

**SUPREME COURT OF NIGERIA**  
14TH FEBRUARY, 1997. SC. 131/1994  
**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, E. O.**  
**OGWUEGBU, S. U. ONU, A. I. IGUH, JJSC.**

ALHAJI UBAN KARI ..... PLAINTIFF/APPELLANT  
AND  
1. ALHAJI ISA ABBA GANARAM  
2. ATTORNEY-GENERAL BORNO STATE ..... DEFENDANTS/  
3. THE COMMISSIONER FOR LAND & SURVEY ..... RESPONDENTS

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***APPEALS*** - Issues - That are not predicated on the grounds of appeal -  
Would be struck out.

***LAND LAW*** - Licence - Is revocable by the licensor at any time - Failure to give  
notice - Would not affect the validity of a proper grant to a 3rd party.

***LAND USE ACT*** - Certificate of occupancy s. 8 of the Act - The docu-  
ment in issue Exh. Z - Is not a certificate of occupancy.

***LAND USE ACT*** - Temporary right of occupancy s. 46(1) (d) - Whether  
Exhibit Z qualifies as a temporary right of occupancy under this section.

***LAND USE ACT***- Validation of Certain Laws Act Cap. 203 s. 1(2)(b) - Is  
not applicable to Exhibit Z.

***LAND USE ACT***- Right of occupancy - Revocation of plaintiff's right - Is  
invalid not being made within s. 28 of the Act.

**FACTS**

The plaintiff/appellant was granted a statutory right of occupancy in respect of the land in dispute. Before then, the 1st defendant/respondent had applied for grant of a temporary right of occupancy (Exh. Z) which was granted to him in respect of part of the land in dispute, by the same Ministry of Land and Survey of Bornu State. The plaintiff had built on part of the land in dispute before his right of occupancy was revoked. The 1st defendant was subsequently granted a right of occupancy in respect of part of the land in dispute. It was in opposition to the revocation of his grant that the plaintiff filed this action before the Maiduguri High Court.

The 1st defendant filed a counter claim. The trial court found in

favour of the plaintiff but ordered him to pay N4,000.00 damages to the 1st defendant. The 1st defendant appealed to the Court of Appeal while the plaintiff cross appealed on the issue of the N4,000.00 damages. The lower court allowed the 1st defendant's appeal. The plaintiff has now appealed to the Supreme Court raising 5 issues 4 of which were struck out for not arising from the grounds of appeal.

***ISSUE FOR DETERMINATION***

*"1. Whether the Court of Appeal is right in holding that the temporary right of occupancy granted to the 3rd defendant/appellant is a statutory right of occupancy by virtue of the Land Use Act.*

***HELD*** (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

***Issues - That are not predicated on the grounds***

1. I must, with respect, disagree with learned counsel for the Plaintiff that questions (2) - (5) could be predicated on the three grounds of appeal. Though Order 6 rule 5(1) of the Rules of this Court requires that the brief of the appellant shall contain what are, in the appellant's view, the issues arising in the appeal, that does not mean that the appellant is free to put forward any issue unrelated to the grounds of appeal filed by him. "Issues arising in the appeal" must be issues arising out of the grounds of appeal, for it is only such issues that can arise in the appeal -Consequently, I uphold Mr. Oru's objection and strike out Issues (2) - (5) formulated in the Appellant's Brief and the arguments thereon. (P. 400 F)

***Whether Exhibit Z is a certificate of occupancy***

2. Could it be said that Exhibit Z come within Section 8 of the Act? The answer must necessarily be in the negative. Having regard to the conditions contained in Exhibit Z, the grant made therein is not for a definite term not are the conditions those implied in a certificate of occupancy as provided in Section 9 & 10 of the Act. Furthermore, a right of occupancy under the Land Use Act is not revocable except as provided in Section 28 of the Act and is alienable on the conditions laid down in sections 21 - 27. But Exhibit Z was revocable at will by the Governor and is non-transferable.(P. 405 F)

***Temporary right of occupancy s. 46(1) (d)***

3. With profound respect to their Lordships of the Court below, they were, in my respectful view, wrong when they Held that Exhibit Z was a grant of a statutory right of occupancy under the Land Use Act. Section 46(1)(d) relied on by the Court below does not help the conclusion they reached.

Section 46(1) only enjoins the National Council of States to make regulations for the purpose of, among other things, a grant of temporary right of occupancy. It appears no such regulations have been made. It does not authorize the granting of a temporary right of occupancy as their Lordships erroneously, with respect, held. (P. 406 E)

***Land Use Act (Validation of Certain Laws) Act Cap. 203***

4. The Court below also predicated its finding on Exhibit Z on Section 1(2) (b) of the Land Use Act (Validation of Certain Laws etc.) Act, Cap 203. This is clearly wrong because the purpose of that Act was only to validate Laws, subsidiary legislation etc., made by a Military Administrator or former Military Governor etc. between 29th March 1978 when the Land Use Act came into force and 30th September 1979. Exhibit Z was issued on the 10th June 1983 outside the period covered by the Act. The Act can, therefore, not apply. (P. 406 G)

***Licence - Is revocable at any time***

5. As a bare or simple licence is revocable by the licensor at any time, the 1st Defendant would have no remedy against either the Plaintiff or the other Defendants. The fact that notice was not given to the 1st Defendant before the grant to the Plaintiff would not affect the validity of the grant to the Plaintiff. The case of *Ogunleve v. Oni* (1990) 2 NWLR 745 at 784 cited by their Lordships of the Court below is just not apposite to the facts of the case here since I have held above that Exhibit Z was not a grant but a licence. (P. 407 B)

