

SUPREME COURT OF NIGERIA
25TH FEBRUARY, 1994. SC.41/1988
CORAM:- M. L. UWAI, E. O. OGWUEGBU, U.
MOHAMMED, Y. O. ADIO, A. I IGUH, JJSC.

1. CHIEF PETER ADEBAYO ADENE
2. MILITARY GOVERNOR OF KADUNA STATE
3. ATTORNEY-GENERAL OF KADUNA STATE
4. PERMANENT SECRETARY, MINISTRY APPELLANTS
OF LANDS & SURVEY, KADUNA STATE
5. KADUNA STATE URBAN PLANNING
DEVELOPMENT AUTHORITY (KASUPDA)
AND
ALHAJI INUWA DATUNBU RESPONDENT

APPEALS - Respondent's Notice - Objection based on a submission that cross-appeal was appropriate and not Respondent's Notice - Appropriate time to raise such objection.

APPEALS - Retrial - Right of occupancy - Where Local Government's grant of right of occupancy is null and void - Retrial ordered by the Court of Appeal is wrong.

CLAIMS - Counterclaim - Commission of any wrong in law not established against plaintiff - Whether counterclaim should not succeed.

EVIDENCE - Judicial Notice - An Order being a subsidiary legislation made under the Land Use Act - Whether trial court was bound to take judicial notice thereof.

EVIDENCE - Urban land - Whether there is sufficient evidence from which to find - That disputed land is situate in an urban area.

LAND LAW - Right of Occupancy - Land Use Act - Whether Local Government has no power to grant right of occupancy - Over land situate in an urban area.

FACTS

The 1st Appellant was granted a piece of land by the Governor of Kaduna State (2nd Appellant) upon which to build a hotel. A Certificate of Occupancy was later granted to him for the period of 40 years. As at the time 1st Appellant wanted to start building on the land, he found out that the Respondent was building some concrete structures on the land in dispute. 1st Appellant's complaint led to the Ministry of Lands and Survey causing the structure to be demolished. Yet the Respondent refused to move out of the land. 1st Appellant instituted this action before the Kaduna State High Court for possession, injunction, and damages.

Respondent tendered his own Customary right of occupancy granted by the Kaduna Local Government in respect of the same land and filed a counterclaim for the sum of N100,000.00 damages against the 1st Appellant. The trial Court erroneously rejected admission of a subsidiary legislation incorporating a plan and by virtue of which the land in dispute was designated an Urban area. But it still relied on other available evidence in finding that the land is within a designated urban area. Judgment was entered in favour of the 1st Appellant. Respondent's appeal to the Court of Appeal was upheld in ordering a retrial before the High Court. Appellants have now appealed to the Supreme Court challenging the Court of Appeal's findings and its order of retrial.

HELD (unanimously allowing the appeal)

1. The 1982 Order being a subsidiary legislation made under the Land Use Act, the trial court was bound to take judicial notice of it together with the plan which is referred to in paragraph 2 of the Order, (p. 59 L.10)
2. There was sufficient evidence from which the learned trial Judge could have found as he rightly did that the land in dispute is situate in urban area. The Court of Appeal acted in error when it reversed that finding of fact. (p60 L.31)
3. Kaduna Local Government had no power to grant a right of occupancy over the land in dispute at the time it did since the land is situate in an urban area, therefore that purported grant is null and void and the first Appellant was entitled to judgment in the High Court by this reason. (p62 L35)

4. The decision of the Court of Appeal setting aside the decision of the trial court given in favour of the first Appellant, and its ordering a retrial is wrong. There is no basis for making such order since the purported grant of the right of occupancy by the Kaduna Local Government has been shown to be null and void. (p.63 L27)

5. The time to raise objection over the filing of the Respondent's Notice (instead of cross-appeal) was when the point arose in the Court of Appeal. Counsel to the present Respondent not having done that, it is now too late to raise it and untenable to urge that the ground of appeal before the Supreme Court be struck out. (p.64 L6)

6. In respect of Respondent's counter claim for damages, there is no doubt that the Respondent had incurred loss in the destruction of the structures which he illegally erected on the land in dispute. But the Respondent had not established that the 1st Appellant had, by causing the structures to be demolished, committed any wrong in law. (p 64 L25)

REPRESENTATION:

K. Adeluola for the 1st Appellant.

G. B. Kore, Senior State Counsel Kaduna State for the 2nd to 5th Appellants.

B. A. Ebenezer for the Respondent.

CASES REFERRED TO

1. Adetipe v. Amodu (1969) NMLR 62 at 67
2. Mayaki v. L.C.C.C (1977) 7 SC 81 at 92
3. Peenok v. Hotel Presidential (1982) 12 SC 1 at 103
4. Dweye v. Iyomahan (1983) NSCC 393; (1983) 8 SC 76 at 85
5. Lawal v. Ijale (1967) NMLR 255
6. Onyeakonmu v. Ekwubiri (1966) 1 All NLR 32
7. Oke v. Atolye (1986) 1 NWLR (pt 15) 241
8. Odunsi v. Pereira (1972) 5 SC 33
9. Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387 at 416
10. Titiloye v. Olupo (1991) 7 NWLR (pt. 205) 519 at 530
11. Dabup v. Kolo (1993) 9 NWLR (pt. 317) 254
12. Oguma v. IBWA (1988) 1 NWLR (pt. 73) 658

13. Bourhill v. Young (1943) AC 92 at 106

14. Salati v. Shehu (1986) 1 NSCC 134

STATUTES AND RULES REFERRED TO

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1. Land Use Act 1978 SS. 5, 6, 14, 3, 74, 2

2. Evidence Act SS. 73, 134, 72

3. Court of Appeal Rules 1981 0.3 r. 14(1) & (2)

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LEAD JUDGMENT BY UWAIS JSC

The 1st appellant was the plaintiff in the High Court of kaduna State, holden at Kaduna. The respondent was the defendant to the action brought by the 1st appellant. By application made by the respondent, the 15 2nd to 5th appellants were joined as co-defendants to the respondent.

The fact of the case are as follows:

The 1st appellant applied to the 2nd appellant on the 6th day of August, 1981 by a letter - Exhibit A for the grant of a piece of land to build a hotel thereon. The application was granted as per a letter- Exhibit B, 20 dated the 14th day of April, 1983.

