OWNERSHIP AND POSSESSION OF LAND UNDER THE NIGERIAN CUSTOMARY LAND TENURE SYSTEM: A LEGAL APPRAISAL*

Abstract
Customary land tenure is indigenous to Nigeria, whereby the right of ownership of Land is vested in the family, village or community. All members of the family, village or community have equal right to the Land. The individual only has the right to use and enjoy the Land allocated to him. Individual ownership of Land is unknown to customary land tenure, it is the introduction of English ideas that led to individual ownership of Land. Possession does not convert to ownership in customary land tenure, particularly where it was permitted by the true owner. Hence the need to examine ownership and possession under the customary Land tenure system; whether these rights are absolute, automatic or otherwise; improvements made with regards to moving from the traditional ownership to modern ownership and what needs to be done more. Going through available literature and statute books, it is clear that the Land Use Act which regulates the English Land tenure system also preserves customary Land tenure system. Consequently, dualising Land tenure system in Nigeria. It is important that the two tenures be consolidated for easy application.

Keywords: Ownership, Possession, Customary, Land Tenure, Duality, Communities.

1. Introduction

Customary land tenure system refers to the system which most communities operate to express and order ownership and possession. It is a landholding system indigenous to Nigeria. In the olden days, all lands were governed by the customary law of the indigenous natives and people. Under the Native law and custom, land did not belong to a single individual. It was vested in the community as a whole, the village or in the family as a group. It was almost a taboo in those days for land to be alienated or sold to any individual. However due to adaptation to the modern economic and commercial imperative, land is traded habitually by Nigerians in both rural and urban areas. This was made manifest in Lagos as from 1st January, 1900 after the introduction of English Common Law principles and Legislations in an attempt to promote individualization. Upon adaption to the said English law in Nigeria, we began to have duality of land tenure system. That is the duality of customary law and received English Law. In Nigeria, despite the existence of Land Use Act it is pertinent that customary land tenure system is discussed. This is because the Act itself recognizes customary law in land administration.

1.1. What is Customary Land Tenure?

The term 'Tenure' means landholding. To the Google English dictionary, it is the condition under which land or building are held or occupied.[1] Customary Land Tenure refers to the system that most rural African communities operate to express and order ownership, possession and access, regulate use and transfer. Unlike introduced landholding regimes, the norms of customary tenure derive from and are sustained by the community itself rather than the state or state law (statutory land tenure). The rules which a particular local community follows are known as customary law, yet they are rarely binding beyond that community. Another term for customary land tenure is indigenous tenure. This is contested in Africa because, although all Africans are indigenous to the continent, the African Union's Commission on Human and People's Right defines indigenous people as mainly hunter-gatherers and pastoralists.[2]

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[1] Oxford Languages, *Google English Dictionary,* http://www.languages.oup.com, accessed 19/4/2023.

[2] Liz Alden Willy, 'Customary Land Tenure in the Modern World; Rights to Resources in Crisis: Reviewing the fate of Customary Tenure In Africa' Right Resources 5th Anniversary dated November, 2011

Nigeria customary law, as a body of rules accepted by her different people as binding on them, has evolved a land tenure system. However, the existence of ethno-cultural differences account for variation. Nonetheless, there are shared common principles from which customary law had derived. It is these features that will be discussed in this work.

2. Ownership and Possession

2.1. Ownership

Ownership is a multi-referential word which does not lend itself to an apt or precise definition and meaning. The issue becomes even much more complex when the word is to be defined in the context of customary land tenure. Ownership is ordinarily and simply defined as collection of rights to use and enjoy property, including right to transmit it to others. Ownership means the complete dominion, title or proprietary right in a thing or claim. It could also mean the entirety of the powers of use and disposal allowed by law. Ownership is the largest right that exit in land. It vests in the claimant an immediate or mediate right of possession of land that is not restricted or curtailed by any superior right vesting in another person. As conceived, ownership must have a residual character and it must be seen also as embodying a bundle of rights. The test of ownership is who has the residual interest after deducting all other interests in land.