***Revocation of plaintiff's right of occupancy***

6. The revocation of Plaintiff's statutory right of occupancy in June 1986 was clearly invalid as it was not made within the purview of section 28 of the Act and as there was no mistake of fact made when the grant was made to him in January of that year: See - *Saude v. Abdullahi* (supra). The Court below found an error was made when a grant was made to Plaintiff in January. But this finding, as it was based on the view that Exhibit Z was a grant rather than a licence, was erroneous. (P. 407 E)

**NOTABLE POINTS OF INTEREST**

**OGUNDARE JSC**

***1. Licence - What it is***

Is Exhibit Z a licence? What is a licence? The word "licence" is defined in Black's Law Dictionary as meaning:

*“the permission by competent authority to do an act which without such permission would be illegal, a trespass or a tort”*

It is ordinarily considered to be a mere personal or revocable privilege to permit an act or series of acts on the land of another. It is a privilege to go on premises for a certain purpose but does not operate to confer on or vest in the licensee any title, interest or estate in such property. (P. 404 D)

**IGUH JSC**

*2. Temporary right of occupancy cannot amount to a statutory right*

A temporary right of occupancy cannot in my opinion, amount to the same thing, in law, as a statutory right of occupancy. A temporary right of occupancy, as its title implies, is essentially temporary, limited or transient in nature. It amounts to no more than bare licence to occupy land on a temporary, and sometimes, short term basis and generally confers no legal estate in the grantee of such a right. This is unlike a statutory right of occupancy which is clearly not temporary in nature, confers more extensive rights on the holder, is by far superior to a temporary right of occupancy and usually confers on the holder, a legal estate in and over the property in question. Besides unlike a statutory right of occupancy which shall be for a definite term, the duration of a temporary right of occupancy need not be for any fixed duration. (P. 410 A)

*3. Title through a common grantor - Resolution of competing interests*

The principle has long been established that where, as in the present case, there are competing interests by two or more parties claiming title to the same land from a common grantor, the position, both at law and in equity, is that such competing interests will prima facie rank in order of their creation based on the maxim qui prior est tempore potior est jure, which simply means, he who is earlier in time is stronger in law. Of the two competing interests in the present case, Exhibit A was issued on the 29th January, 1986 whilst Exhibit Y was granted on the 19th June, 1986. It seems to me clear in the circumstance that Exhibit A which ranked first in time has definite priority over Exhibit Y and that the appellant therefore has a better title to the land in dispute than the 1st respondent. (P. 411 G)

**H 4. Alienation of land - Subsequent grant is invalid**

In the second place, it cannot be doubted that with Exhibit A being valid title in favour of the appellant, Exhibit Y, which was created subsequently by a common grantor in respect of the same piece or parcel of land cannot be a valid grant. This is because after a party has fully divested himself of

interest in land, no right vests in him to deal with such land by way of further alienation any more. The principle is based on another maxim, to wit, *nemo dat quod non habet* which means that no one can give that which he does not have. Exhibit A having effectively vested statutory right of occupancy in respect of the land in dispute to the appellant on the 29th January, 1986, his grantor cannot subsequently lawfully vest the same B statutory right of occupancy in respect of that same piece of land to the 1st respondent. (P. 412 B)

### **REPRESENTATION**

A. A. Waziri for the Appellant

C

M. E. Oru, for 1st Respondent

No appearance for the 2nd and 3rd Respondents

### **CASES REFERRED TO**

Osinupei v. Saibu (1982) 7 SC. 104

D

Ugo v. Amachukwu (1989) 1 NWLR 566 at 580

Thomas v. Vaughan 330 at 351; 124 ER 1098 at 1109

Saude v. Abdullahi (1989) 4 NWLR 377 at 416

Ogunleye v. Oni (1990) 2 NWLR 745 at 784

Ahmadu Bello University v. Fadinamu Trading Company Ltd. (1975) 1 N.M.L.R. 42

E

Adelaja v. Fanoiki (1990) 2 N.W.L.R. (Part 131) 137 at 151

Barclays Bank Ltd. v. Bind (1954) Ch. 274 at 280

Egbuche v. Chief Idigo 11 N.L.R. 140

Adamo v. Suenu 6 N.L.R. 87

F

Sanyaolu v. Coker (1983) 3 S.C. 124 at 163

### **STATUTES & RULES REFERRED TO**

Constitution of Nigeria 1979 s. 213(3)

Supreme Court Rules O. 6 r. 5(1)

G

Land Use Act Cap. 202 LFN 1990 ss. 5(l)(a) & (b), 8, 46 (1) & (2), 9, 10, 28, 12

Land Use Act (Validation of Certain Laws, etc) Act Cap. 203 s. 1

### **LEAD JUDGMENT BY OGUNDARE JSC**

H

Alhaji Isa Abbaganaram, sometime in May 1983 applied to the Ministry of Land and Survey of Borno State for the grant of a temporary right of occupancy in respect of a piece or parcel of land situate at Maiduguri. After inspection of the said land by officials of the Ministry had shown the

land was vacant, the Permanent Secretary on 10th June 1983 by a letter Reference No. TC/I/22 approved the application and granted Alhaji a temporary right of occupancy over the land. Following the approval of his application Alhaji Isa went on the land, cleared it of woods and shrubs, filled it with sand, connected pipe-borne water to the land and erected a reservoir on it with a view to carrying on a car-wash business on the land. He started the business in 1983. He discontinued with the business sometime in 1984-1985 due to water shortage.