On meeting the conditions stated by Exhibit B, the 1st appellant was issued a certificate of occupancy No. NC 8128 - Exhibit C, the terms of which granted right of occupancy to the 1st appellant on the land in dispute for a period of 40 years commencing from the 14th day of April, 25 1983. Consequently, the 1st appellant applied to the Kaduna Capital Development Board for permission to fence the land in dispute. The permission was granted by the board on the 11th day of May, 1983.

Sometime after the grant of right of occupancy to the 1st appellant, he noticed that some concrete structures were being constructed on 30 the land. On making inquiries he discovered that it was the respondent that was responsible for the building of the structures. The 1st appellant lodged a complaint with the Ministry of Lands and Survey, Kaduna State. The latter had the land in dispute inspected by its officials. On receiving confirmation of the complaint, the ministry issued instructions to Kaduna Capital Development Board to demolish the structures and this was done. 35 The respondent was asked to remove his building materials from the land but he failed to do so and instead he continued to remain on the land. The 1st appellant reported the refusal by the respondent to the Kaduna Capital Development Board and the Divisional Police Officer, in charge of the po-

lice station at Sabon Gari, Kaduna, but to no avail. Hence the institution of the suit by the 1st appellant in the High Court.

The respondent contended that the land in dispute was first allocated to one Muhammadu Lawal Mohammed on the 21st day of December, 1982 by the Secretary to Kaduna Group of Local Governments vide Local Government Certificate of Occupancy No. 033742. The allottee sold the piece of land to the respondent for the sum of N10,000.00 and applied to the Secretary of Local Government, Kaduna to transfer the right of occupancy on the land from him (the allottee) to the respondent. The transfer was effected and the respondent was issued a certificate of occupancy No. 037005 on the 27th day of April, 1984. As a result, the respondent caused plans to be drawn for the construction of shops and offices on the land in dispute. The plans were approved by Kaduna Local Government. It was after this that the respondent got the land cleared of bush and paid compensation for the economic trees found thereon. He started with building a wall round the piece of land and followed by a 50 feet long foundation on the land. Later he discovered that the wall which was 324 feet long and the foundation which was 135 feet wide had been demolished by Kaduna Capital Development Board. He had spent not less than N100,000.00 to erect the structures.

Before the hearing in the High Court, pleadings were ordered and exchanged. The 2nd to 5th appellants filed a joint statement of defence while the respondent filed a separate statement of defence and set up a counter-claim against the 1st appellant. The statement of claim filed by the 1st appellant averred in the main the facts narrated above. The respondent denied all the averments therein except as to the building of structures on the land in dispute. He alleged that the 2nd appellant in granting the right of occupancy to the 1st appellant as per certificate of occupancy, exhibit C, did not follow the procedures recognised legally and officially. The grant, he contended in the statement of defence, was therefore "irregular, unlawful, null and void and of no effect whatsoever."

Paragraphs 14 to 17 of the statement of defence, which raise the counter-claim against the 1st appellant read thus -

"14. And by way of counter-claim the defence repeats all the averments contained in paragraphs 1 to 13 of the statement of defence.

15. The defendant further says that it is as a result of the plaintiff (sic) unlawful complaint to Ministry of Lands and Surveys and Kaduna Capital Development Board that the structures already erected legally on

the said piece of land by the defendant that the Kaduna Capital Development Board entered into the said piece of land and pulled down all the structures then erected legally by the defendant and as a result of the negligent act of the plaintiff.

5 16. Consequently the defendant was unlawfully prevented in his drive to construct offices and shops as approved by Kaduna Local Government Authority on the said piece of land.

10 17. Whereof the defendant, as a result of the loss and damages he suffered, counter claims from the plaintiff the sum of N100,000.00 as general damages arising from the plaintiffs negligence. "

In their joint statement of defence, the 2nd to 5th respondents virtually admitted all the allegations made in the statement of claim. I consider it pertinent to quote paragraphs 2 to 11 of their Statement of Defence because they traverse the averments in the statement of defence
15 of the respondent even though the former was filed as a defence to the statement of claim. In other words the joint Statement of Defence did not join issues with the 1st appellant but the respondent:

"2. The 2nd, 3rd, 4th and 5th defendants admits paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the Statement of Claim and state in addition that the
20 said piece of land is within an urban area.

3. The piece of land being in an urban land can only be allocated by the Governor or on his behalf and not by any other authority.

4. That the said piece of land was wrongly allocated by the Kaduna Group of Local Government (sic) to Muhammadu Lawal Mohammed.

25 5. The 2nd, 3rd, 4th and 5th defendants admit paragraph 9 and state that a letter was consequently written to joint Secretary, Kaduna Group of Local Governments advising him to find an alternative site for the affected people and caution those that may tend to tamper with the said land.

30 6. The 2nd, 3rd, 4th and 5th defendants admit paragraphs 10 and 11 and maintain that the 1st defendant was forewarned before the illegal structure were pulled down.

7. The 2nd, 3rd, 4th and 5th defendants are not in a position to admit or deny paragraphs 12, 13 and 14 of the plaintiff's Statement of
35 Claim.

8. In addition to paragraph 3 above, the 2nd, 3rd, 4th and 5th defendants maintain that any purported allocation of an urban land not made by the Governor or on his behalf is unlawful, null and void.

9. *The purported allocation of an urban land to Muhammadu Lawal Mohammed which was transferred and re-allocated to the 1st defendant by the Joint Secretary, Kaduna Group of Local Government (sic) is no allocation in that it is unlawful, null and void.*

10. *In further reply to paragraph 3 of the Statement of Claim, the 2nd, 3rd, 4th and 5th defendants say that in allocating the said land they observed all the laid down procedure."*

At the hearing before Chigbue, J. (as he then was) in the High Court, the 1st appellant gave evidence on his own behalf. The respondent testified and called two witnesses in support of his case. The 2nd to 5th appellants called the Deputy Surveyor-General of Kaduna State as their only witness. The learned trial Judge found for the 1st appellant and granted all his claims which consisted of -

"(a) Possession of the said land.

(b) An injunction restraining the defendant by himself, his servants or agents from remaining on or continuing in occupation or committing any other acts of trespass in the said land, and

(c) Damages."

In dealing with the conflicting titles of the 1st appellant and the respondent to the land in dispute, the learned trial Judge observed as follows -

"I will approach this matter by deciding between the plaintiff and the defendant as to who has a better title on the land and whose interest was prior to the other. Both counsel have in their erudite submission made reference to the provisions of sections 5 and 6 and 14 of the Land Use Act, 1978,

Section 5(1) provides -

"It shall be lawful for the Military Governor in respect of land not an Urban Area -

(a) To grant customary right of occupancy to any person or organisation for the use of land in the Local Government Area for agricultural, residential and other purposes."

