory(as delegated to him by the President) before the alienation of rights of occupancy. The paper which adopts the doctrinal research methodology posits that President or his delegate does not have the power to grant or withhold the grant of consent for the alienation of interest in land once he has made a grant of interest under section 18 of the Federal Capital Territory Act to a grantee of a right of occupancy. The paper recommends in its conclusion that to synchronize land administration in the country in relation to consent for the alienation of interest in land bearing in mind the incongruity that preceded the Land Use Act, the FCT Act should be amended to make express provisions for the consent of the President or Minister in charge of the Federal Capital Territory similar to those contained in the consent sections of the Land Use Act.

Keywords: *Consent, Alienation, Interests, Land, Abuja.*

1. Introduction.

The consent of the Governor or that of the appropriate Local Government is required under the Land Use Act before the holder of a right of occupancy granted by the Governor or Local Government can alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise. However, the case of *Una v Atenda* decides that the Land Use Act does not apply in the Federal Capital Territory, Abuja. The requirement for consent is a creation of the provisions of the Land Use Act. The focus of this article is therefore a review of this decision against the background of the provisions of the Land Use Act and other extant legislation for the purpose of ascertaining the validity or otherwise of the current practice of obtaining consent before such aforesaid alienation and thereafter draw up considered conclusions and make appropriate recommendations. The Land Use Act provides that 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 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;[1] or in other cases without the approval of the appropriate Local Government.[2] Likewise, the Act makes it unlawful 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 provided that the consent of the Governor shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor.[3] The consent of the Governor is also not required to the reconveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Governor.[4] The Act also states that the consent of the Governor to the renewal of a sub-lease shall not be presumed by reason only of the Governor having consented to the grant of a sub-lease

***T.A. YUSUF, LLM (Ilorin), BL,** Senior Lecturer, Nigerian Law School, Kano Campus

[1] LUA, 1978 s 21(a)
[2] LUA, 1978 s 21(b)
[3] LUA, 1978 s 22(a)
[4] LUA, 1978 s 22(b)

containing an option to renew the same.[5] In the same vein, the Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by endorsement thereon.[6] Regarding subleases, the Act provides that a sub-lessee of a statutory right of occupancy may, with the prior consent of the Governor and with the approval of the holder of the statutory right of occupancy, demise by way of sub-underlease to another person the land comprised in the sub-lease held by him or any portion of the land.[7] The provision of the Act giving the Governor the power to request for an instrument in evidence of the transaction to which his consent is sought and on which he may endorse such consent as provided for by section 22(2) of the Act shall *mutatis mutandis* apply when a sub-lessee is creating a sub-underlease.[8]

2. Facts of the Case

The respondents sued the applicants at the High Court of Abuja, claiming in the main, damages for trespass to land and perpetual injunction restraining the applicants from further trespass. The applicants filed a memorandum of appearance and thereafter raised preliminary objection challenging the jurisdiction of the High Court to entertain the suit. The basis of the objection was that the land in dispute is situate in Karmo, a suburb of Abuja, the Federal Capital Territory; that the said suburb has not being designated as urban area and no legal instrument has been promulgated designating it as such in accordance with the provisions of section 3 of the Land Use Act. That not having designated the place as such, it remains a non-urban area in respect of which the High Court has no jurisdiction. After taking submissions of counsel on the objection, the trial court in a reserved ruling referred the matter to the Court of Appeal by way of case stated under section 259(2) of the Constitution of the Federal Republic of Nigeria, 1979 (as amended). In answering the questions, the Court of Appeal considered the following statutory provisions. Section 49(1) of the Land Use Act which provides that –

> Nothing in this Act shall affect any title to land whether developed or undeveloped held by the Federal Government or any agency of the Federal Government at the commencement of this Act and, accordingly, any such land shall continue to vest in the Federal Government or the agency concerned.

Section 1(3) of Federal Capital Territory Act, Cap.128, Laws of the Federation of Nigeria, 1990 to the effect that –

> The area contained in the Capital Territory shall, as from the commencement of this Act, cease to be a portion of the States concerned and shall thenceforth be governed and administered by or under the control of the Government of the Federation to the exclusion of any other person or authority whatsoever and the ownership of the lands comprised in the Federal Capital Territory shall likewise vest absolutely in the Government of the Federation.