Llyod in his book had this to say about ownership:

> It is rare, if not impossible for an individual to hold land by such a tenure that he can aver that no other person (except the state) has any right in it… Every legal system must, therefore, define what rights shall amount to ownership; the definition of one system will not necessarily coincide with another[3].

Ownership generally consists of a complex of rights, all of which are rights in *rem*, being good against the world and not merely against specific persons. It could be said that it is through the notion of ownership that one could assert his individuality. Ownership is the most amplitude of rights or enjoyment, management and disposal over property. To put it the other way round, it implies that the owner's title to these rights is superior and paramount over any other rights that may exist in the land in favour of the other persons.[4] Whatever is its origin, ownership is generally regarded as the creation of law. It is the law of a particular society that could determine what could or could be "owned" by individual or groups in the society[5].

Ownership can be established through:

a) The act of the party and

b) By operation of the law.

2.1.1. The Act of the Party: Here, a person may acquire a right of ownership through:

i) **The act of first settlement**: The general rule is that where a person is the first to enter upon a virgin land with the intention of remaining on the land and excluding other persons from possession for a long and continuous period exercising acts of ownership, the law contemplates the person as the owner of the land. In other words, if a person behaved in the manner and circumstances described above in relation to a given land, customary law attributes to the person the right of ownership. This has been reduced into a judicial principle known as the rule in *Ekpo v Ita*,[6] where it was held that where a person either by his acts or through those of his ancestor was the first to settle on a virgin

[3] P C LLlyod, *Yoruba Land Law* (Oxford University Press, London, 1962) 66.

[4] B O Nwabueze, *Nigeria Land Law* (Nwamife Publishers Ltd, Enugu 1972) P. 9.

[5] Christain Unigwe, 'Customary Land and Real Estate Ownershipin Nigeria: An Appraisal' Rivers State University Science and Technology *Port harcourt Law Journal* (7) (1) 2018.

[6] 1932 11 NLRP.

land and exercised acts of ownership over a sufficient length of time, numerous and positive enough to warrant the inference of exclusive owners, the person will be deemed to have acquired the right of ownership.

However, this act of first settlement has to be proved by evidence such as traditional history. In *Idundun v Okumagba & Others*[7], the defendants traced their title to the first persons to settle on the land in dispute. This was supported by traditional history. The Supreme Court awarded title to the defendant as against the plaintiff.

ii) **Conquest**: Apart from first settlement, ownership could also be established by possession following conquest. The act of conquest vested the right of ownership of the land to the conquerors. This used to be the commonest mode of acquisition in those days when tribal wars were rampant.

iii) **Purchase or Grant**: It can also be established through purchase or grant. Where land is acquired easily by purchase or grant, the totality of the interest of the vendor/grantor is transferred to the purchaser/buyer. In *Nelson v Nelson*[8], ownership of a particular land was established through purchase with funds from a family.

2.1.2. Operation of Law: Ownership may also be established by operation of law. This may arise under the limitation law or Equity. The general principle is that where a statute prescribes a period for bringing of an action in respect of a cause of action, the action must be brought within that time in order to be competent as can be seen from *Obiefuna v Okoye*[9].

Notwithstanding the modes stated above, under the Act,[10] ownership of all land in the State is vested in the Governor and Section 1 of the Land Use Act is a proof of this. It provides that "Subject to the provisions of this Act, all land comprises in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act".

2.2. Possession

Possession can be loosely defined as the right under which one may exercise control over something to the exclusion of all others[11]. Possession must have three qualities. It must be long, continual and peaceable. When the fact of control is coupled with a legal claim and right to exercise it in one's own name against the world at large, we have possession in law as well as in fact.

Possession is the exercise by a person of a physical control over land coupled with the relevant *animo possidendi* (intent to exercise the physical control in the name of the person in possession to the exclusion of the world at large). Possession is 9/10 of ownership[12]. The case of *Buraimoh v Bamgbose* is illustrative. Possession is distinguishable from occupation, though occupation is a means of proving possession. Occupation means the exercise of physical control over land. In *Udeze v Chidebere*[13] the Court posited that occupation entails mere physical control of the Land in the time being, which said control may have been on the permission of the true owner. It is a matter of fact.[14] In this sense, occupation is at best de facto possession. In *Ogunleye v Oni*[15], the Supreme Court conceived occupation in relation to land as the exercise of physical control over land without intention to assert title to the land.