Now Alhaji Uban Kari applied, in 1985, to the Ministry for the grant of a right of occupancy in respect of the said land. By a letter dated 29th January 1986 the Commissioner for Land and Survey granted to him a right of occupancy No. BO 12973 over the land situate along Barna Road in Maiduguri and measuring about 1115 square metres. Alhaji Kari submitted to the Ministry for approval a plan of his proposed building. The plan was approved on 12th February 1986. The plan was demarcated and surveyed by the State's Surveyor-General and a survey plan signed by the said Surveyor-General on 18th March 1986, was produced. Alhaji Kari paid all necessary fees totalling N1,575.10. Alhaji Kari commenced his building operations on the land and completed the first phase which he occupied. By a letter Ref. No. BO/12973/30 dated 17th June 1986 the right of occupancy granted to Alhaji Kari was revoked. Alhaji Kari by letter dated 25th June 1986 protested against the revocation and when it appeared he was going to be displaced he instituted the action leading to this appeal claiming:-

*"1. A declaration that the purported revocation of the Right of Occupancy No. 12973 as contained in the letter Reference No. BO/12973/30 of 17th June, 1986 is null and void.*

*2. An injunction restraining the defendants jointly and severally from taking possession and/or occupying the said land and premises covered by the said Right of Occupancy No. BO/12973.*

*3. General Damages:*

*Alternatively, the plaintiff claims an alternative land and the sum of N55,075.84 being special damages for wrongful revocation of the plaintiff's Right of Occupancy No. BO 12973 granted to him which the second defendant after approbating has again sought to reprobate.*

#### **PARTICULARS**

*(a) Value of improvements already carried out on the land covered by the Right of Occupancy* *N53,000.00*

*(b) Payment made and received by the Government of Borno State in consideration for the grant and for approval of buildings on the said land as shown in*

paragraph 7

1,575.80

(c) Cost of drawing up approved plan

500.00

N55,075.80 total

Meanwhile, Alhaji Isa Abbaganaram had on 24th October 1985 applied for the grant of right of occupancy over the same land. His application was approved on 19th June 1986 and he was given right of occupancy B No. BO/1297 4 over the said land situate along Bama Road and indicated on Maiduguri Sheet 122, it measures 700.38 square meters. He was subsequently given a certificate of occupancy.

Alhaji Isa had by letter dated 21/4/86 protested against the grant of right of occupancy over the said land to Alhaji Kari. The letter resulted in the revocation of Alhaji Kari's right of occupancy and the grant to Alhaji Isa. Alhaji Kari was offered another land in BOTP/106A layout, Maiduguri which he rejected. Alhaji Kari then sued Alhaji Isa Abbaganaram, the Attorney-General of Borno State and the State Commissioner for Land and Survey as defendants.

Pleadings were ordered, filed and exchanged. Alhaji Isa Abbaganaram (hereinafter is referred to as the 1st defendant) filed a counterclaim in which he claimed against Alhaji Uban Kari (hereinafter referred to as the plaintiff), as follows:

*"And the 3rd defendant counter-claim damages*

*1. Improvements already carried out by the 3rd defendant before plaintiff's interference as stated in paragraph 6 above.*

(a) Construction of Water reservoir - N8,500.00

(b) Purchase and installation of pumps - 5,000.00

(c) Clearing of the piece of land - - 1,000.00

N14,500.00

*1. Plaintiff's interference with defendant's*

*business of car wash since 1984* N40,000.00

*2. Rents collected by the plaintiff from tenants who use land for business of*

(a) Mechanic Workshop (b) Food selling N10,000.00

*3. Plaintiff using part of the said land*

*as cooking Gas Depo* N17,000.00

N67,500.00

And the 3rd defendant's claim is N67,500 (sixty seven thousand five hundred Naira).

The actions proceeded to trial at which evidence was led on all sides. After address by learned counsel, the learned trial Chief Judge, Kolo C.J. found:

*"So in the final analysis, I come to the conclusion that the plaintiff has a better title and hence judgment must be entered in his favour and it is hereby entered in favour of the plaintiff. Consequently, I hereby order that the certificate of occupancy issued to the 3rd defendant be revoked as null and void. A certificate of Occupancy in respect of the said land be issued to the plaintiff since he had already completed all the necessary formalities. An alternative plot be granted to the 3rd defendant and in particular the plot which was granted to the plaintiff but the plaintiff declined to accept it is not granted to another person. The 3rd defendant be compensated for pumps he installed and dam he constructed. I direct that a lump-sum of N4,000.00 be paid to the 3rd defendant by the plaintiff as general damages. This N4,000.00 compensation takes care of the counter claim and any other claim. The counter claim and any other claim falls to the ground."*

and adjudged as follows:

*"Judgment for the plaintiff, N4,000.00 to be paid back by the plaintiff to the 3rd defendant as general damages for the development at the land in question. Parties to bear their own costs. No order as to costs."*

Being dissatisfied with the whole judgment the 1st defendant appealed to the Court of Appeal sitting at Jos. The plaintiff, too, was unhappy about the trial Court's order that he should pay N4,000.00 to the 1st defendant as general damages "for the development at the land in question" and cross-appealed to the Court of Appeal. The 1st defendant's appeal was allowed and the following orders were made:-

- "(i) That the appeal is hereby allowed;*
- (ii) That the judgment and orders of the Borno State High Court made on the 27th March, 1990 is hereby set aside;*
- (iii) That in its place the plaintiff's claim is hereby dismissed;*
- (iv) That the grant of the land in dispute No. BO 12973 issued to the plaintiff is hereby set aside;*
- (v) That costs of two hundred and fifty Naira (N250.00) and four hundred and fifty Naira (N450.00) respectively are awarded to the appellant in the Court below and this Court; and*
- (iv) No order as to costs is made against the 2nd and 3rd respondents."*