Further subsection 5(2) provides that -

"Upon the grant of statutory right of occupancy under the provision of subsection (1) of this section, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished."

This means, as I think, that notwithstanding any other existing rights prior to the grant under this subsection, such rights automatically

ceases as soon as the Military Governor exercises such right whether in an urban or non-urban area. Meaning, if the Local Government has exercised similar right as provided under section 6(1) (a) of the same Act, that right as exercised by the Military Governor as envisaged above supersedes such right of the Local Government. The powers of the Local Government is, however, limited to its area of jurisdiction and not in Urban Areas. The distinction is quite obvious as section 6(3)(a) curtails the powers of the Local Government to enter, use and occupy its jurisdiction which are (sic) not in an area to be declared urban area etc.....

I will now proceed to deal with the question as to who has prior interest over the land between the parties as claimed by them. Exhibit 'A' - the plaintiff's application for Statutory Right of Occupancy (is) dated the 6th August, 1981. Exhibit B. - The reply to it by the Ministry of Land and Survey, Land Division, Kaduna dated the 14th April, 1983 stated among other things the offer as accepted by the plaintiff and the date of commencement of the Right of Occupancy as 1st April, 1983 and the plot or the Area in question the approval was given to him is shown on Kaduna Sheet 61 and 68 as attached to the sketch plan. And finally Exhibit 'C' the Certificate of Occupancy No. 8128 reveals that Kaduna Sheet 61 and 68 that (sic) the land in question lies along Ibrahim Taiwo Road - and the Survey Plan was prepared by the Survey Division Kaduna. The sheets contains (sic) No. 61 and 68 as above. Exhibit C. states that the commencement date of the period of 40 years grant was effective from 14th April, 1983.

In respect of the defendant's claim that his predecessor-in-title sold to him the land in question by virtue of a certificate of occupancy IDF. ID "F" is no legal evidence as was put in for identification purposes and as such has no probative value. The defendant (sic) further title to the land in Exhibit G - the certificate of Occupancy issued to him by Kaduna Local Government dated 27th April, 1983. By reason of comparison the plaintiff's Certificate of Occupancy dated the 4th April, 1983 came prior to that of the defendant which came into existence on the 27th April, 1983. It behoves, therefore, that the plaintiff's (sic) has prior interest in the land."

On the question whether the land in dispute lies within an Urban Area, where the Military Governor could exclusively make allocation or within a non-urban area where the Local Government can grant customary right of occupancy, the learned trial Judge found thus -

"I prefer the evidence of DW1 to that of DW2 and I believe the evidence of DW1 to the effect that the land lies within the Urban Area. I find as a fact that only the Governor can validly issue certificate of occupancy in respect of the land within such area. I disbelieve the evidence of DW2 that the land lies within the Local Government Area of Kaduna as he did not know the exact Area where the land lies. I hold that the case for the defendant became weaker when the evidence of the Co-defendants he brought to defend the action failed to support him."

The respondent appealed from the decision of the trial court to the Court of Appeal complaining inter alia that the learned trial Judge erred in holding that the land in dispute lies within Urban Area, and that the plaintiffs title took priority over that of the 1st defendant.

Prior to the hearing of the appeal by the Court of Appeal (Wali, Akpata, JJ .C.A., as they were then, and Ogundare, J.C.A.) the 2nd to 5th defendants filed a notice under Order 3 rule 14(1) (2) of the Court of Appeal Rules, 1981 praying the Court of Appeal to affirm the decision of the trial court on the grounds -

"1. That plan No. NC/MISC. 18 (sic) rejected by the trial court ought to have been admitted.

2. That the said plan No. NC/MISC. 18 which was further extended by Kaduna State (Designation of Land in Urban Area) Order, 1982 and numbered NC/MISC. 46 forms part of an order made in pursuance of a law which the learned trial Judge ought to have taken judicial Notice of without the necessity of tendering it."

In arguing the appeal before that court, counsel for plaintiff and the 2nd to 5th defendants submitted that the Military Governor of Kaduna State had absolute power to grant a statutory certificate of occupancy (sic) for land in Kaduna irrespective of whether the land is situate in urban or non urban area by virtue of section 5 subsection (1) (a) of the Land Use Act, 1978. They referred to Kaduna State (Designation of Land in Urban Area) Order, 1980 and Kaduna State (Designation of Land in Urban Area) Order, 1982 and argued that since plan No. NC/MISC. 46 was made part of the 1982 order the learned trial Judge ought to have relied on it by virtue of the provisions of section 73 of the Evidence Act, to hold that the land in dispute was situated in urban area.

In its judgment, the Court of Appeal (per Ogundare, J.C.A.) made the following observations -

"At the trial, the plaintiff tendered his statutory certificate of occupancy (sic) No. 8128 of 30th May, 1983, Exhibit C, but called no Surveyor to plot his land on the Kaduna Capital Territory master plan, even though he pleaded Kaduna Sheets 61 and 68. When learned counsel for the 2nd to 5th defendants sought to tender it through the Deputy Surveyor-General of Kaduna State, the court rejected it on the ground that it was not pleaded.

At that stage, by virtue of section 134 of the Evidence Act, the plaintiff had failed to prove his case. That section provides as follows:-

"134(1) Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

It is not sufficient as argued by the learned Solicitor-General, and the learned Senior Advocate of Nigeria for the respondents, that the lower court should have taken judicial notice of SLN No.7 of 1982 (sic) including the master plan recited in it. Even if it did, an expert witness, the surveyor-General, his deputy, or any registered land surveyor had to be plaintiff's witness to interpret the master plan to the court and to locate the land in dispute within the Kaduna Capital Territory Area. That was not done. Were the Court of Appeal itself to take judicial notice of the subsidiary legislation, it will suffer the same handicap as it cannot give evidence on the master plan

The primary question in the appeal is whether or not the land in dispute is within Kaduna Urban Area. To this, first respondent, as plaintiff, provided no answer, and it was vital to his case. In short he failed to prove his title to the land as his statutory certificate of occupancy has to be related to the area designated as Kaduna Capital Territory."

