

**THE IMPERATIVE OF EXCLUSIVE POSSESSION IN EVALUATING THE CONCEPTS OF TENANCY AND LICENSE\***

**Abstract**

*The needs of man have been described to be food, clothing and shelter. In pursuance of the third element shelter, comes land. Due to the unequal distribution of wealth, some live at the mercy of others who are able to acquire lands and build houses. This results in the landlord- Tenant relationship which has generated controversies from time immemorial evident from the cases the courts have had to resolve. While in adjudicating some, the parties are left to the dictates of statutory interpretation, some are left to the position of legal theorists to determine rights and liabilities. This work analyzes the concepts of Tenancy and License within the context of exclusive possession associated with the enjoyment of land. The differences and similarities will be examined, taking into consideration the criticisms and how the courts ascertain the intention of the parties when such arises. This work will adopt a doctrinal method of research with the help of texts, decided cases, articles and online journals.*

**Keywords:** Exclusive possession, Tenancy, License.

**1. Introduction**

In every agreement between parties, there should be meeting of the minds in order to bring about a mutual consent to their bargain<sup>1</sup>. Contractual assent and decided policy must be operative where the parties are silent. Since contractual silence is pervasive, the court is therefore saddled with the responsibility to identify the intention of the parties in every legal agreement or contractual relationship. This could be done objectively or subjectively. Christians are also familiar with a segment of their religious book 'The Bible' which is Amos 3:3, it says 'can two walk together except they agree?' this goes to say that agreement between parties is important before carrying out certain obligations towards each other. The above excerpts are explicit in showing the importance of ascertaining the intention of the parties in every contractual relationship or any form of agreement at all.

**2. Conceptual Clarification of Land Rights or Interests**

Land interests are entitlements to land and the appurtenances or improvements on the land accruing to a person having a legal or equitable relationship with the land or incorporeal hereditament<sup>2</sup>. They refer to the ability of individuals to freely obtain, utilize, and possess land at their discretion, as long as their activities on the land do not impede on rights of other individuals<sup>3</sup>. They are also the category of rights a person has over a land whether he is the owner or he is just in possession. Land interests could also be legal or equitable. They are legal where they are established and recognized by law e.g. easements, legal mortgage, tenancy, etc. They are equitable where they are recognized by the doctrines of equity which were applied in the Court of Chancery and not by the Common Law Courts, e.g. interest created under trust, interests not formally created, and restrictive covenants. Land rights or interest is the umbrella which covers all forms of interests relating to land including lesser interests, it will be vital to the understanding of this article to clarify the two major lesser interests which are of importance to this paper.

**3. Tenancy**

Generally, tenancy is seen as a contract whereby a person who is the owner of the property gives a right of occupancy to another person who will have exclusive possession of the property for a definite period of time specifically not exceeding three years for an amount of money called *rent* which serves as consideration. The relationship between a landlord and a tenant arises where the grantor *Landlord* grants, by means of contract between the parties the right to occupy and enjoy exclusive possession for a particular number of years to the grantee *Tenant*. This contract is usually called a tenancy agreement. There is a difference between tenancy and a lease. Although they are very similar in nature, but the major

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<sup>1</sup>Savigny, Friedrich Carl von: *System des heutigen Römischen Rechts*. Bd. 3. Berlin, 1840. Available online at [http://www.deutschestextarchiv.de/book/show/savigny\\_system03\\_1840](http://www.deutschestextarchiv.de/book/show/savigny_system03_1840). Accessed on the 30<sup>th</sup> of June, 2019

<sup>2</sup> I.O. Smith: *Practical Approach to law of Real property in Nigeria* (Ecowatch Publications Ltd, Revised edition 2013) 38

<sup>3</sup> Edward D. Brown: *What is an Interest in Land and Why Does it Matter*. Available online @ <https://www.pitblado.com/resources/what-interest-land-and-why-does-it-matter>. Accessed on the 30<sup>th</sup> of June, 2019.

difference between them is the duration of years. Tenancy is the right of occupation on the land of another for 3 years or less than 3 years while a lease is a right of occupation on the land of another for a period above 3 years<sup>4</sup>. In *Hamidu v Sahar Ventures Ltd*<sup>5</sup>, where the 1<sup>st</sup> appellant granted the respondent a term of two years at the rent of ₦25,000. At the end of the first year, the 1<sup>st</sup> appellant issued a two week notice of revocation, upon the respondent's refusal to vacate the premises, the 1<sup>st</sup> appellant entered the premise forcefully, and contended that the lease was void as the Governor's consent was not obtained. The court in disagreeing with this contention held that the maximum duration for tenancies is three years; therefore the consent of the Governor is not required.

