THE LAND USE ACT AND THE CHALLENGES OF RESTRAINTS IN TRANSFER OF LAND RIGHTS
BY
L.O. OGIJI Esq.*

Abstract
This article discusses restraint of land alienation through the requirement of consent in the Land Use Act. It identifies the attendant delays, exorbitant consent fees and other prohibitive land charges levied on applicants as major drawbacks to development in Nigeria. These create fears in the minds of many Nigerians that they may be rendered homeless in the nearest future as efforts by estate developers to house these hopeless Nigerians are being frustrated by the unrealistic requirements.

1.1 Introduction

The policy of free alienation of land, as against restraint of same, has been analyzed as arising from the economic assumption that if development is to be assured at all times, it must be possible for rights in land to be adjusted or transferred, cheaply, quickly and with certainty.[1]

In the view of Western economists, freedom and the ease of transfer are absolutely vital to ensure that land gets into the hands of those best capable of developing and promoting the most use of it. This principle was advocated by the East African Royal Commission which set out the economic arguments and reached the conclusion that "policy concerning tenure and disposition of land should aim inter alia at a degree of mobility of transfer and disposition of land which... will enable access to land for its economic use"[2].

It may be observed from the egalitarian policy of the Land Use Act that part of the underlying objectives is to ensure that land is made available promptly to all those who are willing, ready and able to use it for all purposes in the interest of the economy. It is also observed that the administration of the Act for over 30 years has betrayed this lofty ideal.[3]

* Lecturer Faculty of Law B.S.U'. Makurdi.
[1]Report the East Africa Royal Commission (1985) p. 346
[2]Adeoye, F.O. and Oguniran "The Socio-Economic Implication of the Land Use Act," published in The Land Use Act: Administration and Policy Implication edited by Oliade Adigun (Department of Private and Property Law, University of Lagos, 1991).P.80
[3]Ibid. p. 80

1.2 Delay in Processing Application for Land Rights

The implementation of the consent provision in pa placed servere bottlenecks in the path of those willing to transfer land for industrial, commercial or residential purposes to Nnamani, JSC (as he then was):-

> *Aspects of the Act which have brought untold hardship include the provisions relating to the issue of Certificate and grant of consent to alienate. Both can take years and the applicant is subjected to the vagaries of bureaucratic action which demands for survey plans, intermeddle fees, documents and a lot of to and forming. These cumbersome procedures have adversely affected economic and business activities and make industrial take off a matter very much in the future.*[4]

Expressing a similar view, Adigun and Utuama[5] also observed tl

> *The operations of the consent provisions of the Act have made land transaction more difficult and less economic. In fact, it can be said that the delay in seeking compliance with the consent provisions of the Act has tended to reduce considerably the number of land transaction; consequently, capital formation has not been satisfactory, so also is the general development process in the country.*[6]

1.3 Exorbitant Consent Fees.

Apart from the question of delay, demands for exorbitant co

---

[4]Nnamani, (J.S.C) "The Land Use Act: - 11 years after", (1989) Vol. 2 GRPBL (No. 6) p. 37.
[5]Adigun, H.D. and ULuaraa, A.A. Op. Cit. p. 48
[6]Ibid.

by some States have been a source of great dissatisfaction. This is sought to be justified on the ground that it assists in generating public revenue.[7] Adeoye and Oguniran[8] in describing as objectionable the revenue generation purpose have this to say: -

> *In some States, for example, the consent fee imposed for "consent to a subsequent transaction to a grant of a statutory or customary right of occupancy" is as prohibitive as fifteen percent (15%) of the value of the land. Where there is improvement on the land, the 15% is calculated based on the value of the development as well as that of the land. The sums payable as consent fees in such cases are usually ridiculously prohibitive. And the industrialists in Lagos State have once cautioned that this land cost factor could well cause astronomical increase of price of locally produced goods and services to the detriment of the nation.*

The learned authors opined that there is no legal basis for charging such exorbitant amounts as consent fees. The authors referred to the position of the common law which maintains a clear dichotomy between "fees" and "tax", or "fines". A fee is prima facie regarded as a charge for the purpose of defraying the cost of or expenses for services rendered. And it is accepted that the payment of a fee of a reasonable sum to cover any legal or other expenses incurred by the landlord may be demanded by him as the condition for consent. But a fee in the nature of a fine is regarded as a "restraint on alienation" which is unenforceable unless otherwise provided in the lease or lease agreement.[9] This will be regarded as "tax" which is a compulsory exaction of money by a Public Authority for the public purpose enforceable by law, and not in payment for services rendered.