The Court of Appeal also adverted to the question: which of the parties between the plaintiff and the 1st defendant had a better title? And it held as follows:

"The next question is as the plaintiff held a statutory certificate of occupancy No. 8128 of 30th May, 1983 and the first defendant/appellant held a customary (sic) Certificate of Occupancy No. 037005 of 27th April, 1983, both of which were in respect of the same parcel of land, which of the two has a prior valid interest? Here again, the key is whether the disputed land was in an urban or rural (sic) area, and if urban, with effect

from what date? The plaintiff also provided no answer. In such a situation, should the lower court have dismissed the plaintiff's case or non-suited him? In the final analysis, the plaintiff has to prove his case first, before the defendants can, if need be, break down that case, brick by brick. Or is it a proper case to order a retrial?"

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In its conclusion, the Court of Appeal held that the appeal before it succeeded, it set aside the judgment of the High Court and ordered a retrial before a judge other than the learned trial Judge.

The 1st appellant and the 2nd to 5th appellants have appealed to this court challenging the decision of the Court of Appeal. The 1st appellant has formulated the following issues for determination:-

"(i) whether the learned justices of the Court of Appeal have not erred in law or misdirected themselves when they held that:-

"It is not sufficient as argued by the learned Senior Advocate of Nigeria for the respondents (sic) that the lower court should have taken judicial notice of SNL No. 7 of 1987 including the master plan recited in it."

(ii) Whether the learned justices of the Court of Appeal did not misdirect themselves in law and in fact when they deviated from the crucial issues raised by the appellant for consideration.

(iii) Whether the learned justices of the Court of Appeal did not misdirect themselves in law and in fact when they ruled that an order for retrial is inevitable in this case."

The 2nd to 5th appellant for their part stated, in their joint brief of argument, 7 issues for determination, to wit:-

"1. Whether the onus of establishing the location/status of the land in dispute lies solely on the 1st appellant;

2. Whether there was proof before the trial court to the effect that the disputed land falls within an urban designated area;

3. Whether the interest of the 1st appellant is prior to that of the respondent so that the 1st appellant has a better title;

4. Whether the wrongful rejection of the master plan by the trial court estopped the plaintiff from proving its (sic) case;

5. Whether or not the evidence adduced by the co-defendants can be relied upon by the plaintiff in establishing its (sic) case;

6. Whether or not on preponderance of evidence the plaintiff proved his case;

7. Whether or not an order for retrial is inevitable in this case."

The respondent, drafted the following issues:-

"(a) Can the appellant raise the issue of wrongful rejection of master plan before this Honourable Court despite the fact that he has not cross-appealed? (sic).

(b) Should the court have taken judicial notice of the master plan
5 NC/MISC. 46 recited in Legal Notice KDSLNo. 7 of 1982?

(c) Must the said master plan be specifically pleaded by any party seeking to rely upon it?

10 (d) Does the master plan No. NC MISC. 46 form an annexure to the legal notice KDSLNo. 7 of 1982 and as such need not be pleaded?

(e) Was the identity of the land as per the proper authority to issue the certificate of occupancy firmly settled by oral and or documentary evidence?
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(f) Did the 1st appellant unequivocally on the balance of probabilities succeed in establishing that he had a better title to the land?

(g) From the facts available to this Honourable Court on whom will the onus to prove a better title as provided under section 145 of the
20 Evidence Act rest?

(h) From the circumstances of this case was it inevitable that an order for a retrial be made?

(i) Are all the ingredients necessary for ordering a retrial present in this case?"
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I think that all the issues raised by all the parties in this case can, in the light of the grounds of appeal filed by the 1st appellant and the 2nd to 5th appellants, be conveniently classified under the following three headings -

1. The issue of rejection in evidence by the learned trial Judge of
30 plan No. NC. MISC. 46 referred to in Kaduna State (Designation of land in Urban Area) Order, No.7 of 1982, and whether the land in dispute is urban or non-urban land pursuant to the Land Use Act, 1978.

2. The priority of the titles of the parties to the land in dispute.

3. The correctness of the order for retrial made by the Court of
35 Appeal.

I will now deal with the issues as condensed by the headings.

Heading No.1

In the trial court, the 2nd to 5th appellants called the Deputy Surveyor-General of Kaduna State as their only witness. The appellants made

attempt to tender the master plan of Kaduna State, which shows the area designated as urban area in the state, through the witness. Objection against the admission was raised by counsel for the respondent. The objection was sustained by the learned trial Judge and the plan was rejected. In the court of appeal, the 2nd to 5th appellants complained that the rejection of the plan by the trial court was wrong because the plan formed part of Kaduna State Order No.7 of 1982, which was published in Kaduna State Gazette No. 21, Volume 16 of 26th August 1982 and that the trial court should have taken judicial notice of the plan and admitted it in evidence by virtue of section 73 of the Evidence Act. The Court of Appeal held that even if the learned trial Judge had taken judicial notice of the plan, the evidence of a Surveyor, as an expert, would have to be called to interpret the plan to the trial court and this was not done. The lower court then stated that were it to take judicial notice of the plan, the same situation which arose in the High Court, would have arisen before it. The court, therefore, held that the case of the 1st appellant had not been proved.

Before us, it is argued in the brief of argument of the 1st appellant that the Court of Appeal was in error to have held so. It is submitted that the Court of appeal failed to advert its mind to the provisions of section 72 and 73 of the Evidence Act. Since the court was obliged to take judicial notice of the 1982 Order including the plan, it is argued, there was no need to call a Surveyor to interpret the plan to the court. In other words there was no need for the 1st appellant to prove the plan. The following cases are cited in support of the submission -

Adetipe v. Amodu (1969) 1 NMLR 62 at p. 67; Mayaki v. L.C.C.C. (1977) 7 S.C.81 at p.92; Adinuso v. KNA (1962) 1 SCNLR 13, Federal Supreme Court Suit No. 272/1961 and Peenok v. Hotel Presidential (1982) 12 S.C.1 at p.103; (1983) 4 NCLR 122. Finally, it was argued that although the plan was not admitted in evidence, the Deputy Surveyor-General said in his testimony that the land in dispute falls within Kaduna Urban Area.

In reply, the respondent conceded in his brief of argument that it is true that judicial notice of the 1982 order could have been taken under section 73. However, it is argued that even then the court could have refused under section 73 subsection (3) of the Evidence Act, to take judicial notice of the order since the order was not produced in court. It is argued further that the plan in question was not pleaded in the statement of claim filed by the 1st appellant and as such the 1st appellant could not rest his case on it.