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[7] NMLR 200

[8] 1932 1 WACA 215, 13 NLR 248.

[9] 1961 1All NLR 357.

[10] Land Use Act, 1978, Cap L5 Laws of the Federation of Nigeria (LFN) 2004

[11] C Wigwe, *Mortgage Practice and the law of possession in Nigeria* (chrismarcus Chambers, Lagos 2017) P. 37.

[12] R A Onuoha, *Basic Principles of Nigerian Land Law* (1st edn Anon Publishers, Canada 2010) P 22

[13] (1990) 1NWLT (pt25) 141

[14] *Ibid. See also Abioye v Yakubu* (1991) 5 NWLR (pt19) 180

[15] 1990 2NWLR Pt 135 @74

Possession is a matter for the law to determine whereas occupation is a question of fact, which can be proved. Possession may be acquired and established through a grant from the true owner of the land or by the facts of title or ownership of land or may be acquired from the acts of first settlements. It may even be acquired wrongfully, such as by act of trespass or adverse possession. Hence possession may be lawful or wrongful. However, acquired, possession is the darling of the law and is protected, except against the true owner.

2.2.1. Is Possession Evidence of Ownership?

Section 46 of the Evidence Act[16] states that the acts of possession exercised in respect of one piece of land is deemed to be evidence of acts of possession in respect of an adjoining land or land of similar features. In other words, where there is dispute between two parties with respect to more than one piece of land, if one party is able to prove acts of possession with respect to one plot, such acts of possession is extended to the adjoining plot of land or land with similar feature. Section 146 of Evidence Act provides that when there is a dispute as to ownership of a thing, the person in possession is deemed to be the owner of that thing until the contrary is proved and the person disputing his ownership bears the burden of furnishing evidence to the contrary. This has been affirmed in the case of *Udeze v Chidebe.*[17] To buttress more on this, in *Agheghen v Waghoreghor*,[18] Elias C.J.N (as he then was) while considering the nature of the interest of the defendant who was a customary tenant, observed that in customary land law parlance, the defendants are not gifted of the land, they are not borrowers or lessees, they are grantees of land under customary tenure and hold as such a determinable interest in the land which they may enjoy in perpetuity subject to good behavior. While in the land he can maintain action in trespass and enjoy all the rights of the owner except absolute transfer. When a grant is accorded to a customary tenant, he is conveyed with full right of possession but however, reversionary right is reserved by the original owner and that is what he can use to prove constructive possession. An attempt to elevate possession to ownership was resisted by the Supreme Court in the case of *Abioye v Yakubu.*[19]

Suffice it to state, that there is nothing like title by prescription under customary land tenure. No matter how long an adverse possessor holds land in possession it cannot convert into ownership. This was affirmed by the Court of Appeal in *Shaba & Ors v Kpotun & Ors*[20] wherein it held that:

> One of the major incidences of customary land tenure is that there is nothing like title by prescription. Thus, no matter how long an adverse possessor remained on land held under customary tenure, his possession cannot ripen into rights of ownership in the land against the original owner.

However, the principle of Law that there is no prescriptive tittle under customary tenure, applies where possession is sought to be used against the true owner. The court of Appeal illuminating on this point, held in *Abechi & Ors v. INC Trustees of Ochefu Foundation*[21] that it is correct as argued by the Appellant's Counsel that there is no prescriptive title under customary tenure. However, this applies where possession is sought to be used against the true owner. The appellants have not shown that they are owners or true owners of the land in dispute. Therefore, the argument of the Appellant's Counsel on this point fails.

[16] 2011 (as amended)
[17] 1990 1NWLR (Pt 25) 141
[18] 1974 1SC 171
[19] 1991 5NWLR Pt 190 @180
[20] (2021) LPLER 54766 (CA)
[21] (2020) LPELR-49964(CA) p.31

3. Nature of Customary Land Tenure System

Under the customary law, ownership of land is generally vested in the village, community, or family with the head holding it for the use of the whole village, community and family respectively. Individual right is limited to use and enjoyment of a portion of the land allocated to them. Alienation without consent is invalid because absolute ownership is vested in the community, village or family as the case may be.[22] To buttress the above the Supreme Court in *Oyewunmi & Anor v Ogunesan*[23] posited that in native law and custom land belongs to all members of the community or village where everyone has a right. The head chief holds all land in trust for the community or the people. He gives portion of the land to a deserving member of the community who asks for it. In a loose sense, he is called the owner as he has control over the whole land.