A tenancy could be created orally<sup>6</sup> or formally. It is created orally where it is created by word of the mouth, and on the occurrence of such, the tenant must go into possession once the tenancy has been agreed upon, he must pay the best rent obtainable, and the duration of the tenancy should not exceed three years. A tenancy is created formally where it is put down in writing stating the terms and conditions that are to be abided with. In Nigeria, there are certain laws which govern tenancies and the relationship between the Landlord and the tenant<sup>7</sup>. Sections 21, 22 and 26 of the Land Use Act<sup>8</sup> provide that any transfer of interest by the holder of a statutory or customary right of occupancy which is not subject to the consent of the Governor is void. This goes to imply that any form of alienation of interest like lease, tenancy, mortgage, etc. of the land or property which is the subject of right of occupancy will be void if the consent of the Governor is not obtained.

### Incidences of tenancy

- a) **Exclusive possession:** It involves the tenant having a right to occupy the property during the tenure of his occupancy to the exclusion of everyone else except those he gives license to do so. In *Onitiri v Ayinde*<sup>9</sup>, it was held that where in a tenancy agreement, the tenant does not have exclusive possession, and then the tenancy agreement was void.  
In recent times, based on the Laws guiding Landlord and tenancy relationship in different states, the requirement of exclusive possession is not a pre-requisite for a valid tenancy, although exclusive possession is still an incidence of tenancy.
- b) **Restriction on the number of years:** In *UBA v Tejumola*<sup>10</sup>, it was held that where a tenancy or a lease does not have a definite duration i.e. beginning and ending, they will be termed void.  
With respect to the general property law practice in Nigeria, a right to occupy property granted by a person who has been granted a right of occupancy by the Governor for a maximum of three years is referred to as tenancy while if the minimum of years a person can occupy such property is three years, it is referred to as a lease. This is why based on property law<sup>11</sup>, a tenancy is called a sublease or sub under lease which basically refers to a microscopic part of a lease, or a subsection of a lease.
- c) **Capacity of the landlord and tenant:** This paper examines the nature of a tenancy agreement and it is submitted to be a contract. Thus, from the general knowledge of contract, one of the major requisites for a contract is capacity. Therefore, the landlord and the tenant before entering a tenancy agreement must have capacity to enter the contract, if not; the agreement will be *void ab initio*. This being so, the landlord must have a right of occupancy granted by the Governor of the State where the property is located, and the tenant must have the capacity to enter a valid contract.
- d) **Covenants:** Covenants are agreements between parties to do something or to refrain from doing something. They could either be express covenants or implied or usual covenants. Both the landlord and the tenant have covenants in which they are to abide with. They are express when they are unequivocally stated in the tenancy agreement in which both the Landlord and the tenants are to abide with. They are also implied when they are

<sup>4</sup>Section 3 of Statute of Frauds 1677, Section 79(1) Property and Conveyancing Law Cap 100, Laws of Western Nigeria 1959.

<sup>5</sup>(2004) 13 NWLR (Pt. 1052) 567

<sup>6</sup>Section 3 of the Statute of Frauds 1677.

<sup>7</sup>Recovery of Premises Law of various states, Lagos Tenancy Law 2011, Law of Landlord and Tenant Laws of Osun State of Nigeria Cap 65 2002, Laws of Ondo State of Nigeria Cap 75 2006, Laws of Oyo State of Nigeria Cap 71, 2000, Laws of Anambra State of Nigeria Cap 76 1991, Laws of Akwa Ibom of Nigeria Cap 71 2000, Laws of Bauchi State of Nigeria Cap 79 2006

<sup>8</sup>Cap L5 Laws of the Federation of Nigeria 2004

<sup>9</sup>(1974) 4 CCHCJ 455

<sup>10</sup>(1986) SCNJ 173; 4 NWLR (Pt. 38) 815

<sup>11</sup>Section 2(3) of Laws of Rivers State Cap 75 1999, Section 2(3) of AkwaIbom State CAP 71 2000 and also other property laws in other states.

imposed on the parties to the tenancy agreement by law. These covenants are binding and enforceable. The laws guiding the Landlord and tenant relationship provides for usual covenants. Although what is a usual covenant is a question of law to be determined by the court of law using evidence, but the court can be guided by conveyancing practice, custom of trade, type of lease, custom of locality in which the premise is located.