---

[7]See section 3, Conveyancing Act 1882: and section 159, Property and Conveyancing Law. 1950, "No line or sum in the nature of a fine shall be payable for in respect of such consent. See also Jenkns v Rice (1907) 2 Ch. 229, wherein it was held that an increase in rent as a condition to the granting of consent in the nature of a tine.
[8]Adeoye, F.C). and Oguniran, H.D. Op. Cit. p. 48
[9] See the Australian case of Matthew v Chicory Marketing Board (1983) 60 C.L.R. 263, at 276

Commenting on the consent provisions of the Land Use Act, James[10] states as follows:-

> *There is no doubt that a consent fee of 15% of the annual rental value of property, or of the consideration payable on an assignment is, at least, a fee in the nature of fine. It is unrelated to the cost of services for processing the application. If for example two properties are being assigned for ₦1million and ₦10,000.00 respectively, the consent fees will be m50,000.00 and ₦1,500.00. There can be no justification to argue that these widely differing charges reflect the difference in the cost of services rendered to examine and approve the transaction.*

It is argued that this cannot be justified in the absence of clear and unambiguous provisions to this effect either in the Act or any other law enabling the collection of such a tax. It is trite law that statutes which are claimed to have delegated the power of taxing must be construed strictly so as to show that the delegate has a "clear and distinct legal authority" to impose taxes.[11] This principle is normally expressed by the saying that "there is no room for an intendment to tax". In **Williams v L.S.D.P.C.**[12] the Supreme Court declared as "illegal levies" charges of 5% of the consideration money or value of the leasehold property on a subsequent assignment. In making this declaration, the court cited with approval the case of **Gosling v Veley**[13] in which Chief Justice Wilde (as he then was) stated as follows: -

> *The rule of law that no pecuniary burden can be imposed upon the subjects of*

[10] James, R.W. Op. Cit. p. 63
[11] See A.G. v Wills United Dairies Ltd (1922) L.J.K.B.; Liverpool Corporation v Author Maiden Ltd (1939) 4 All ER 200; Akingbade v Lagos Town Council (1955) 2 L.L.R. 90.
[12] (1971) 3 Sc 11; see also Kopada v L.S.D.P.C. (1975) 9/CCHCJ/1387
[13] 12 KB 407.

this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed to be a legal axiom, and requires no authority to he cited in support of it.

Adeoye and Oguniran[14] have opined that nothing could be more arbitrary than the consent fees imposed pursuant to the provisions of the Land Use Regulations made under the Land Use Act. In Benue State of Nigeria, for instance the Government of Gabriel Suswam introduced, in addition to the list of existing exorbitant charges, the collection of what the government tags "Capital Gains Tax". This is an outright tax which is not authorized by the Land Use Act or any other law. A Capital Gains Tax is usually 10% of the value of the property which is the subject of transaction. This redraws the list of fees chargeable on land acquisition in Benue State as follows:-

1. Application Form N1,500.00 (Land Form 1^{A})
2. Current Tax Clearance Certificate of both parties.
3. Ground Rent Receipt
4. Processing Fee: N5,000.00
5. Registration Fee: 3% of value of property in transaction.
6. Stamp Duty Fee: 3% of value of property in transaction.
7. Capital Gains Tax: 10% of value of property in transaction,
8. Photocopies of Title Deeds
9. Passport photograph of parties to the transaction.

This paper has been able to establish the fact that Capital Gains Tax is a Federal Tax collection which cannot be done by any State except there is an Act of the National Assembly enabling that State to do so. For instance, tax as a subject is in the Exclusive Legislative List.[15] "Taxation of Incomes, profits and capital gains," form item 59 in the Exclusive

[14] Adeoye, P.O. and Oguniran, H.D. Op.Cit, p. 81
[15] 2nd Schedule Part II item 7 CFRN, 1999

Legislative List in the Constitution of the Federal Republic of Nigeria, 1999.