The plaintiff has now appealed to this Court upon three grounds of appeal which read:

*"(i) The learned Justices of the Court of Appeal Jos Division erred in law when they held inter alia ".....in my view the appellant has acquired a Statutory Right of Occupancy over the land in dispute since 1983 as per Exhibit 'Z' it is a special Statutory Right of Occupancy envis-*



*aged under section 8 of the Land Use Act .....*”

**PARTICULARS OF ERROR**

*(a) The Land Use Act recognises only two ways by which a person can legitimately acquire Statutory Right of Occupancy over land in an Urban Area in Nigeria;*

*These are:-*

**B**

*(i) grant(s) made by the Governor, and*

*(ii) grant(s) deemed to have been made by the Governor under the*

*Act*

*(b) The Land deemed granted are those specified under Section 34(1), (2), (5)(a) and (6) of the Act.*

**C**

*(c) Neither the Land Tenure Law Cap 59 of the Laws of Northern States applicable to Borno State nor the Land Use Act recognises a Temporary Right of Occupancy as a Statutory Right of Occupancy.*

*(ii) The learned Justices of the Court of Appeal erred in law and on facts when they gave effect to the 1st respondent's Temporary Right of Occupancy but nullified the appellant's grant of right.*

**Particulars of Error**

*(a) There was unequivocal evidence on record to the effect that the appellant's grant was withdrawn in bad faith.*

*(b) A letter of grant; of Right of Occupancy has the same effect as E Certificate of Occupancy.*

*(c) The appellant was in exclusive and undisturbed possession of the disputed land before the 1st respondent was issued with his Certificate of Occupancy.*

*(iii) The learned Justices of the Court of Appeal erred on the facts F when they held that the respondent's tenure granted by Exhibit 'Z' still subsisted as at the 1st day of June 1986 when the appellant's grant was made to him.*

**Particulars of Error**

*(a) There was unchallenged evidence on record to the effect that G 1st respondent had abandoned the disputed land for a long time over the same parcel of land.*

*(b) The grant to the 1st respondent vide exhibit 'Z' was a temporary one which by virtue of the Provisions of Section 5(2) of the Land Use Act became extinguished after the grant of the Statutory Right of Occu- H pancy to the appellant.”*

And in his brief of argument he raises the following questions as calling for determination in the appeal:-

*“1. Whether the Court of Appeal is right in holding that the tem-*

*porary right of occupancy granted to the 3rd defendant/appellant is a statutory right of occupancy by virtue of the Land Use Act.*

*2. Whether the Court of Appeal improperly propped up the 3rd defendant's case by taking points of law in his favour suo motu.*

*3. Whether the Court of Appeal is right in holding that revocation of the plaintiff's right of occupancy is lawful and that the case of Saude v. Abdullahi (1989) 4 NWLR (Pt.116) 387 is "clearly relevant and apposite."*

*4. Whether the Court of Appeal is right in holding that the learned trial Judge imported motive and based his decisions on speculation when he held that the plaintiff has a better title to the land*

*5. The appropriate order on the 3rd defendant's counter-claim."*

Perhaps this is a convenient-stage to dispose of two preliminary issues raised by the 1st defendant. First, the 1st defendant, through his counsel, raised a preliminary objection at the oral hearing to the competence of grounds (ii) and (iii) in that the grounds not being of law, the plaintiff required leave of either the Court below or of this Court, by virtue of section 213(3) of the Constitution, to appeal on them.

When learned counsel to the 1st defendant's attention was drawn to the record of appeal which showed that leave of this Court to appeal was sought and obtained on 6th February 1995, he withdrew the objection and this was accordingly struck out.

Learned counsel to the 1st defendant again raised objection, both in the brief and oral argument, to questions (2) - (5). It is argued that these questions do not and cannot arise from the grounds of appeal. Mr. Waziri for the plaintiff, submits that ground (i) covers issues 1 and 2, that ground (ii) covers issues 3 and 4 and ground (iii) covers issues 1,2 and 5. I have examined the questions formulated in appellant's brief in the light of three grounds of appeal contained in the Notice of Appeal. **I must, with respect, disagree with learned counsel for the plaintiff that questions (2) - (5) could be predicated on the three grounds of appeal. Though Order 6 rule 5(1) of the Rules of this Court requires that the brief of the appellant shall contain what are, in the appellant's view, the issues arising in the appeal, that does not mean that the appellant is free to put forward any issue unrelated to the grounds of appeal filed by him. "Issues arising in the appeal" must be issues arising out of the grounds of appeal, for it is only such issues that can arise in the appeal - See Osinupehi v. Saibu (1982) 7 Sc. 104; Ugo v. Obiekwe & Anor. (1989) 1 NWLR (Pt.99) 566 at 580. Consequently, I uphold Mr. Oru's objection and strike out Issues (2) - (5) formulated in the appellant's brief and the arguments thereon. This appeal will now be determined on issue (1) only.**

The 2nd and 3rd defendants did not file any brief of argument nor were they represented by counsel at the oral hearing of the appeal.