- e) **Intention of the parties:** For the tenancy to be valid, the parties have to express their intentions as regards the tenancy agreement. The intention includes expression of the covenant and also the terms and conditions that the parties will abide by during the duration of the tenancy. The parties need to come to a consensus as to the agreement or else, the agreement will be void<sup>12</sup>. The intention of the parties should be expressly stated<sup>13</sup> which is very necessary so as to prevent conflict of interest and to reduce conflicts which may arise between the Landlord and the tenant i.e. it could serve as reference points for any of the parties if any conflict arises. In *Street v Mountford*<sup>14</sup>, it was held that to create a valid tenancy, the intention of the parties must be ascertained and fully expressed.
- f) **Agreement should be in writing:** Based on the provision of the Statute of Fraud<sup>15</sup>, no action may be brought upon any contract for the sale of land or any interest in land, unless the agreement upon which such action is brought or some memorandum or note thereof, is on writing, and signed by the party to be charged or by some other persons thereunto by him lawfully authorized. A tenancy agreement which is a form of interest in land falls under this category is therefore bound by the provision of the Statute. In England, Section 1 of the Residential Tenancies Act<sup>16</sup> applies even if a tenancy agreement isn't in writing. This means a landlord and a tenant cannot avoid their obligations under the law by refusing to put their agreement in writing. Writing a tenancy agreement is necessary as the law will not imply any express covenant which was not written down, so as to enable the parties to claim certain reliefs like specific performance. Also so as to serve as evidence of the agreement of the parties.

A tenancy or a tenancy agreement could be determined in various ways which includes: Notice to quit, Effluxion of term, Merger, Frustration, Surrender.

#### **4. License**

A licence is permission given by the owner of a land or by the occupier of the land (licensor), making it lawful for the property to be used by a person who is not the legal owner (licensee) for a definite period of time. The existence of such permission makes lawful what would otherwise be a trespass. But it does not create or grant any interest in the land to the licensee<sup>17</sup>. In *Mobil Oil Ltd v Johnson*<sup>18</sup>, the court held that a license is a personal privilege in the form of authority or permission granted to a person to enter and use premises or perform some acts therein which would otherwise be wrongful or amount to trespass. Since a licence does not create an interest in land, it is not binding upon a successor in title of the original grantor unless the circumstances of the case are such as to give rise to a constructive trust. Therefore, in principle if the property is sold to another, the interest under a licence does not pass with it. A license gives minimal rights to the licensee, it gives a non-exclusive occupation of the property for a specific time frame. Therefore, he has no interest in the land and the license establishes no way of accruing such. However, in certain situations a license could specify certain rights which the licensee will possess. In *Thomas v Sorrel*<sup>19</sup>, the court held that a dispensation or license properly passed no interest nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. Licenses could be manifested in various forms. They include:

- a) **Bare or Gratuitous License:** It involves giving a mere permission to the licensee to enter the land. The rule as regards bare license is that it can be revoked at any time by the licensor upon giving reasonable notice because it is not usually granted for valuable consideration. Also, this license is not enforceable against a subsequent holder of land i.e. the license is determined if the licensor dies. It is not also alienable. In *Anifowoshe v. Siyanbola*<sup>20</sup>, the court held that a permission to live in a premise by an act of grace was held to be a bare license.

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<sup>12</sup>Given that it is a contract, and one of the major pre requisites for a valid contract is consensus ad idem of the parties.

<sup>13</sup> As no part can be implied and any part which is not stated will be unenforceable

<sup>14</sup>(1985) UKHL 4

<sup>15</sup>Section 4 of the Statute of Frauds 1677

<sup>16</sup>Statutes of British Columbia Chapter 78, 2002.

<sup>17</sup>Darlington Solicitors, License to occupy, <<http://www.beingaleaseholder.co.uk/commercial-lease/licence-to-occupy>> accessed on the 20th of January 2019 at 3:20 pm