By section 3 of the Land Use Act, Cap. 202 of the Laws of the Federation of Nigeria, 1990 the Governor of Kaduna State is empowered to declare what area in the state shall be urban area. The section reads -

5 *"3. Subject to such general conditions as may be specified in that behalf by the National Council of States, the Governor may for the purposes of this Act by order published in the state Gazette designate the parts of the area of the territory of the state constituting land in an urban area."*

It was in exercise of this power that the Governor of Kaduna State issued Kaduna State (Designation of Land in Urban Area) Order, 1982, Kaduna State Legal Notice (KDSL N) No.7 of 1982. The order came into force on the 26th day of August, 1982 when it was published in Kaduna State Gazette No. 21, Vo. 16 of the same date. Paragraph 2 of the order provides -

15 *"2. Without prejudice to the provisions of the Kaduna State (Designation of Land in Urban Area) Order, 1980, the area of Kaduna State delineated on the plan numbered NC. MISC 46 which is deposited in the office of the Kaduna State Surveyor-General at Kaduna and shown on such plan surrounded by a blue broken verge line is hereby designated as*
20 *area constituting land in urban area."*

The question is: does the land in dispute in the present case fall within the area designated "urban area" in the 1982 order or in the earlier order of 1978? It is the appellants' case that the land in dispute is "urban
25 land and that it comes under the area so designated by the 1982 order. It was in attempt to establish this fact that the 2nd to 5th appellants called the Deputy Surveyor-General of Kaduna State to tender plan number NC MISC 46 in evidence. However, the learned trial Judge upheld the objection raised by counsel for the respondent on the ground that the plan was
30 not pleaded in the statement of Defence of the 2nd to 5th appellants and that since it was not so pleaded its admission would go to no issue. It is now contended, as it was indeed raised by the appellants in the Court of Appeal, that the trial Judge was in error not to have admitted the plan because under the provisions of sections 72 and 73 of the Evidence Act, he
35 was bound to take judicial notice of it since it forms part of the 1982 order.

Now sections 72 and section 73 of Cap. 112 of the Laws of Federation of Nigeria, 1990) reads -

"72. No fact of which the court must take judicial notice need be

proved."

and section 73 (now section 74 of Cap. 112) provides in subsection 1(a) thereof as follows -

"73(1) The court shall take judicial notice of the following facts -

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(a) all law or enactments and any subsidiary legislation made there-under having the force of law now or hereto before in force, or hereafter to be in force, in any part of Nigeria;"

There is no doubt that the 1982 order is a subsidiary legislation 10
made under the Land Use Act, 1978. It, therefore, seems to me clear from
the foregoing that the trial court was bound to take judicial notice of the
1982 order and, in doing so, the plan No. NC. MISC. 46 which is referred
to in paragraph 2 of the order. The trial court did not perhaps, take judicial
notice of the plan because its attention was not drawn to that effect by the 15
counsel who appeared before it. However, when the point was raised in the
Court of Appeal, that court held that even if judicial notice of the plan was
taken, a Surveyor be it the Kaduna State Surveyor-General or his Deputy
or any other registered surveyor would have to be called as expert witness to
interpret the plan to the court. Since that was not done, it held that the 1st 20
appellant failed to prove his case.

With respect, I do not think the lower court was right in holding
that the plan had to be interpreted to it by a surveyor. Once a court took
judicial notice of a document it could examine the document by itself. For 25
example if the document is an Act or Gazette or any written document or
book the Judge can read it on his own. It is only when such document
cannot be read or understood by the Judge that resort may be had to an
expert witness. In the present case we admitted in evidence, as exhibit
SC.1, the plan rejected by the trial court. It is in fact a map. On examining
the exhibit it is possible to see the area of Kaduna State which have been 30
declared urban area. Kaduna town is one of the area so declared. The map
does not however, show the streets in Kaduna Town and so it is not possible
to say whether the land in dispute which is situate at No. BB 29, Ibrahim
Taiwo Road, Kaduna is indeed in the urban area. It is even doubtful if any
Surveyor, without the knowledge of Kaduna Town and its surroundings 35
can, by looking at Exhibit SC.1, say that the land in dispute is within the
urban area.

This notwithstanding, it is not only by looking at a map or plan
that an urban area can be determined. The evidence of a Surveyor, who is

an expert in that field, can be relied upon. In *Dweye & Ors. v. Iyomahan & Ors.* (1983) 2 SCNLR 135; (1983) NSCC. 393 at p. 396 (1983) 8 S.C.76 at p. 85, I made the following observation

*"Furthermore, if we are to entertain the new point now being raised, it is clear from the submissions of both counsel for the appellants and the
5 respondents that the evidence of a Surveyor will have to be adduced or a map tendered to explain the area designated "urban area" as contained in Bendel State Legal Notice No. 22 of 1978. This would be necessary in order to enable us determine whether the land in dispute was in fact situated outside the area declared "urban" by the Legal Notice."*

10

In the present case when the Deputy Surveyor-General testified he stated as follows -

*"We had for a very long time prepared Township map for Kaduna. We have maps designated as Kaduna Urban Areas. I know Ibrahim Taiwo
15 Road, Kaduna. It falls within Kaduna Urban Area."*

Surely, this is sufficient evidence identifying the road - Ibrahim Taiwo Road, where the land in dispute is situate on plot BB 29. There is also the testimony of the Kaduna State Chief Lands Officer - Ahaji Yusuf
20 Alhassan, who was called by the respondent as defence witness No. 1 (D.W.1). The witness said under cross-examination by counsel for the 1st appellant as follows -

*"I saw the land in question and the drawings. It is situated along Ibrahim Taiwo Road, Kaduna. It is within Kaduna Urban Area. There is no
25 other authority to allocate land within this area besides us."*

The learned trial Judge said of that piece of evidence thus -

"In these circumstances, I prefer the evidence of DW1 to that of DW2 and I believe the evidence of DW 1 to the effect that the land lies within the Urban Area."

30

It follows from the foregoing that there was sufficient evidence from which the learned Judge could have found that the land in dispute is situate in urban area. He was therefore, right in so holding. Consequently, the Court of Appeal acted in error when it reversed his finding of fact that
35 the land lies within the "urban area" of Kaduna Town.

Heading No.2

Next is the question: which of the titles held by the 1st appellant and the respondent is better? The latter adduced evidence to show that his predecessor- in title over the land in dispute was one Mohammadu Lawal

Mohammed, who was granted right of occupancy on the 21st day of December, 1982 over the land in dispute by the Joint Secretary of Kaduna Local Government. The certificate of occupancy issued to him by the Local Government bore the number 033742. The respondent purchased the land from him and the right of occupancy over the land was transferred to the respondent by the Kaduna Local Government on the 27th day of April, 1983. The respondent was issued with certificate of occupancy number 037005.