The Court of Appeal held per Akintan, J.C.A (as he then was) thus:

> The question therefore of the powers conferred on and exercised by the Governor of a State under the Land Use Act being applicable in the Federal Capital Territory will not arise, since it is clear from the objective of the Land Use Act as set out in its preamble and the specific provisions of section 49(1) of the same Act, the provisions of the said Act are *not applicable to title to land* held by the Federal Government or any agency of the Federal Government. It follows therefore that the provision of section 3 of the Land Use Act which gives the Governor of a State power to designate parts of the areas of the State constituting land as urban area is also inapplicable to the land in the Federal Capital Territory.[9]

The court also held that title to land in the FCT is vested in the Government of the Federal Republic of Nigeria and this different from the provisions of the Land Use Act which vests all lands in the states of the Federation

[5] LUA, 1978 s 22(c)
[6] LUA, 1978 s 22(2)
[7] LUA, 1978 s 23(1)
[8] LUA, 1978 s 23(2)
[9] *Una v Atenda* (2000) 5 NWLR (pt.656) 245 at 267.

in the Governor of that state 'in trust' for the people.[10] It also held that before Area Councils could have anything to do with the lands within the Federal Capital Territory, an Act of the National Assembly must first be promulgated to define the administrative and the political structure of the Area Councils and this has not been done. The court went further to hold that the question of urban or non urban area is a creature of the Land Use Act and has no relevance or application to federally held lands. The jurisdiction of the courts in relation to lands under the Land Use Act cannot also affect the lands within the Federal Capital Territory.[11] The court also gave judicial fortification to the provisions of section 51(2) of the Land Use Act which vests all powers on any land held or vested in the Federal Government on the President or any Minister designated by him and stated that no mention was made of any Local Government or Area Council in the said section of the law.[12]

3. Review of the Case

The sum total of the judgment of the Court of Appeal in this case is that the whole of the provisions of the Land Use Act (which goes without saying, includes its consent provisions) do not apply in the Federal Capital Territory. So the question is: 'From where does the President or the Minister in charge of the Federal Capital Territory derive its power to grant consent to alienation of interest in land? The principal and enabling legislation in our opinion which regulates the administration of land in the Federal Capital Territory is the Federal Capital Territory Act. Fortification is found for this assertion in the Constitution which provides that the Federal Capital Territory, Abuja shall be the capital of the Federation and seat of the Government of the Federation[13] and it shall comprise six area councils and the *administrative* and political structure thereof shall be provided by an Act of the National Assembly.[14] This, the National Assembly is deemed to have done by the enactment of the Federal Capital Territory Act. Hence it would be apt to examine some of its provisions we consider relevant to this article. Section 13(1) (3) (b) of the Act provides that in addition to any law having effect, or *made applicable throughout* the Federation, the laws set out in the Second Schedule to the Act shall as from 9 May, 1984 apply in the Federal Capital Territory. It goes further to state that the laws set out in the Second Schedule to the Act and applying in the Federal Capital Territory by virtue of subsection (1) of the section shall have effect with such modifications as may be necessary to bring them into conformity with the Constitution of the Federal Republic of Nigeria and, in particular – *functions conferred by any such law on the Governor, Premier, Military Governor or Administrator, Minister or any Commissioner in the Government of a State* shall, without prejudice to the exercise of those functions by the President and until other provision in respect of any such function is made by the authority having power to do so, *vest in the Minister charged with responsibility for the Federal Capital Territory*.