The individual members of the community or family only had rights to use land. In the celebrated case of *Amodu Tijani v Secretary of Southern Nigeria*[24] the evidence given and accepted by the court was that the traditional belief is that "Land is conceived as belonging to a vast family of which many are dead, few are living and countless members yet unborn". The concept of land ownership in Nigeria is encapsulated by the opinion of Viscount Haldane at the Privy Council where he said:

> The next fact which it is important to bear in mind in order to understand native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village, and family have an equal right to the land but in every case the chief or headman of the village or community or head of the family has charge of the land and in loose mode of speech is sometimes called the 'owner'. He is to some extent in the position of a trustee and as such holds the land for the use of the community or family. He has control of it and any member who wants a piece of it to cultivate or build upon goes to him for it. But the land so given remains the property of the community or family.

In the recent case of *Shaba & Ors v Kpotun & Ors*[25] the court opined *inter alia* that now, land is not *res nullius*, that every piece of land belongs to an individual, family, groups of families, villages or community. That in Nigeria land is owned by families, community and sometimes individually by members of a family, but the full usufructuary title in land is vested in the family, community or village and is held in trust by the head of the family or the Chief of the community or village. He cannot make any important disposition of the Land without consulting the elders of the family, village or community and their consent must be obtained before a grant can be made to a stranger. Individual ownership is due to introduction of English ideas. Also, customary land tenure was and still largely is the principal mode of land ownership in Nigeria, more particularly in the rural areas.[26] It noted that The Land Use Act did not extinguish incidences of customary ownership of land.[27]

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[22] Isochukwu, 'Land Law 1.3 Customary Land Tenure System in Nigeria' https://isochukwu.com>dated 1st November, 2018 accessed on 27th January, 2022.

[23] (1990) LPELR-2880(SC) p. 43

[24] 1921 AC 399

[25] *Op cit*

[26] *Ibid:* See also Kaigama Vs Namnai (1997) 3 NWLR (Pt 495) 549 at 569C. Nwaocha vs Odoemelam (1995) 1 NWLR (Pt. 369) 43, Falomo Vs Onakanmi (2005) 11 NWLR (Pt 935) 126, Adeyeye Vs Adewoyin (1960) SCNLR 310.

[27] *Nkwocha Vs Governor of Anambra State* (1984) 1 SCNLR 634.

4. Rights vested under the Customary Tenure

It could be said that in the past access to land by the natives was straight forward. Fundamentally, land was used for subsistence and not for commercial purposes. Every member of the family has the right to use the land when need be. Absolute ownership is vested in the community as a whole. Any member of the community was entitled only to use and occupy the portion which the head of the community or head of family allocates to him. He had a right of exclusive possession over the land allocated to him and could maintain an action for trespass against other members of the family interfering with his possession[28].

Statement on the rights of an individual vis-à-vis family land was stated in *Lewis v Bankole.*[29]In this case, the plaintiff (grandchildren) who had inherited partitioned lands given *inter vivos* to their parents also sought to participate in the sharing of profits from family land. Other family members (defendants) disputed this claim on the ground that they had resided in the family land for over 30 years without let or hindrance from the plaintiff and as such they were absolute owners to the exclusion of the plaintiffs. Acting CJ, in the lower Court favoured the defendants claim on the ground that by 'tacit mutual arrangement and acquiescence of all parties extending over a number of years these various properties have been separated and come to be considered as separately owned.' He sought to avoid "throwing the property into the melting pot of an acrimonious family feud." On Appeal, Osborne CJ disagreed. He recognized the rights of the grandchildren to the family compound jointly with the defendants. Family ownership had not been determined and as such it held that: the plaintiffs were not entitled to share in profits equally; the different branches of the founder's family would be represented *per stripes* in the family council, each branch having one vote. The plaintiffs had no right to build on the land without the consent and allocation by the family; and not being ordinarily resident in the compound they had no right of ingress or egress save the right to attend to safeguard their interest in the land, subject to the occupants' rights to enter family land which was already allocated to another member.