The 1st appellant, on the other hand, acquired his right of occupancy on the land in dispute on the 14th day of April, 1983. Therefore, in order of time, Muhammadu Lawal Mohammed was the first to be granted right of occupancy. Next came the 1st appellant and thirdly, the respondent.

The learned trial Judge found, by way of comparison between the certificate of occupancy held by the 1st appellant and the certificate of occupancy of the respondent, that the former had prior interest on the land. The Court of Appeal set aside this finding on the ground that the critical question was whether the land in dispute was in "urban" or "non-urban" area. It held that the 1st appellant had failed to establish that and, therefore, the trial court should have dismissed his case.

The 1st appellant argued in his brief that where the title to land is in issue as a result of competing claims by two parties and one of the parties is found to be in possession, the party in possessing is, by virtue of section 145 of the Evidence Act, presumed to be the owner. The party alleging the contrary then has the burden to prove that he has a better title before he can displace the party in possession. The cases of *Mustafa Lawal v. Ijale*, 1967 N.M.L.R. 155, *Onyeakonmu & Ors v. Ejuwubiri*, (1966) 1 All N.L.R. 32 and *Oke v. Atoleye*, (1986) 1 N.W.L.R. (pt 15) 241 are cited in support of the argument. It is then submitted that the Court of Appeal was wrong to have held that by virtue of section 134 of the Evidence Act, the 1st appellant had failed to prove his case. Reference is made to section 5 (2) of the Land Use Act, 1978 to submit that the Military Governor of Kaduna State had the absolute power to grant a right of occupancy irrespective of whether or not the land in question is in an urban area. And once the grant is made all existing rights on the land become extinguished by virtue of section 5 (1) of the Act. The same argument is presented by the 2nd to 5th appellants in their brief of arguments.

In reply the respondent argues, also in his brief, that he was in actual physical possession when the 1st appellant instituted action in this

case. It is, therefore, not correct, for the 1st appellant to base his title on being in possession of the land in dispute. Since the respondent was the one in possession the dicta in the case cited by the appellants are against them but in favour of the respondent. The case of *Oduwa v. Pereira* (1972) 1 S.C. 33 is cited to buttress the point.

5

I think the real question here for determination is not who is in possession of the land in dispute or not, but which of the parties (1st appellant or respondent) has a better title in view of the certificates of occupancy granted to them by the Governor and the Local Government respectively.

10 As shown above, the land in dispute falls within an "urban area" as declared by the 1982 order. All the parties that held right of occupancy over the land in dispute acquired the right after the declaration. The respondent and his predecessor - in- title, Muhammadu Lawal Mohammed, were granted their right of occupancy by the Kaduna Local Government.

15 This is contrary to the provisions of sections 6 subsection (1)(a) of the Land Use Act, which reads-

"6(1) It shall be lawful for a Local Government in respect of land not in urban area-

(a) to grant customary rights of occupancy to any person or
20 *organisation for the use of land in the Local Government Area for Agricultural, residential and other purposes."*

In contrast, section 5 subsection (1) (a) and (b) of the same Act provides as follows-

"5(1) It shall be lawful for the Governor in respect of land, whether
25 *or not in an urban area*

(a) to grant statutory rights of occupancy to any persons for all purposes;

(b) to grant easement appurtenant to statutory rights of occupancy"

30 It follows then that a Local Government can only grant a right of occupancy over land situate in non - urban area; while the Governor has the right to grant a right of occupancy in respect of any land irrespective of whether it is in urban or non-urban area.

35 From all these it is clear that with effect from 26th August, 1982, Kaduna Local Government had no power to grant a right of occupancy over the land in dispute since the land is situate in urban area. So that when it purportedly granted to the respondent a right of occupancy on 27th April, 1983 it had no power to do so and, therefore, the purported grant is

null and void. By reason of this the 1st appellant was entitled to judgment in the High Court.

It is pertinent to point out that the learned trial judge entered judgment for the 1st appellant for a different reason. He relied on the provisions of sections 5 subsection (2) of the Land Use Act, 1978 to hold that the 1st appellant had a better right of occupancy over the land in dispute than the right of occupancy held by the respondent. In his own words, quoted above-

"This means, as I think, that notwithstanding any other existing rights prior to the grant under this subsection, such right automatically cease as soon as the Military Governor exercises such right whether in urban or non-urban areas. Meaning, if the Local Government has exercised similar rights as provided under section 6 (1) (a) of the same Act, the right as exercised by the Military Governor as envisaged above supersedes such right of the Local Government."

The view so expressed by the learned trial judge is based on the interpretation of the provisions of sections 5 subsection (2) of the Land Use Act, 1978. Were the view applicable to the present case, it would have been supported by the decisions of this court in Saude v. Abdullahi, (1989)4 N.W.L.R. (pt. 116) 387 at p 416; Titiloye v. Olupo, (1991)7 N.W.L.R. (part 205) 519 at p. 530 and Dabup v. Kola, (1993) 9 N.W.L.R. (Pt.317) at pp. 277, 283, 284 and 286. However, as already shown that is not the true situation in this case. Here the grant made by the Local Government is a grant in respect of a piece of land situated in an urban area, upon which the Local Government has no authority under the Land Use Act to exercise such power.

Heading No.3

It is quite clear from the foregoing that the decision of the Court of Appeal to set aside the decision of the trial court, given in favour of the 1st appellant, and to order a retrial is wrong. There is no basis for making such order since the purported grant of the rights of occupancy by the Kaduna Local Government has been shown to be null and void.

Conclusion

Before concluding this judgment I should point out that learned counsel for the respondent had drawn our attention to the preliminary objection which he raised in the respondent's brief. The objection is in respect of the respondent's Notice which the 2nd to 5th appellants filed in the Court of Appeal in accordance with the provisions of Order 3 rule 14 (1) and (2) of the Court of Appeal Rules, 1981. He complained that the 2nd to 5th appellants should have cross- appealed against the ruling of the High

Court rejecting to admit plan No. NC MISC 46. He cited Oguma v. IBWA. (1988) 1 N.W.L.R. (part 73) 658 at p. 668 per Agbaje, J.S.C. in support and urged that the ground of appeal filed before us by the 2nd to 5th appellants, which raises the issue of non-admission in evidence of the plan, should be struck out for being incompetent.