<sup>18</sup> (1961) All NLR 93

<sup>19</sup>(1673) Vaughan 351

<sup>20</sup> (1956) SCNLR 139

- b) **Contractual license:** This occurs where the licensee gives consideration to the licensor for the grant of the license. The duration of this license depends on the express or the implied terms of the agreement by the parties. In the absence of such term, the license can be revoked at any time by licensor after giving reasonable notice. In *Hurst v Picture Theatres Ltd*<sup>21</sup>, a plaintiff who had purchased a ticket for a seat at a cinema show was forcibly turned out of his seat on the instruction of the manager who thought the Plaintiff had not paid for his seat. It was held that the defendant's breached the contractual license and therefore liable to pay damages. However, where the license is coupled with a grant or interest, it is irrevocable by the licensor. It binds all successors in title except a *bona fide* purchaser of the legal estate without notice from the licensor.
- c) **License coupled with an interest:** This involves a license which is granted to the licensee to take something away from the land of the licensor. A license of this nature involves firstly, a license to enter the house, and secondly, the grant of an interest in the nature of a profit *a prendre*<sup>22</sup>. This form of interest is both irrevocable and assignable. It is also enforceable by against the successors in title of the license and licensor.
- d) **License by estoppel:** This form of license arises as a result of the application of certain equitable principles such as where one person makes an expenditure on the land of another with the person's acquiescence. In licensees of this case, the duration is discernable. This license may also be enforceable against subsequent holders of the property. Upon revocation of the license by the licensor, the licensor is bound to give reasonable notice or he will be liable in damages<sup>23</sup>. In *Ramsdenv Dyson*<sup>24</sup>, it was held that if a man under a verbal agreement with a landlord for certain interest in land or not to do something under an expectation created or encouraged by the landlord that he shall have a certain interest takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such expectation.
- e) **Statutory license:** The Governor of a state has the power to grant a license to any person to enter upon any land which is not the subject of a statutory right of occupancy or of a mining lease to remove, extract any stone, clay, gravel or any mineral that may be required for the manufacture or building materials<sup>25</sup>.

The issue as to whether a license is transferable or not is dependent on the nature and circumstances of the grant. In *Inwards v Baker*<sup>26</sup>, a son's license was to remain in the bungalow for as long as he desired to use it as a home, it was held that the right was clearly personal and not transferable. Furthermore, revocation of license can also depend on the agreement between the parties, and if in the process of revoking the license, the licensor does not go according to the agreement, the licensee can sue him for damages or loss of earnings but not trespass or injunction.

### 5. Analysis of Intention in Tenancy and License

In *Errington v. Errington*<sup>27</sup>, a father wanted his son and daughter in law to have a house to live in, so he bought a house for them to stay in, on the promise that they will pay the value of the house in installments to a building society till the money is completed. The issue before the court was whether the interest the son and daughter in law had on the land was a license or a tenancy. Although the court, looking at the intention of the father and other surrounding circumstances held that the interest was a license, but one of the major obiters which made in that judgment was that of Lord Denning. Lord Denning wrote: '...although a person who is let into exclusive possession is, prima facie to be considered a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone will not suffice. Parties cannot turn a tenancy into a license by merely calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee'. This obiter is unequivocal in explaining the intention of the parties as regards transfer of interest in the property. Although in common law, exclusive possession is a valid requirement of a tenancy, and where such is absent, it will be deemed to be a license<sup>28</sup>. Even, under the Laws guiding Landlord and Tenant Relationship, exclusive possession is not conclusive of a tenancy because under these laws tenancy may refer to a license, lease, restrictive

<sup>21</sup>(1915) 1KB 1

<sup>22</sup> It is a French term which means right of taking. A profit *a prendre* is a right to take something off the land of another person. It is a right to enter the land of another person and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right.

<sup>23</sup>*Aldin v Latiner* (1894) 2 CH. 437

<sup>24</sup>(1866) LR 1HL 129, *Willmott v Barber* (1880) 15 Ch D 96.

<sup>25</sup> Section 12 of the Land Use Act 1978 Cap L5, Laws of the Federation of Nigeria 2004

<sup>26</sup>(1965) 2 QB 19

<sup>27</sup>(1952) 1 All ER 149

<sup>28</sup>*Lynes v. Snaith* (1899) 1 QB 486, *Radiach v. Smith* (1950) 101 CLR 209

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covenants, etc. There are instances where although there was exclusive possession, they were held not to amount to a tenancy. The interests were held to be licenses. In *Foster v Robinson*<sup>29</sup>, a landlord, on the death of the widow who was a statutory tenant, allowed her daughter to remain in possession paying rent for six months, the interest the daughter was possessing was held to be a license even though she had exclusive possession. Also, in *Becker v Palmer*<sup>30</sup>, the premise owner gave some evacuees permission to stay in a cottage for the duration of the war, rent free. The court held that the evacuees were not tenants, but only licensees. In that case, Lord Creane held that there is one golden rule which is of general application, namely, that the law does not impute an intention to enter into legal relationships when the circumstances and the conduct of the parties negative any intention of the kind.