On the collection of the Capital Gains Tax, item 7 in the Concurrent Legislative List of the Constitution[16] provides as follows: -

> 7. *In the exercise of its powers to impose any tax or duty on-*
>
> (a). *capital gains, income or profits of persons other than companies; and*
>
> (b). *documents or transaction by way of stamp duties,*
>
> *The National Assembly may, subject to such condition as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State,*
>
> 8. *where an Act of the National Assembly provides for the collection of tax or duty on capital gains, incomes or profits or the administration of any law by an authority of a State in accordance with paragraph 7 hereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one State,*
>
> 9. *a House of Assembly may subject to such conditions as it may prescribe, make provisions for the collection of any tax, fee or rate or for the administration of the Law providing for such collection...*

For a capital gains tax to be levied either on a company or individual, therefore, the National Assembly must make a law authorizing a State to that effect. Secondly, the House of Assembly of a State must also make a law for the collection of such tax or rate. Until these steps are taken, any State that purports to collect such tax or rate does so illegally.

Particularly with regard to Benue State where the Capital Gains Tax is being levied on persons or individuals at the time of this research, it was established that the National Assembly had not made any such Act authorizing Benue State in that direction and that Benue State House of Assembly never in turn made any law enabling the collection of Capital Gains Tax, but the same is being collected.

Still in Benue State, the method the said Capital Gains Tax is being collected does not depict the name it assumes and this method of collection

[16] Ibid

may be wrong too. The State imposes the tax on the entire value of the property rather than the increase in the market value of the asset[17] Ayua[18] defines Capital Gains as :-

> *Gains resulting from increases in the market value of assets to a person who does not regularly offer them for sale and in whose hands they do not constitute stock-in-trade. They may be 'paper' gains where the assets in value while still in the hands of the owner or may be 'realized' gains when the assets are sold or disposed of.*

According to Ayua,[19] the chief assets that usually give rise to capital gains include stocks, shares and securities, land and building, plant and machinery and other business assets such as goodwill and secret processes. Tax officers are always negligent of their duties to ensure that the value of the asset is assessed and taxed while still in the hands of the owners; and if it is property such as building that the owner has sold before it is taxed, he will have realized his gains without paying tax on the gains, because the moment he sells his property, he shifts the responsibility of paying the tax to the buyer. In other words he evades the payment of tax on it. The board of Inland Revenue will then lay an ambush for the buyer until he comes to process the documents at the Ministry of Lands and Survey when he would be referred to the Board for stamp duties. It is at that time the buyer would be compelled to pay the capital gains tax; (which ought to have been paid by the seller) on not only the gains realized but wrongly on the entire value of the property. The owner or seller of the property is let go free. This happens as a result of ineffectiveness in tax administration. By law it is the seller that is supposed to pay, but in practice it is the buyer that pays before consent is sought.

1.4 Prohibitive Land Charges.

Nigerians have continued to cry out under these difficulties for more

[17] Interview with Director of Tax, (who chose to remain anonymous) Benue State Board of Internal Revenue Makurdi.
[18] Ayua, L.A. Nigerian Tax Law. Spectrum Books Ltd, Ibadan, (1996) p. 211
[19] Ibid. p. 211

than three decades of the inception of the Land Use Act. The population of Nigeria has been on the increase over the said past three decades. The more the population increases the more difficult the situation becomes for the citizenry. Yet the Land Use Act is not amended to meet the yearnings of Nigerians. Recently, in a news analysis by Chuka Uroko in the Business Day Newspaper[20] issues of Friday 18th to Sunday 20th December, 2009, the writer analyzed how land charges frustrate efforts at housing Nigerians. In his opinion, the rising incidence of increased land charges and other encumbrances might hinder the dreams of many Nigerians to have their own houses. Uroko stated as follows:-

> *It is a matter of grave concern that many Nigerians might be homeless in the year ahead as efforts by private estate developers to house these hopeless Nigerians are being frustrated by some state government particularly Lagos, Abuja and Ogun with their outrageous land charges. This is happening in a country where housing demand-supply gap is, by UN-Habitat statistics, put at 16 million housing units. This is also happening in a country where, according to the 2006 National Population Census, only 19.2 million households live in their own houses. In Lagos where available record reveals that over 65 percent of its 15 million residents live in rented accommodation, many more residents may remain either without homes they can call their own or in less befitting ones as excessive land charges by the state governments continue to frustrate housing development efforts by private developers. Because it is Lagos where everybody wants to be; where every company wants to operate, and where every foreigner wants to live, land in the state commands such a*

[20] Business Day Friday 18th to Sunday 20th December, 2009

value that is second to none in the country and the state government has made access to It very difficult, explaining that its land resources are its own gold and oil.