5 With respect, I think learned counsel for the respondent is not right. The time when he should have raised objection over the filing of the respondent's Notice was when the point arose in the Court of Appeal. This he failed to do and the court of appeal heard argument on the Notice and
10 pronounced on the argument. Surely, the 2nd to 5th appellants are entitled to appeal to this court against the pronouncement made by the Court of Appeal since they feel aggrieved. With respect, the case cited in support of the preliminary objection is not apposite, because that case dealt with the
15 filing of respondent's notice in the Supreme Court, by the respondent therein, to challenge a misdirection of the Court of Appeal in holding that an exhibit which was admitted at the trial in the High Court was inadmissible in evidence and expunging it from the record of the proceedings.

 The proper venue to raise the preliminary objection in this case
20 was the Court of Appeal and this the respondent had not done. It is now too late to raise it here and untenable to urge, that the ground of appeal before us be struck out.

 I therefore, find no merit in the preliminary objection. It is hereby dismissed.

25 Finally, with the grant of certificate to the respondent by Kaduna Local Government having been held to be null and void, the bottom has been knocked out of the respondent's counter claim. The object of an award of damages is to give compensation to the plaintiff for the damages, loss or injury which he has suffered. However, before damages can be recovered,
30 there must be a wrong committed. There is no doubt that the respondent has incurred loss in the destruction of the structures which he illegally erected on the land in dispute. But it has not been established by the respondent that the 1st appellant had, by causing the structures to be demolished, committed any wrong in law - *damnum sine injuria*. In *Bourhill v. Young*,
35 (1943) A.C. 92 at p. 106, Lord Wright held as follows-

"Damages due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damages. It is damnum ahseque injuria (i.e. loss without wrong). The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff."

(parenthesis mine).

In the result the appeal succeeds. The decision of the Court of Appeal is set aside and the decision of the High Court is hereby restored through different reasons. The plaintiff's action succeeds and the defendant's counter-claim fails. The plaintiff is hereby awarded possession of the land in dispute and damages for the trespass committed by the defendant in the sum of N2,000.00. The defendant, his servant or agents are hereby restrained from remaining on or continuing in occupation or committing any further acts of trespass on the land in dispute. The costs of N250.00 in the Court of Appeal and N1,000.00 in this court are hereby awarded in favour of each set of appellants, namely the 1st appellant and 2nd to 5th appellants respectively.

OGWUEGBU JSC

I have had the preview of the judgment just read by my learned brother, Uwais, J.S.C. I am in full agreement with the reasoning and conclusions.

Two main issues call for determination in this appeal. They relate to the rejection of plan No. NC MISC 46 referred to in the Kaduna State (Designation of land in Urban Area) Order No.7 of 1982 by the trial court and the priority of the competing titles of the 1st appellant and the respondent to the land in dispute.

The first issue arose as a result of the refusal of the learned trial judge to admit in evidence the master plan in respect of Kaduna State. One Yakubu Mai Kano Deputy Surveyor-General in the ministry of Lands and Survey, Kaduna sought to tender the said master plan in evidence. Objection was taken by the learned counsel for the respondent (1st defendant) on the ground that it was not specifically pleaded. This notwithstanding, at the close of evidence and address by both counsel, the learned trial judge in a reserved judgment found for the 1st appellant who is the plaintiff in the trial court relying on section 5 subsection (2) of the Land Use Act, 1978.

The 1st defendant in the court of trial was not satisfied with the decision and appealed to the Court of Appeal, Kaduna Division.

The 2nd appellants herein who were 2nd to 5th respondents in the court below in compliance with Order 3 Rule 14(1) and (2) of the Court of Appeal Rules, gave notice in the court below of the contention that the

judgment should be affirmed or varied on other grounds. The grounds on which they relied are as follows:-

"1. The Master-plan which was rejected by the learned trial judge was clearly admissible.

2. The question whether or not the land in dispute was within the Urban Area so designated was one of the vital issues for determination in the court.

3. The evidence in the circumstances conclusively proved that the land in dispute is within Urban Area."

10 The appellant's counsel contended in the court below that the learned trial judge was in error when he rejected the master plan.

In their briefs of argument in the court below, both learned counsel submitted that the Plan NC MISC 18 which was prepared in pursuance of the powers vested on the Military Governor under Section 3 of the Land Use Act, 1978 is part of Kaduna State (Designation of Land in Urban Area) Order, 1980 and as such need not be tendered since the court is expected to take judicial notice of it by virtue of Section 73(1)(a) of the Evidence Act and under section 72 therefore, such evidence need to be proved.

20 On the above submission, the Court of Appeal said at p.174 from line 30 to page 175 lines 1-24:

".....When the learned counsel for the 2nd 5th respondents sought to tender it through the Deputy Surveyor-General of Kaduna State, the court rejected it on the ground that it was not pleaded.

25 *At that stage, by virtue of section 134 of the Evidence Act, the plaintiff had failed to prove his case. The section provides as follows:-*

"134(1) Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

30 *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. "*

It is not sufficient as argued by the Solicitor-General, and the learned S.A.N. for the respondents, that the lower court should have taken judicial notice of SLN No.7 of 1982 including the master plan recited in it. Even if it did an expert witness, the Surveyor-General, his deputy, or any registered licensed surveyor had to be plaintiff's witness to interpret the master plan to the court to locate the land in dispute within the Kaduna Capital Territory Area. That was not done. Were the Court of Appeal itself to take the judicial notice of the subsidiary legislation, it will suffer the same handicap;

it cannot give evidence on the master plan."

In the end, the court below allowed 1st defendant's appeal and ordered a retrial. The plaintiff being dissatisfied with the decision of the Court of Appeal appealed to this court.

5

The Kaduna State (Designation of Land in Urban Area) Order, 1982 (Kaduna State Legal Notice No.7 of 1982) came into force on 26:8:82. Plan No. NC MISC 46 was made part of it and was deposited in the office of the Kaduna State Surveyor-General at Kaduna. The area designated as area constituting land in urban area was shown in the plan. The order of 1982 is without prejudice to earlier Order of 1980 made by the Kaduna State Government - Kaduna State (Designation of Land Area) Order, 1980. This has plan No. NC MISC 18 as part of that order. The latter Order namely, that of 1982 merely extended the area designated and constituting land in urban area.

15

The 1982 Order is a subsidiary legislation made under section 3 of the Land Use Act 1978 and both the trial court and the Court of Appeal should have taken judicial notice of it by virtue of Section 72 and 73 (1) (a) of the Evidence Act now section 73 and 74(a) of the Evidence Act Cap.112 Vol.VIII Laws of the Federation of Nigeria which provide:-

20

"73. No fact of which the court must take judicial notice of need be proved."