I now come to the only issue arising in this appeal and which is the nature of the temporary grant (Exhibit Z) made to the 1st defendant in 1983. Was it a licence as contended by the plaintiff or a right of occupancy as contended by the 1st defendant? The Court below, per Musdapher, J.C.A. B said:

*“Now, the appellant (that is, the 1st defendant) had in Exhibit Z a document giving him a temporary right of occupancy. By virtue of the Land Use Act it was a Statutory Right of Occupancy. See Sections 8 and Section 46(1)(d) of the Land Use Act.”* C

The learned Justice of the Court of Appeal went on to say:

*“In my view, the appellant has acquired a Statutory Right of Occupancy over the land in dispute since 1983 as per Exhibit Z. It is a special statutory Right of Occupancy envisaged under S.8 of the Land Use Act ..... (Words in brackets are mine)* D

It is clear to me, that the appellant's tenure under Exhibit Z still subsisted as at 1/6/86 when the purported grant was made to the 1st respondent/cross appellant. The question is, could there be any valid grant on the same land to the 1st respondent when the appellant was already enjoying the grant under Exhibit Z?” E

It is contended in plaintiff's brief, that Exhibit Z given to the 1st defendant in 1983 did not confer on him a legal estate; it was a licence to occupy the land temporarily for his car washing business. It is submitted that

*“the combined effect of sections 5 and 8 of the Act is to empower F the Governor to grant statutory right of occupancy in the nature of an estate subject to the terms of any special contract. If, as in this case, the grant cannot take effect as a statutory right of occupancy under the Land Use Act because, one of the essential elements, that is to say, the requirement of definite term among other things, is missing, one is driven to the conclusion that the grant is void for not being a statutory right of occu- G pancy under the Act and the Military Governor has no power to grant it.”*

It is further submitted by the plaintiff thus:-

*“However, there is reference to temporary right of occupancy in H section 46(1)(d) of the Act with reference to the body empowered to make regulations applicable to its grant. Similarly Section 46(2)(a) empowers the Governor subject to Subsection (1) to make regulations with regard to the method of application for any licence or permit and the terms and conditions under which licences may be granted. Thus, temporary right of occu-*

pancy and licence or permit are rights recognised by the Land Use Act. On the effect of section 1 (2)(b) of the Land Use Act (Validation) of Certain Laws, etc.) Act, it is argued:-

“the deeming provisions of section 1(2)(b) of the Land Use Act (Validation of Certain Laws Etc.) Act enables the temporary right of occupancy in this case, which is otherwise void, “to have effect according to its tenor and intendment” It is further submitted, with respect, that the Court of Appeal in this case wrongly gave effect to the temporary right of occupancy according to its discretion rather than according to the express wording of the Land Use Act (Validation of Laws Etc.) Act.

After referring to some legal works on licence, it is finally submitted -

“On the basis of the above analysis, statutory provisions and submissions, I respectfully urge upon Your Lordships to hold that the temporary right of occupancy in this case took effect as a bare licence as found by the learned trial Judge and not as a statutory right of occupancy and that accordingly the decision of the learned trial Judge ought to be restored and the judgment of the Court of Appeal reversed.

Mr. Oru, both in the respondent’s brief and in oral argument, submits that a grant of temporary right of occupancy is not a licence but a grant under the land Use Act. It is submitted:

“.....the learned Justices of the Court of Appeal (Jos Division) approached the issue of Temporary Right of Occupancy correctly and came to the correct conclusions on the evidence when they held that Exhibit Z granted to the 1st respondent in 1983 (Temporary Right of Occupancy) was by virtue of the Land Use Act a special statutory Right of Occupancy by virtue of sections 8 and 46(1)(d) of the Land Use Act, 1978 and S.1(2)(b) of Land Use Act (Validation of Certain Laws etc) Act Cap 203 Laws of the Federation 1990.

Submit that S.46(1)(d) of the Land Use Act, 1978 copiously provides for the grant of temporary Rights of Occupancy and the terms and conditions upon which such special contracts may be made or revoked must be followed: See also Sections 8, 9 and 46(1)(a)(b)(c) & (d) of the Land Use Act 1978.”

I will at this stage set out the relevant statutory provisions relied on by the parties and relevant to the resolution of the question now under consideration. Land Use Act Cap 202 Laws of the Federation of Nigeria H 1990. Section 5(1) (a) & (b):

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

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

*(b) to grant easements appurtenant to statutory rights of occupancy;"*

section 8:

"Statutory right of occupancy granted under the provisions of section 5(1)(a) of this Act shall be for a definite term and may be granted subject to the terms of any contract which may be made by the Governor and the holder not being inconsistent with the provisions of this Act"

Section 46(1) and (2):

*"46(1) The National Council of States may make regulations for the purpose of carrying this Act into effect and particularly with regard to the following matters -*

*(a) the transfer by assignment or otherwise howsoever of any rights of occupancy, whether statutory or customary, including the conditions applicable to the transfer of such rights to persons who are not Nigerians;*

*(b) the terms and conditions upon which special contracts may be made under section 8 of this Act;*

*(c) the grant of certificates of occupancy under section 9 of this Act;*

*(d) the grant of temporary rights of occupancy;*

*(e) the method of assessment of compensation for the purposes of section 29 of this Act.*

*(2) The Governor may, subject to subsection (1) of this section make regulations with regard to the following matters -*

*(a) the method of application for any licence or permit and the terms and conditions under which licences may be granted;*

*(b) the procedure to be observed in revising rents;*

*(c) the fees to be paid for any matter or thing done under this Act;*

*(d) the forms to be used for any document or purpose."*

LAND USE ACT (VALIDATION OF CERTAIN LAWS, ETC.) ACT Cap 203 Section 1:

*"1(1) Notwithstanding anything to the contrary in the Land Use Act or any other enactment, all laws and subsidiary legislation made at any time between the commencement of the Land Use Act and 30th September 1979 by a Military Administrator (or former Military Governor), the Executive Council, a Commissioner or any other authority or any public officer of a State shall be deemed to have been validly made and shall have effect as if they had been made under or pursuant to the Land Use Act and accordingly, shall hereafter continue to have effect according to their tenor and intentment as if they were regulations made under or pursuant to section 46 of that Act.*

(2) For the purposes of subsection (1) of this section -

(a) all contracts and all executive and judicial acts, including acts pertaining to the establishment, membership and functions of any Land Use and Allocation Committee or of any other authority or to the appointment of any person, shall be deemed to have been validly entered into or done and shall hereafter continue to have effect as provided in the said subsection; and

(b) any instrument or other evidence relating to the allocation of any land, whether or not expressed to have been made under the Land Use Act, shall be deemed to have been validly issued or given under or pursuant to that Act and shall continue to have effect according to its tenor and intent accordingly.”