Since it has been established that exclusive possession does not necessarily imply a tenancy, in order to establish any type of interest, what should be relied on is the intention of the parties and the surrounding circumstances. The intention of the parties could be ascertained through the interest of the parties, the duration in which the person stays on the land and the act the person is carrying out on the property. In *Cobb & Anor v Lane*<sup>31</sup>, the court held that whether or not a tenancy agreement has been created depends on the intention of the parties and also the circumstances surrounding the intention. Also, in *Street v Mountford*<sup>32</sup> it was held that for a lease or tenancy to be valid, the intention of the parties must be identified and examined to make sure that the parties intend to create a tenancy. Furthermore, in *Mrs M.N Clubwal & Anor. v Fida Hussain Saheb & Ors*<sup>33</sup>, the court held that exclusive possession is not conclusive evidence of the existence of a tenancy though that would be a consideration of first importance. Lord Denning in *Marchantv Charters*<sup>34</sup>, reiterated on a slightly different form by holding that the true test is the nature and quality of the occupation and not always whether the person has exclusive possession or not. The true test in the language of the learned Judge is as follows: '...It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?' Also, given that a tenancy is a contract, one of the essentials of a contract is intention to create legal relations i.e. the parties should have intended and should intend to enter such transaction, and where such intention is lacking, the contract will be void *ab initio*. In *Street v Mountford*<sup>35</sup>, the document of the contract purported to create a license, while the facts of the case created a tenancy, the court held that a tenancy was created, further holding that where the language of license contradicts the reality of a lease, the facts must prevail since that is what expresses the intention of the parties more. From the analysis and decisions above, it could be said that in determining a tenancy or a license, the intention of the parties should be put into consideration so as to know what exactly the parties intend on carrying out.

### **6. Distinctions between Tenancy and License**

Although, the distinction between a tenancy and a license is very vital to this work, but on the occurrence that this work gets outside the jurisdiction of Nigeria, it will also be vital to note that the distinctions which are being drawn are relevant only in common law. Under the Law of Landlord and Tenants governing various states in Nigeria, no such distinction is recognized. The bottom line is usually 'lawful occupation of premises by the tenant' and this phrase embraces all forms of use of the premises. Under these laws, all other persons classify as 'tenants'. The distinction between a license and a tenancy are as follows:

- a) Interest in the property: The interest in the property is the entitlement a person has as regards a particular property. In tenancies, the interest in the property is usually a right to occupy the property permanently for a definite period of time, while in license, it involves a privilege given to the licensee to use and enter the property, so he would not be guilty of that acts which would have otherwise amount to trespass or unlawful acts on the land of another. The right of occupancy being given to the tenant must be gotten from one who has a valid grant of right of occupancy given by the government. In *Baker v Gee*<sup>36</sup>, Justice Macdonald stated that under the general law, and apart from the rental regulations, the relationship of landlord and tenant implies, as

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<sup>29</sup>1951 1 K.B., 149, 156

<sup>30</sup>1942 A.E.R., Pg 674

<sup>31</sup>(1952) All E.R. 1199

<sup>32</sup>Ibid.

<sup>33</sup>(1965) AIR SC 610

<sup>34</sup>(1977) 3 All E.R. 918

<sup>35</sup>Supra

<sup>36</sup>(1945)3 W.W.R. 555

one of its essential features, the transmission of an estate or interest from the landlord to the tenant. A license does not create any estate or interest in the property to which it relates, it merely conveys a privilege in the use of the property and makes an act lawful which without it would be unlawful.