*"74(1) The court shall take judicial notice of the following facts-
(a) all laws or enactments any subsidiary legislation made there-
under having the force of law now or heretofore, in force, or hereafter to be
in force, in any part of Nigeria;"*

25

The court below in my view erred in law when it held as follows:

"It is not sufficient as argued by the learned Solicitor-General and the learned Senior Advocate of Nigeria for the respondent that the lower court should have taken judicial notice of SLN No. 7 of 1982 including the master plan recited in it." See page 175 lines 12-16 of the record of appeal.

30

The master plan NC MISC46 which was deposited in the office of the Kaduna State Surveyor-General at Kaduna was recited in the 1982 Order. Both the order and the master plan form one package and a court cannot take judicial notice of one without the other. Both should be considered. It is also my view that the courts below are in a position to read and interpret the master plan which was admitted in evidence in this court as Exhibit "SC 1."

35

Furthermore, there is abundant oral testimony that the land in dispute is in the urban area. Yusufu Alhassan (DW1) who is the Chief Land Officer in the Department of Lands and Survey, Kaduna stated under cross examination by the plaintiff's counsel that he saw the land in question and the drawings and that it is situate along Ibrahim Taiwo Road, Kaduna, within Kaduna urban area and besides the Governor, no other authority can allocate land within that area. See page 59 lines 6-9 of the record of appeal. Mr. Yakubu Mai Kano a deputy Surveyor-General in the Ministry of Lands and Survey, Kaduna in answer to cross examination said that the Ministry of Lands and Survey has maps designated as Kaduna Urban Areas. He knows Ibrahim Taiwo Road, Kaduna and that it falls within Kaduna Urban Area. See page 64 lines 17-19 of the record of appeal.

These co-defendants pitched their camps with the plaintiff throughout the proceedings and they admitted most of the material averments contained in the plaintiff's statement of claim.

In addition, the identity of the land in dispute was known to the parties. From all these, there is abundant oral evidence showing that the land in dispute is within the urban area as found by the learned trial judge and the court below ought not to have upset his findings on this.

As to priority of the competing claims of the 1st appellant and the respondent, the land in dispute lies within the urban area and the Local Government has no right whatsoever to grant a certificate of occupancy in an urban area. Such right if it existed before the Land Use Act, 1978 was taken away by Section 6(1) and (3)(a) of the said law. In the circumstance, the purported grant made to the respondent in Exhibit "G" is null and void and of no effect.

In view of the foregoing, an order for a retrial made by the court below is wrong.

For the reasons set out above and the fuller reasons contained in the lead judgment of my learned brother Uwais, J.S.C. I too allow the appeal. The decision of the Court of Appeal is set aside and the decision of the High Court is affirmed for other reasons. The plaintiff is entitled to the possession of the land covered by the Certificate of Occupancy No. NC 8122- Exhibit "C". He is also awarded N2,000.00 (two thousand naira) damages for the trespass committed by the 1st defendant (respondent) on the said land. The 1st defendant, his servants and or agents are hereby restrained from committing further acts of trespass on the land. I abide by the order as to costs contained in the lead judgment.

MOHAMMED JSC

I agree with my learned brother, Uwais, J.S.C., in his recital of the relevant facts and his reasoning and the conclusion in the lead judgment, just read. I have had the privilege of reading the judgment in draft before now. I may only add on the issue of the power of the Local Government over land declared "Urban Area" by the State Government. 5

The Court of Appeal was right to point out that the primary question in this appeal is whether or not the land in dispute is within the area designated in Kaduna as "urban area". The Court of Appeal is however wrong to say that the appellant had not provided an answer to that proposition. 10

It is quite clear that Kaduna State (Designation of Land in Urban Area) Order 1982, which came into force on 26th August, 1982, is a subsidiary legislation having the force of law. The Kaduna State map which shows the area designated Kaduna Urban Area in the said legislation being part of that law does not require proof, since by the provision of sections 72 and 73 of the Evidence Act the court was obliged to take judicial notice of the order. Coupled with the evidence of the Deputy surveyor-General of Kaduna State, wherein he said that he knew Ibrahim Taiwo Road, Kaduna, and that the road was within Kaduna Urban Area, it is clear that the learned trial judge came to correct conclusion that the disputed land lies within the area designated by the State Government as "Urban Area" in Kaduna. 15 20

It is settled law that the Government of a State, by virtue of the provisions of sections 3 of the Land Use Act, 1978, can designate any area of the state as an urban area. Such exercise when made by an order shall be published in the Gazette. In the case of Alhaji Saba Salati v. Alhaji Shehu (1986) 1 NWLR (Pt.15) 198, this court, per Uwais, J.S.C., explained the import of such subsidiary legislation in respect of land allocation and grant by both State and Local Governments in the following manner, 25 30

"Section 2 of the Land Use Act, 1978 confers on the Military Governor of each state, the management and control of all lands which comprise the urban areas of the state. It also gives to the Local Governments in each state the power to control and manage in their areas of jurisdiction all lands that are not designated "urban area" by the Military Governor. Under the Act, a Military Governor may grant to any person a right of occupancy over a piece of land, whether or not such piece of land is situate in an urban area or non-urban area. (See section 5(1) thereof). Such grant of title is "a statutory right of occupancy" under the Act (see 35

70 Adene v. Datunbu (1994) 4 KLR Mohammed JSC
section 50(1) thereof). Similarly, a Local Government may grant to any person a right of occupancy. But such grant is restricted to a piece of land that is not in an urban area (see section 6(1) of the Act. The right granted by a Local Government is "a customary right of occupancy" (see section 50(1) of the Act."

5 For these reasons and more fuller reasons given in the lead judgment of my learned brother, Uwais, J.S.C., I shall allow this appeal. It is accordingly allowed. I abide by all the consequential orders made in the lead judgment.

10

ADIO JSC

I have had the privilege of reading, in draft, the judgment just read by my learned brother, Uwais J.S.C. and I agree with it. The appeal succeeds and I too allow it. I abide by the consequential orders made by my
15 learned brother, Uwais, J.S.C. including the order for costs.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Uwais, J.S.C.

20 I entirely agree with the reasoning and conclusion therein and I have nothing to add.

 Accordingly, I too, shall allow this appeal. I abide by the consequential order made in the lead judgment including the order as to costs.

25 Appeal allowed.

30

35