Now, a member cannot alienate his own plot to third parties or dispose of it by a will to his children without the consent of the family. The aftermath of this decision is that any improvement made to the family property belongs to the family. This was the view of the court in the case *Owoo v Owoo.*[30]

5. The Concept of Communal Ownership of Land

The concept of communal ownership of land was based on the recognition that land is a gift of nature to mankind and it is sacred. Land was available to all members of the community or family as a right, which is not dependent on good behavior. The point that in Nigeria, land belong to all members of the family was judicially recognized as long as, **since** 1921 in the famous case of *Amodu Tijani v Secretary of Southern Province*[31]where the privy council stated that land belongs to the village, family or community and never to an individual and that the concept of individual ownership of land was foreign to native ideas.

Our focus here is whether members of the community have absolute title over the communal land or not. It is on the strength of this that it becomes pertinent to discuss the member's rights.

5.1. Member's Right

Members of the community have definite rights in communal lands which vary from locality to locality. Generally, however, a member of the community has equal right to a portion of communal

[28] Oluyele Delano,' Land Tenure Reform in Nigeria' https://www.Akindelano.com.<accessed> on 28th January, 2022
[29] (1908) 1NLR 81
[30] 1945 11 WACA 81
[31] *Supra* (1924) 2NLR 21 and AC 399

land upon which to build and to farm.[32] Upon an allocation of a portion, the member allottee does not become the owner of the land. He enjoys exclusive possession, while title remains with the community.[33]

Consequently, while the allocation subsists, the chief or headman cannot make an inconsistent allocation or grant to another person without consultation and the agreement of the original allottee.[34] The rule has been explained by the larger principle that communal land does not admit communal user and consequently a subsisting grant or allocation cannot be derogated by the grantor. In certain jurisdictions, however, a grant of land by the traditional authority exhausts in the allocated member permanent right in land equivalent to ownership.[35] Thus, the Supreme Court on the principles of the Bini Customary tenure system observed that basically all land in Benin is owned by community for whom the Oba of Benin holds same in trust, and it is the Oba of Benin who can transfer to any individual the ownership of such land.[36]

6. Communal Land Today

Communal landholding can be said to be on gradual but steady decrease. Many factors have been responsible for this phenomenon. The most dramatic was the application of state powers of compulsory acquisition under the various enabling statutes[37]to transform land held under customary law into State lands by virtue of State Land Laws. The next is the transformation of the erstwhile indigenous subsistence economy into a monetarized one; consequently, customary land became free saleable.[38] The development constituted many a communal land into individual tenure. So also, has been the effect of traditional grants to individual members of community where such grants divested the community of title and vested same in the grantees where such customary law permits. The combined effect of these events over the years has been to deplete communal lands in favour of the State, the individual purchasers and grantees of communal land. This notwithstanding, communal landholding is still a strong feature of customary land law. In modern times, communal titles still exist in relation to market places, communal shrines, sacred bush, chieftaincy land, communal play grounds, communal farm lands and ponds.

7. Individual Landholding

Deviating from the expressed view in the celebrated case of *Amodu Tijani v Secretary of Southern Nigeria*[39], individual tenure is a feature of customary land law. It has been argued by some authors[40] that it would seem that the basis of the concept of family property is the recognition of individual ownership, for when a founder of a family dies, his self-acquired property devolves on his children as family property. In *Agaran v Olushi*,[41] it was held that where a family sold its family land to a member or stranger, the purchaser becomes an absolute owner of the property.