It is not in dispute that the land to which Exhibit Z relates is the same or part of the land in respect of which the plaintiff was granted a right of occupancy in January 1986. It is also not in dispute that the land is in an urban area, Maiduguri. Is Exhibit Z a licence? What is a licence? The word “licence” is defined in Black’s Law Dictionary as meaning:

*“the permission by competent authority to do an act which without such permission would be illegal, a trespass or a tort”*

It is ordinarily considered to be a mere personal or revocable privilege to permit an act or series of acts on the land of another. It is a privilege to go on premises for a certain purpose but does not operate to confer on or vest in the licensee any title, interest or estate in such property. As the court put it in *Thomas v. Sorrell*, *Vaughan* 330 at 351; 124 ER 1098 at 1109.

*“a dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful.”*

Exhibit Z reads:

*“Alhaji Isa Gana,  
Abba Ganaram,  
State Low Cost. No. D2,  
Maiduguri.  
Dear Sir,*

**APPLICATION FOR THE GRANT OF TEMPORARY RIGHT OF  
OCCUPANCY**

*With reference to your application dated 24th May, 1983, I am directed to inform you of the approval of a grant of Temporary Right of Occupancy to you in respect of a piece of land on Maiduguri Sheet 122 along Barna Road, at Maiduguri of about 738.35 square metres for the purpose of car wash.*

*I am to add that the grant is hereby made upon the following conditions:-*

*(i) Neither this certificate nor any of the rights conferred by it shall be transferred or assigned to any other person.*

*(ii) Upon receipt or the posting on the said plot of a notice in writing under the hand of the Governor or his agent calling upon you to quit the whole or any part of the said plot of land upon a date specified in such notice, you will quit the whole or part of the land which is the subject of this title in accordance with the requirement of such notice.*

*(iii) The date of commencement of this Temporary Right of Occupancy will be the date of acceptance as signified by you on this letter and C should be within one month of the receipt of this letter by you.*

*Yours faithfully,*

*(Sgd.)*

*(P.D. Nggada)*

*for: Permanent Secretary D*

On the face of it, it is nothing but a bare or simple licence. It is non-transferable and is revocable by the licensor, that is, the Governor at any time.

It has been argued, and this found favour with the Court below, that Exhibit Z created a statutory right of occupancy by virtue of sections 8 E and 46(1) (d) of the Land Use Act. Section 5(1) of the Land Use Act empowers the Governor of a State to grant statutory rights of occupancy to any person. Section 8 of the Act states that such a right shall be for a definite term and may be granted subject to the terms of any contract which may be made by the Governor and the holder, such terms not being inconsistent with the provisions of the Act. F **Could it be said that Exhibit Z come within Section 8 of the Act? The answer must necessarily be in the negative. Having regard to the conditions contained in Exhibit Z, the grant made therein is not for a definite term nor are the conditions those implied in a certificate of occupancy as provided in Sections 9 & 10 of the Act. Furthermore, a right of occupancy under the Land Use Act is not G revocable except as provided in Section 28 of the Act and is alienable on the conditions laid down in sections 21 - 27. But Exhibit Z was revocable at will by the Governor and is non-transferable.**

I am aware that there is mention in section 46(1)( d) of the Act of H “grant of temporary rights of occupancy”. But such a grant can only be the grant provided for in section 12 of the Act which reads:

*“12(1) It shall be lawful for the Governor to grant a licence to any person to enter upon any land which is not the subject of a statutory right*

*of occupancy or of a mining lease, mining right or exclusive prospecting licence granted under the Minerals Acts or any other enactment, and remove or extract therefrom any stone, gravel, clay, sand or other similar substance (not being a mineral within the meaning assigned to that term in the Minerals Act) that may be required for building or for the manufacture of building materials.*

*(2) Any such licence may be granted for such period and subject to such conditions as the Governor may think proper or as may be prescribed.*

*(3) No such license shall be granted in respect of an area exceeding 400 hectares.*

*(4) It shall not be lawful for any licensee to transfer his licence in any manner whatsoever without the consent of the Governor first had and obtained, and any such transfer effected without the consent of the Governor shall be null and void.*

*(5) The Governor may cancel any such licence if the licensee fails to comply with any of the conditions of the licence."*

And the grant in section 12 is specifically referred to as a licence but it is a licence coupled with an interest known as profit a prendre. In my respectful view, Exhibit Z was not issued under the Land Use Act but in exercise of the Governor's common law right over land under his control to grant permission to anyone to do certain things - for example, car wash, on the land without which such person would be liable for trespass or some other tort.