- b) **Exclusive possession:** Exclusive possession implies that the occupier of such property has a right of occupation to that property to the exclusion of every other person during the term of the tenancy. In tenancies, the tenant, once he is vested with the right to occupy is also vested with exclusive possession. Therefore, on the occurrence of entry into the property by the Landlord or any other person without his permission, the tenant has a right of action in trespass against whosoever enters the land without his consent. However, licenses are non-exclusive, that is, the licensor or whoever else is permitted to enter the property still has a right to enter the premises during the subsistence of the license. In *R v Boos*<sup>37</sup>, Justice Spencer opined that the law relating to the distinction between tenancy and license shows that a tenancy must involve the grant of exclusive possession of the premises to the tenant while a license does not necessarily need exclusive possession. Also, in *Re Br. American Oil*<sup>38</sup>, it was held that ‘an agreement which confers exclusive possession of the premises as against the entire world, including the owner, is a lease, while if it merely confers a privilege to occupy under the owner, it is a license’.
- c) **Writing:** Section 4 of the Statute of Frauds<sup>39</sup> provides that all forms of interest or transfer of interest in land should be in writing if not, the interest will be unenforceable. Therefore, a tenancy agreement is always in writing. A tenancy agreement usually consists of the names of the parties, the date, recitals, testatum, habendum, reddendum, covenants, the schedule, testimonium, execution clause, attestation. A license, most times, is not always in writing because it does not really transfer any form of interest in the property. It just involves a permission to use land. Thus, a license is not always in writing because the duration is very small compared to other types of interest.
- d) **Intention of the parties:** In every transaction, the interest of the parties is the most important thing. As regards tenancies, the parties intend to transfer the right of occupancy of three years. Moreover, in a license, the party just intends to give the licensee a permission to use his property. If the intention of the parties are not well ascertained at the beginning of the contract, the parties may run into problems as they may write or ratify or describe what they don’t intend. In *Marchant v Charters*<sup>40</sup>, Lord Denning was of the opinion that ‘in determining the intention of the parties, regard has to be taken to the nature and quality of the occupancy. Was it intended that the occupier should have a stake or permission in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?’
- e) **Implied terms:** In a tenancy agreement, there are certain covenants which the law implies in order to reduce conflict of interest among the parties. Although the parties could still add express covenants to the agreement, but the law implies certain covenants in order to protect the parties. Section 33(1) of the Landlord and Tenant Law of Rivers State of Nigeria<sup>41</sup> provides that in the absence of express provision in a lease or tenancy agreement, parties to the lease shall be deemed to agree that the lease shall contain covenants which are usual for the type of lease contemplated in the area where the premise situated shall be imposed on them. In a license on the other hand, there are no covenants which are implied by law, the only covenants or terms and conditions in a license is the one that is expressly stated in the agreement.
- f) **Nature of property (premises):** Section 1(4) of the Landlord and Tenant Law of Bauchi State of Nigeria<sup>42</sup> provides that the relationship between the landlord and the tenant is limited to ‘tenancy by which a building or part thereof is let to any person for dwelling purposes, whether or not any part of such building is also used for other purposes than dwelling’. This goes to say that the subject matter which is the premises of a tenancy agreement can only be a dwelling place. Moreover, a license can refer to any type of building or premise no matter the purpose it is being used for. This was the position of the court in the case of *Balogun v UAC*<sup>43</sup>, in that case a licensee was given a license to operate on some equipment in a petrol station. The court held such license to be valid.
- g) **Assignment to a third party:** A tenancy can be assigned or transferred to a third party. This form of transfer is called a sublease or a sub under lease depending on the circumstances of the assignment. For this to occur, the consent of the landlord must be obtained if not the assignment will be void. This assignment can be done by a

<sup>37</sup>(1978) 5 RPR 242 BC

<sup>38</sup> 1960)21 DLR 2d 110 ONCA,

<sup>39</sup>Section 4 of the Statute of Frauds 1677

<sup>40</sup>(1977) 3 All E.R. 918

<sup>41</sup>Cap 75 Laws of Rivers State of Nigeria 1999

<sup>42</sup> Cap 79 Laws of Bauchi State 2006

<sup>43</sup> (1958) NNLR 77

deed. In *Obasuyi v Mandilas & Karaberis Ltd*<sup>44</sup>, it was held that in so far as the Landlord has given his consent to such assignment, then the assignment to the third party is valid. On the other hand, a license is revoked once the licensee should assign the license to another person. In *Nmeragini v Port Harcourt Municipal Council*<sup>45</sup>, it was held that a sublicense cannot be made out of a license because a license gives a mere personal right to the licensee.