It is interesting to note that even though the Land Use Act applies throughout the Federation, it is not one of the laws listed in the second schedule to the Act by virtue of section 13(1) (3) (b) of the Act. Nor is the Land Tenure Law of the former Northern Region of Nigeria. This omission was judicially noted by Mangaji, J.C.A in the case under review when his lordship stated that:

> Having found that the Land Use Act does not apply to the Federal Capital Territory, section 13(1) of the Federal Capital Territory Act did set out those laws that apply to the Federal Capital Territory in addition to any law having effect, or made applicable throughout the Federation. Schedule II of the Act listed out the applicable laws and the Land Use Act is not mentioned. In any effect, by virtue of section 261(2) of the Constitution, the Federal Capital Territory Act and the Land Use Act itself, all lands owned by the Government of the Federation or its agencies will not be subjected to the provisions of the said Land Use Act.[15]

Also section 18(b) and (c) of the Act provides that as from 28th May, 1984, the President has delegated to the Minister of the Federal Capital Territory the following functions, that is to say – any executive power of the Federal Government vested in the President pursuant to section 299(a) or any other section of the Constitution of the Federal Republic of Nigeria and exercisable within the Federal Capital Territory and any function or

[10] *Ibid.* per Musdapher, J.C.A. at pp 270 – 271.
[11] *Ibid.*
[12] *Ibid.* per Bulkachuwa, J.C.A at pp. 271 – 272.
[13] CFRN, 1999 s 298
[14] CFRN, 1999 s 303
[15] *Una v Atenda, supra* at p.289.

power conferred by *any law* set out in the Second Schedule to this Act vested in the Governor or Military Governor of a State.[16] Section 299(a) of the Constitution provides:

> The provisions of this Constitution shall apply to the Federal Capital Territory, Abuja as if it were one of the States of the Federation; and accordingly all the legislative powers, the executive powers and the judicial powers vested in the House of Assembly, the Governor of a State and in the courts of a state shall, respectively, vest in the National Assembly, the President of the Federation and in the courts which by virtue of the foregoing provisions are courts established for the Federal Capital Territory, Abuja.

Now apart from the fact that the Land Use Act is not contained in the second schedule to the Federal Capital Territory Act and hence is inapplicable in the Federal Capital Territory, Abuja, section 19(b) of the Federal Capital Territory Act provides that the powers delegated to the Minister under the provisions of section 1 of this Act shall not include any power *expressly excepted under any other law*, instrument or otherwise howsoever. The operative or controlling words which we would like to emphasize here is 'shall not include any power expressly excepted under any law'. Such an exception in our opinion is the one contained in section 49(1) of the Land Use Act. This section excepts the whole provisions of the Land Use Act from applying in the Federal Capital Territory or any land vested in the Federal Government of Nigeria. This much has been stated above by the Court of Appeal in the case under review. This decision had come up for consideration by the Supreme Court in *Abaji Area Council & Ors V Jonas & Ors*[17] and by the Court of Appeal in *Frank Eribenne V Mr. Ali Sunday UG & Chief Allah Yayi Zakoyi*[18]. However, the substance of the judgments is of no assistance in the examination of the theme of this paper.

4. Conclusion

Flowing from our understanding of legislative provisions examined above and the decision under review, it would appear that the President or his delegate does not have the power to grant or withhold the grant of consent for the alienation of interest in land once he has made a grant under section 18 of the Federal Capital Territory Act to a grantee of a right of occupancy. It should be noted that the power to grant interest in land and the power to consent to the alienation of such interest are not the same. To be exercisable, both must be expressly provided for by law. An examination of the FCT Act reveals that its only consent provision is contained in section 7 of the Act and it relates solely to development control or physical planning and has nothing to do with alienation of interest in land. Finally, it is submitted that to synchronize land administration in the country in relation to consent for the alienation of interest in land bearing in mind the incongruity that preceded the Land Use Act, the FCT Act should be amended to make express provisions for the consent of the President or Minister in charge of the Federal Capital Territory similar to those contained in the consent sections of the Land Use Act. The other option would be to amend the Land Use Act but when one considers the procedure for its amendment, it would be more pragmatic to opt for the former than the latter option.

[16] Mangaji, J.C.A in this case held at page 275 of the Law Report that by virtue of section 18 of the Federal Capital Territory Act, only the Minister for the Federal Capital Territory can grant statutory rights of occupancy over lands situate in the Federal Capital Territory.

[17] Unreported Suit No: SC/187/2000.

[18] Unreported Suit No: CA/A/105/05.