[32]See *Amodu Tijani v Secretary of Southern Nigeria* (*Supra)*
[33] R A Onuoha, *Basic Principles of Nigerian Land Law* (1st edn Anon Publishers, Canada 2010) P 66
[34]Oragbade v Onitiju (1962) 1ALL NLR 32
[35] *Adewuyin v Adeyeye* 1963 1ALL NLR P52
[36]*Arase v Arase* (1981) 5SC 33@58 per Idigbe J.S.C
[37] The Town and Country Planning Law of the Various States, The Local Government Law of the respective States, Land Use Act, 1978.
[38] The judgment of Irekefe JSC (as he then was) in the case of *Peenok Investment Ltd v Hotel Presidential Ltd* (1982) 12 Sc 1 @ pp 60-61.
[39] *supra*
[40] S O Okafor and C E Aduaka, "Customary Land Law and Nature of Family Property in Nigeria", *International Journal of Innovative Legal and Political Studies* 9(4) Dec 2021.
[41] (1907) 1 NLR 66

It was colonialism, modernization, urbanization and the force of socio-economic activities since independence that brought about individual ownership. Speed Ag. C. J remarked in *Lewis v Bankole*[42]

> it is perfectly well known that in strict ancient native law all property was family and all real property was inalienable, and it is equally well known that a very large portion of the land, on which this town (Lagos) is built is not owned by individuals and that family ownership is gradually ceasing to exist. In a progressing community, it is of course, inevitable, that this should be so.

This statement has been challenged in certain respects; Supreme Court having viewed it in different dimension in the case of *Otogbolu v Okeluwa & Ors*[43] where the Supreme Court confirmed individual ownership of land under customary law. In the words of Obaseki JSC, he stated in the matter thus:

> The knowledge of the customary land tenure of each locality is within the knowledge of members of the community. Each member of the community generally within his economic capacity does acquire as he desires in a piece or parcel of communal land which he can transmit to his off-spring and which he is entitled to protect and prosecute by action, a claim to his right against any other member who trespass. To that extent, the interest of the community in the land is displaced or postponed

Notwithstanding the recognition of individual ownership by the court, yet there is a judicial presumption in favour of the communal ownership which a person who claims to be absolute owner would have to rebut with credible evidence in order to succeed.[44]

8. Inefficacy of Customary Law

Customary law has no durable mode of recording transactions or evidence of title and it depended mainly on unreliable human memory and stories passed from generation as root of title. This was a recipe for duplication of land transactions and fraudulent dealings and endless litigation. Typically, litigations involved questions of legal status i.e whether an individual is a family member, the head of family or even a stranger; under what conditions is a land held; the boundaries between two communities, individuals or families; disputes as to ownership of land and whether a customary tenancy existed between neighbouring communities and so on and so forth. The unwieldy state of the customary law tenure is aptly described by Prof B.W Harvey when he said:

> It is a sad commentary to the vagaries of customary land law that the lawyer in Nigeria whose specialty is conveyancing tend to take the view that it is not prudent to advice a client to proceed with the purchase of land held under customary tenure unless there are exceptional circumstances. Special circumstances might exist where land is owned by a well-known family whose ownership has been confirmed in an action for declaration of title in the High Court or Supreme Court. Failing such circumstances, the legal practitioner would do well to bear in mind the following dictum of sir Verity… in *Ogunbambi v Abowaba, 13 WACA 222.* It passes my

[42] *Supra*
[43](1981) 6-7 S.C. @ 115- 116
[44] *Chukwueke v Nwankwo* 1985 2 NWLR P. 195, *Eze v Igilegbe* 1962 1 ALL NLR 619 @623

> comprehension how in these days when such disputes have come before these days when such disputes have come before these Courts over and over again, any person will purchase land from the (Oloto) family without the most careful investigation, for more often than not they purchase a law suit, and very often that is all they get.[45]

9. The Duality of Tenure

The British met a tenure system which stifled commerce, in that land could not be readily applied for the raising of capital and access to land by foreigners was severely restricted under the native law. English common law principle and legislation were therefore introduced in an attempt to promote individualization, and free up land for use and to promote commerce. In *Coker v Animashawun*, it was pointed out that English common law and statutes of general application were applicable in Lagos as from 1st January 1900. This principle has to be applied side by side or juxtapose with the existing customary law. The duality of customary law and received English law is perhaps most striking features of Nigerian legal system. In order to acquire some degree of certainty of title to land held under customary land tenure, it must be converted into an English tenure which was capable of being registered.