- h) Death of Landlord and Licensor: The death of the landlord does not revoke the tenancy. He could be represented by his personal representatives, assignees or successors in title. Although the death of a licensor terminates the license since the interest merely gives permission to use the land.
- i) Action for easement: Since a tenant has an interest in the property, he can bring an action against anybody for right of way or easement. In *Bailey v Stephen*<sup>46</sup>, it was held that an easement must be connected with the enjoyment of the dominant tenement and must be for its benefit the incident sought to be annexed so that the assignee of the land may take advantage of it, must be beneficial to the land in respect of the ownership. But looking at the nature of the licensee's interest, he does not have such right to legal action in easement.
- j) Revocation of interests: Revocation of interest varies in tenancies and in licenses. A tenancy cannot be revoked until the term has expired. In *Hamidu v Sahar Ventures Ltd*<sup>47</sup>, the court held that a tenancy could not be revoked until the duration of the tenancy was over. However a license can be revoked through giving notice of revocation to the licensee allowing him reasonable time to leave the property as was held in *Smith v West African Pictures*<sup>48</sup>. Although, if the license is coupled with a proprietary interest then the licensor clearly cannot revoke it<sup>49</sup>.
- k) Defects and Repairs: In a tenancy agreement, the tenant is responsible for defects and repairs which occur as a result of frequent use while the Landlord is responsible for structural defects. It could also depend on the agreements of the parties. But without express agreements of the parties, the tenant will be responsible for repairs and liability for commission of waste<sup>50</sup>. In Lagos State, there is an implied obligation by the Landlord to keep the roof and main walls.<sup>51</sup> However in a license, the Licensor is responsible of all forms of repairs except the parties agree otherwise.
- l) Action for rent in arrears: One of the remedies available to a Landlord on the occurrence that the tenant does not pay his rent is prevented for rent or an action for payment of rent in arrears. Where the Landlord can prove this to the courts, the court will order the tenant to pay all the reserved rent, beginning from the time the 'rent due' started counting which is on the midnight of the date of expiration till the time occupation will stop. However, in a tenancy, there is no occurrence of such since the licensee does not pay any form of consideration, and even in licenses with interests, the licensor does not have any right of action where the licensor has not tendered consideration for the interest provided. Although he could sue for breach of contract, or specific performance.

## 7. Similarities

- a) Two parties: A tenancy and a license both have two parties. In a tenancy agreement, the *Landlord*, is the owner of the premise who grants the right to occupy to the *Tenant*, who occupies the premises for a period not exceeding three years. In a license, the *Licensor* is the one who grants the personal privilege or permission to use the property, while the *Licensee* is the person to whom the permission is granted to.
- b) They are both revocable: These interests are revocable after a specific period of time. Although they are irrevocable on different grounds but, they can only be revoked by the person who granted the interest i.e. the Landlord or the Licensor or an agent of such person.
- c) Certainty of duration of terms: There is certainty of duration as between these two interests. This means that there is a certain time when the interest begins or when it ends. The interest might also begin on the occurrence of a future contingency which is certain to occur and be determined by a certain event.
- d) Reversion of interest: As between these two interests, both the Landlord and the licensor have reversionary interest in the property. This means that the property, after the determination of the interest will still revert back

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<sup>44</sup> (1962) WNLR 51

<sup>45</sup> (1959) SCNLR 140

<sup>46</sup> (1862) 12 C.B (N.S)

<sup>47</sup> Ibid.

<sup>48</sup> (1975) 6 CCHCJ 933

<sup>49</sup> Ibid.

<sup>50</sup> M. Debank Transport td v. Weide& Co. Ltd (1971) 1 UILR (Pt. 3) 303

<sup>51</sup> Section 8(vi) of the Tenancy Law of Lagos State of Nigeria 2011.

to the Landlord or Licensor. In *Attorney General of Lagos State v. Sowande*<sup>52</sup>, it was held that since a tenancy is for a fixed period of time, the Landlord, being the reversionary has a reversionary interest in the demised property, therefore, the property will revert to him after the expiration of the term<sup>53</sup>.

- e) Consent of Governor: In both forms of agreements, the consent of the governor is not required. In a tenancy agreement, the consent of the Governor is not required<sup>54</sup>.
- f) Registration: Both interests are not required to be registered under the Registration of Titles Act mainly because of the type of estate the interest transfer. In *Banshnafer v King*<sup>55</sup>, it was held that short periodic tenancies may be validly created without registration. Also, Section 14 of the Registration of Title Act<sup>56</sup>, provides that a tenancy is exempted from registration under the Registration of Titles Act.
- g) Stamp duty: After the preparation of the tenancy agreement, the agreement or the deed will be perfected. In the process of perfection, it will go through a process called stamping. A tenancy agreement attracts an ad valorem stamp duty<sup>57</sup>. A license agreement which has also been put into writing attracts an ad valorem stamp.<sup>58</sup>