**With profound respect to their Lordships of the Court below, they were, in my respectful view, wrong when they held that Exhibit Z was a grant of a statutory right of occupancy under the Land Use Act. Section 46(1)(d) relied on by the Court below does not help the conclusion they reached. Section 46(1) only enjoins the National Council of States to make regulations for the purpose of, among other things, a grant of temporary right of occupancy. It appears no such regulations have been made. It does not authorise the granting of a temporary right of occupancy as their Lordships erroneously, with respect, held.**

The Court below also predicated its finding on Exhibit Z on Section I(2)(b) of the Land Use Act (Validation of Certain Laws etc.) Act, Cap 203. This is clearly wrong because the purpose of that Act was only to validate Laws, subsidiary legislation etc. made by a Military Administrator or former Military Governor etc. between 29th March when the Land Use Act came into force and 30th September 1979. Exhibit Z was issued on the 10th June 1983 outside the period covered by the Act. The Act can, therefore, not apply.

It is not in dispute that a grant of statutory right of occupancy over



the land in dispute was made to the plaintiff in January 1986. With this grant, 1st defendant's licence was extinguished by virtue of section 5(2) of the Act which reads:

*"Upon the grant of a statutory right of Occupancy under the provisions of sub-section (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."*

See Saude v. Abdullahi (1989) 4 NWLR (Pt.116) 377 at 416. **As a bare or simple licence is revocable by the licensor at any time, the 1st defendant would have no remedy against either the plaintiff or the other defendants. The fact that notice was not given to the 1st defendant before the grant to the plaintiff would not affect the validity of the grant to the plaintiff. The case of Ogunleye v. Oni (1990) 2 NWLR (Pt.135) 745 at 784 cited by their Lordships of the Court below is just not apposite to the facts of the case since I have held above that Exhibit Z was not a grant but a licence.** Lack of notice to the 1st defendant before the grant to the plaintiff might entitle the 1st defendant to a claim for damages against the Governor as licensor, and no more, but I express no definite opinion on this moreso that 1st defendant had suspended his car wash business on the land before that grant.

It is in evidence that the 1st defendant was granted a statutory right of occupancy over the land in dispute in June 1986. That grant in my respectful view, was invalid. **The revocation of plaintiff's statutory right of occupancy in June 1986 was clearly invalid as it was not made within the purview of section 28 of the Act and as there was no mistake of fact made when the grant was made to him in January of that year: see - Saude v. Abdullahi (supra). The court below found an error was made when a grant was made to plaintiff in January. But this finding, as it was based on the view that Exhibit Z was a grant rather than a licence, was erroneous.**

There was evidence that a certificate of occupancy was granted to the 1st defendant and none was granted to the plaintiff before the purported revocation of his own grant. This is of no moment as a certificate is only evidence of a grant - see: section 9(1) of the Act.

From all I have been saying I must answer the only question calling for determination in this appeal in the negative. As the grant to the plaintiff is valid, I must allow this appeal and grant his claims (1) and (2). The alternative claim (3) is dismissed. The order made by the learned trial Judge that N4,000.00 be paid by the plaintiff to the 1st defendant was never asked for by either party. That order is hereby set aside. For the

reasons I have given in this judgment that the grant of statutory right of occupancy to the 1st defendant in June 1986 was invalid, his counter-claim fails and it is dismissed. This appeal is allowed and the judgment of the court below is set aside. I enter judgment for plaintiff in terms of his claims (1) and (2) set out earlier in this judgment and award him N1,000.00 costs of this appeal. N450.00 costs in the Court below and N250.00 costs in the court of trial, making a total of N1,700.00.

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### ***BELGORE JSC***

C Where there is a subsisting right of occupancy, it is good against any other right. The grant of another right of occupancy over the same piece of land will therefore be merely illusory and invalid. The appellant's right of occupancy subsists up to now as it has not been revoked and the wrongful grant to the 1st respondent has no effect whatsoever on its authenticity. This appeal on all the facts before the Courts below has great merit and I allow it by agreeing with the reasons advanced in the judgment of my learned brother, Ogundare, J.S.C. I award N1,000.00 as costs in this appeal, N450.00 in the Court of Appeal and N250.00 as costs at the trial High Court against the respondents. If costs in the Courts below have been paid, they should be refunded to the appellant.

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### ***OGWUEGBU JSC***

F I had the privilege of a preview of the judgment of my learned brother Ogundare, J.S.C. For the reasons stated therein, I agree that the appeal should be allowed and I hereby allow it. I abide by the consequential orders made in the lead judgment including the order as to costs.

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### ***ONU JSC***

G Having before now had a preview of the judgment of my learned brother Ogundare, J.S.C. just delivered, I am in complete agreement with his reasoning and conclusion that this appeal be and is hereby allowed. I make the same consequential orders inclusive of those as to costs contained therein.

**IGUH JSC**

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree entirely that there is merit in this appeal.

On the unchallenged evidence before the trial Court, the appellant's grant of a statutory right of occupancy No. BO/12973 in respect of the land in dispute, Exhibit A, was issued to him by the Government of Borno State on the 29th January, 1986. This was after the 1st respondent, who was previously on the land by virtue of a temporary right of occupancy granted to him on the 10th day of June 1983, Exhibit Z, had discontinued his car-washing business on the land. The 1st respondent was granted the said temporary right of occupancy for the purpose of running a car-washing business. It was a licence to occupy the land temporarily for his said car washing business. As per the condition of the grant, he was not supposed to erect any permanent structure on the land. Indeed, the learned trial Chief Judge found that he erected no such permanent structure thereon. D

It would appear that after the 1st respondent abandoned his business of car washing for which he was granted the temporary right of occupancy, the appellant moved into the land and erected a food canteen thereon. The appellant remained on the land until the 29th January, 1986 when, on his application, the said statutory right of Occupancy, Exhibit A, was granted to him. Thereafter the 1st respondent complained against this grant of Exhibit A to the appellant. It was as a result of this complaint that Exhibit Y, another grant of a statutory right of occupancy No. BO/12974 dated the 19th June, 1986 was issued to the 1st respondent by the same Governor of Borno State. A Certificate of Occupancy dated the 14th July, 1986, Exhibit X, was duly issued to him. It is clear that the real issue for determination in this case is which of these competing rights conveyed a better title to the said land in dispute.