10. Interaction of the Land Use Act with the Indigenous Land Tenure System

Notwithstanding that there is no direct reference to the Indigenous land tenure in the Act, the recognition and preservation of customary land law within language of the Act may imply the survival of the indigenous land tenure. Section 24[46] preserves the customary law rules governing devolution of property, while section 25, which prohibits partitioning of land, expressly exempts cases which are regulated by customary law. Under section 29, where the holder or occupier entitled to compensation is a community, the governor is empowered to direct payment of the compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law. Under section 50 of the Act, a customary right of occupancy is defined as the right of a person or community lawfully using or occupying in accordance with customary law…" and occupier is similarly defined as "any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law…" this is in addition to section 48 of the Act, which preserves all existing laws relating to the registration of title to, or interest in, land subject to such modifications as will bring those laws into conformity with the Act or its general intendment. It is submitted that customary land law is an existing law within the meaning of section 48 of the Act. Indeed, it can be asserted that section 1 of the Act merely borrows and enacts the notion of corporate ownership and trusteeship under the indigenous land tenure system. The position of the governor under the Act appears to be comparable to that of the head of the community or family in relation to communal land under customary law. But this would seem to be half-truth only: when the powers of the governor are closely analyzed, the area of conflict with the head of the community can easily be identified, especially in relation to the power of management and control of the land.[47]

Similarly, in *Otogbulu v Okeluwa*[48] Obaseki JSC stated that each member of the community generally within his economic capacity do acquire as he desires interests in a piece or parcel of communal land which he can transmit to his offspring and which he is entitled to protect and

[45] Oluyele Delano,' Land Tenure Reform in Nigeria' https://www.Akindelano.com.<accessed> on 28th January, 2022

[46] *Land Use Act*

[47] P E Oshio,' The indigenous Land Tenure and Nationalization of land in Nigeria' *Boston College Third World Law Journal* 10 (1) 1990

[48] 1981 6-7 S.C. 99 @116

prosecute by action, a claim to his right against any other member who trespass and to that extent, the interest of the community in the land is displaced or postponed.

11. Conversion from Customary Tenure to English Tenure

One of the first issues lawyers had to grapple with is the conceptual basis of the conversion from customary tenure to English. The argument goes that an owner of land under customary law does not hold a fee simple and therefore without special statutory powers cannot convey it: *Nemo dat quod non habet.* He could only convey what he has i.e., customary title. This was the view of Kingdom CJ in *Balogun v Oshodi,* he thought that:

> ...the whole idea of a fee simple is contrary to native law and custom that… it cannot exist side by side with native customary tenure in respect of the same piece of land. There can be only one *rei lex sitae* and in this case there can be no doubt that the original *rei lex sitae* is native law and custom, nor can I subscribe to the proposition that the native law and custom applicable to the area in which the land is situated has changed that now it is in accordance with that land can be held and conveyed in the fee simple.

This argument suffers from mis-appreciation of the nature of legal right which an individual enjoys as a customary owner. The ownership of land by a native through individualization is absolute, and it is in theory at least, more extensive than a freehold estate in fee simple. Since English law allows the owner of land to create a lesser right from his title, it follows that an individual can vest land in fee simple on a purchaser from his customary ownership. This was the reasoning of the court in the case of *Coker v Animashawum*.

12. Conclusion and Recommendation

This research has shown that generally under the customary land tenure system no land is owned by individual but by the community, village or family except where a member of the community, village or family applies for land to be allotted to him or the family members decide to partition the Land and share individually. Where such happens, it may then be inherited by the family members individually. Now customary land can be owned by individual, family, village or community.

Again, despite the presence and existence of the law which now regulates the land tenure system in Nigeria, yet the said Law which is the Land Use Act recognizes and preserves the existence of customary land tenure.[49] It is therefore stated that is fair to say that instead of enforcing unification of land tenure regimes, the Act has merely placed yet another layer of tenurial regime on the existing tenure.

It is my considered opinion and recommendation that the Land Use Act be amended to unify and consolidate the two land regimes (customary and English) for effective and efficient Land administration of in Nigeria.

[49] Refers to sections 24, 25, 29 and 50 of the Land Use Act 1978