## 8. Criticism

From the analysis above, observations and also criticisms about these concepts have been made, some of which include; the practice of property law in Nigeria, majorly the law relating to Landlord and Tenants which varies from state to state hence resulting in conflicts of laws and interest. At times, these laws provide for different things from that which is held in the other states and often times contradict the Land Use Act. This brings about duality of laws and legislations and then poses a problem to the judiciary. Tenancy agreements are usually open to manipulation, firstly because of the term of years, also because of the nature of informalities guiding them. Tenancies are not subject to the Governor's consent neither do they need to be registered nor even be in writing. So on the occurrence of all these, the parties to the tenancies just input whatever they like in the agreement since the formalities surrounding them are not rigid enough. This makes parties take advantage of such event to manipulate the agreement. A license agreement is not usually in writing, therefore making the licensee most times not to be able to seek reliefs on the occurrence of any breach, also the licensee could use this opportunity to manipulate the licensor. Also the fact that the agreement is not in writing can make it unenforceable in the court of law. Lastly, the law protects the tenant more than the landlord, in almost every circumstance. Some examples are on the expiration of the tenancy, for a Landlord to be able to recover his premise, he has to send the tenant a notice of intention to recover possession. Also a statutory tenant, who is holding over the premise without right cannot still be evicted by the tenant because he or she has the backing of certain statutory provisions. Furthermore, certain covenants which are implied by the law in a tenancy agreement are in the favour of the tenant or assignment of interest in land so as to avert any form of confusion by the courts.

## 9. Conclusion and Recommendations

In this work, the concept of interests have been explained, as well as the incidences of tenancies and license, also analyzing the importance of intention in any type of contractual relationship using the obiter by Lord Denning in *Errington v Errington* as precedence. Distinctions between tenancies and licenses, as well as the criticisms pertaining to certain practices in relation to interests in property has been reviewed, with viable recommendations to proffer possible solutions to the challenges emanating from the dealings in properties, that is both Tenancies and licenses within the context of this work. Based on the above, it is submitted that in every form of contract or relationship between parties which involves the transfers of interest, clarification of intentions and interest are very important, as it is the basis by which parties can input other terms into such agreements which further averts any form of confusion that might emanate. The courts certified this opinion in *C.M. Beenav P.N. Ramachandra Rao*<sup>59</sup>, saying that the difference between lease or tenancy and the license is to be determined by finding the real intention of the parties from a total reading of the document or agreement, if any, between the parties and also considering the surrounding circumstances. The learned Judges made it clear that use of

<sup>52</sup> (1992) 8 NWLR 589

<sup>53</sup> Also, in *Olagbegi v Oba Ogunoye* (1996) 5 NWLR 332, it was held that since at the expiration of the tenancy, the tenant no longer has interest in the property, he has a non-existent residue, therefore, the reversionary interest in the land automatically reverts to the Landlord at the time the tenancy comes to an end by effluxion of time granted.

<sup>54</sup> I.O SMITH: *Practical Approach to law of Real property in Nigeria* (Eco watch Publications Ltd, Revised edition 2013) 277

<sup>55</sup> (1965) EARL 714 (Nairobi Kenya)

<sup>56</sup> Cap 181 Laws of the Federation of Nigeria 1935

<sup>57</sup> Schedule, Stamp Duties Act Cap S8 Laws of the Federation of Nigeria 2004

<sup>58</sup> Section 64, Stamp Duties Act Cap S8 Laws of the Federation of Nigeria 2004

<sup>59</sup> 2004 (3) SCC 595



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terms 'lease' or 'license', 'lessor' or 'licensor', 'rent' or 'license fee' by themselves are not decisive'.Based on the criticism and analysis above, the following is recommended:

A uniform legislation which will govern the country as regards Landlord and Tenant relationship should be enacted so as to reduce conflicts of interest and also to make parties, lawyers and members of the bench to be aware of the position of the law, so as to prevent being thrown forth and back like a pendulum and also to prevent contradictions. Also, the laws should be amended and the loopholes which allow for manipulation as regards tenancy agreements should be clogged. Clogging the loophole will include requirements to implying certain covenants in the tenancy agreement for the benefit of both parties. License agreements should be written, although not all, but those of a complex nature should be written so as to afford parties a right of relief on the occurrence of any breach in the agreement or terms to the license. This will prevent manipulation by both parties; it could also serve as evidence of their agreement. The law should put in more regulations which would make the application of certain implied covenants stricter. This is inclusive of some laws which seem to favour one party other than the other so that justice will be done and seen to be done. Parties should also be required to express their intentions in the best way they can when dealing with agreements which deal with transfer or assignment of interest in land so as to avert any form of confusion by the courts.