Also in Abuja, the Federal Capital Territory, property values are equally high and the Federal Capital Territory Administration (FCTA) under Adamu Aleiro the then Minister of the FCT made it very difficult for people to benefit from the Federal Capital Territory land resources. Aleiro increased ground rents in the Federal Capital Territory from ₦2,000.00 to ₦20,000.00 per square metre.[21] His explanation was that it was the only way of getting money from the rich to develop the satellite towns in the Federal Capital Territory. A full plot of land is usually 30 square metres. This means that every grantee of a plot of land of 30 square metres pays ₦600,000.00 (six hundred thousand naira) every year as ground rent alone.[22] The question is whether private developers are not able and willing to develop lands in the said satellite towns if such lands are made available to them, or must it be developed directly by Government? The facts stated above reveal the reality of the policy of imposing high cost of land processing "fees" that smack of penalty upon applicants of land titles.

Narrating his experience in Lagos recently, Charles Okoye,"[23] the Managing Director of UBN Properties, disclosed that to get the planning approval for a piece of land which his company bought at Lekki Phase I, Lagos State Government demanded 16 million naira after which he was referred to the New Town Development Authority for clearance. On getting there, the further fee the Managing Director was asked to pay was frustrating. Said he:-

There, I was told we didn't pay the capital development levy for which I was asked to cough out 428 million. Add this to the 16 million, I had paid earlier in a piece of land I bought for 1.6 billion. This was how we had to put on hold a project where we proposed to build a condominium of 52

[21] Ibid
[22] Ibid
[23] Ibid

flats and pen house.

The experience is all over the country. In Ogun State, which has taken advantage of its closeness to Lagos; Nassarawa State which has taken advantages of its closeness to the Federal Capital Territory, and the latter itself.

Equally, the unnecessary delay which attends the grant of consent to alienation and other documentation in most states has considerably reduced the volume of land transaction thereby slowing down the pace of economic development. Nnamani[24] J.S.C. (as he then was) in commenting on the inordinate delays experienced by applicants for Certificate of Occupancy and grant of consent to alienate stated thus:

> *Both can take years and the applicant is subjected to vagaries of bureaucratic action which demands for survey plans, interminable fees, documents and a lot of to and froing. These cumbersome procedures have adversely affected economic and business activities and made industrial take off a mater very much in the future.*

1.5 Conclusion

In view of these adverse polices on land documentation procedures, the engine of development is being stalled, as it is not getting enough power to propel the holistic development of the country. This is one great challenge to development under the administration of the Land Use Act in addition to the challenge of Governor's consent before alienation earlier discussed.

In the light of the above, writers and indeed entire stakeholders in land transaction in the country, have denounced land charges especially consent fees imposed pursuant to the provisions of the Land Use Regulations made under the Land Use Act. The practice in some states, as can be seen from the views expressed above, is wholly unsatisfactory. This has posed a great difficulty on the implementation of the consent provisions in the Land Use Act. One unsalutory consequence of the high land charges being

[24] Nnamani J.S.C. Op. Cit.

imposed is that the charges are being openly circumvented. Lawyers collude with vendors and the purchasers to draft separate agreements and deeds of assignment bearing less property values, in which the value of the property is drastically reduced, since land charges are based upon a given percentage of the value of the property. And when such documents are presented for stamping, they are accepted by the government officials without questions.[25]

As Adeoye and Oguniran rightly pointed out, the Act has failed woefully as a veritable instrument of social change. According to the learned authors, a law that is honored more in breach rather than in observance cannot be regarded as a "living law".[26]

[25]Adeoye and Oguniran Op. Cit. p. 80
[26]Ibid.