There is however the 1st respondent's temporary right of occupancy, Exhibit Z. This, too, had been granted to him in respect of the same piece of land on the 10th June, 1983. It was the view of the Court of Appeal that the said temporary right of occupancy, Exhibit Z, was in no way different from a statutory right of occupancy. Said the court -

*"Now, the appellant had in Exhibit Z, a document giving him a temporary right of occupancy. By virtue of the Land Use Act, it was a Statutory Right of Occupancy. See Section 8 and Section 46(1) of the Land Use Act. In my view, the fact that appellant had discontinued the business of car washing on the land, without more, could not be deemed*

*that he had surrendered his tenure. Indeed, there was no evidence whatever that his Statutory Right of Occupancy has been revoked or withdrawn”*

With the greatest respect to the court below, I find it difficult to accept this proposition of law as well founded. A temporary right of occupancy cannot in my opinion, amount to the same thing, in law, as a statutory right of occupancy. A temporary right of occupancy, as its title implies, is essentially temporary, limited or transient in nature. It amounts to no more than a bare licence to occupy land on a temporary, and some times, short term basis and generally confers no legal state in the grantee of such a right. This is unlike a statutory right of occupancy which is clearly not temporary in nature, confers more extensive rights on the holder, is by far superior to a temporary right of occupancy and usually confers on the holder, a legal estate in and over the property in question. Besides, unlike a statutory right of occupancy which shall be for a definite term, the duration of a temporary right of occupancy need not be for any fixed duration.

The Court of Appeal in holding that a temporary right of occupancy is synonymous with a statutory right of occupancy referred to the provisions of sections 8 and 46(1)( d) of the Land Use Act, 1978 as its authority. Section 8 of the Land Use Act provides as follows-

*“8. Statutory right of occupancy granted under the provision of section 5(1)(a) of this Act shall be for a definite term and may be granted subject to the terms of any contract which may be made by the Governor and the holder not being inconsistent with the provisions of this Act.”*

And section 46(1)(d) runs thus -

*“46(1) The National Council of States may make regulations for the purpose of carrying this Act into effect and particularly with regard to the following matters -*

- (a) .....*
- (b) .....*
- (c) .....*
- (d) the grant of temporary rights of occupancy;*
- (e) .....*”

With profound respect, I cannot see how either of Sections 8 or 46( 1) (d) of the Land Use Act is able to raise a mere temporary right of occupancy to the status of a statutory right of occupancy. I therefore think that the court below slipped into a serious error when it held that Exhibit Z issued on the 10thlune, 1983 ranked at par in status with a statutory right of occupancy and that the grant being first in time, the 1st respondent had a better title to the land in dispute than the appellant. Exhibit A, being a grant of a statutory right of occupancy and having conferred a legal estate

on the appellant is, without doubt, a better title and is superior to a bare licence, Exhibit Z.

In this regard, attention must be drawn to Section 5(2) of the Land Use Act, 1978 which provides thus:-

*“Upon the grant of a statutory right of occupancy under the provisions 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,”*

(Italics supplied for emphasis)

It seems to me plain under the provisions of Section 5(2) of the Land Use Act, 1978 that upon the grant of a valid statutory right of occupancy in respect of a piece or parcel of land by a State Governor, all other existing rights, if any, to the use and occupation of the same piece or parcel of land shall be deemed extinguished. Accordingly, Exhibit Z, which is no more than a mere licence and only conferred on the 1st respondent, the temporary right to the use and occupation of the land in issue, became automatically extinguished by operation of the said section 5(2) of the Land Use Act the moment the statutory right of occupancy, Exhibit A, was issued to the appellant on the 29th January, 1986 in respect of the same piece or parcel of land. Exhibit Z is therefore of no evidential significance in the present case.

The position, as I see it, is that both the appellant and the 1st respondent claimed and traced their title to the land in dispute to a common grantor, namely, the Borno State Government. These claims they made by the statutory rights of occupancy, Exhibits A and Y respectively. The validity of Exhibit A issued on the 29th January, 1986 was not successfully challenged before the courts below. Indeed the trial court pronounced it valid and lawfully issued. The court below was only prepared to hold, quite wrongly, that the temporary right of occupancy, Exhibit Z, ranked in law as a statutory right of occupancy. It then proceeded to conclude that being *fii*”stin time, Exhibit Z constituted a better title than Exhibit A. But as I have mentioned, Exhibit Z is by far inferior to Exhibit A and was extinguished the moment Exhibit A was issued.

The principle has long been established that where, as in the present case, there are competing interests by two or more parties claiming title to the same land from a common grantor, the position, both at law and in equity, is that such competing interests will *prima facie* rank in order of their creation based on the maxim *qui prior est tempore potior est jure*, which simply means, he who is earlier in time is stronger in law. See *Ahmadu Bello University v. Fadinamu Trading Co. Ltd. and Another* (1975) 1 NMLR

42; Ahiodun Adelaja v. Olatunde Fanoiki and Another (1990) 2 NWLR (Pt. 131) 137 at 151; Barclays Bank Ltd. v. Bird (1954) Ch. 274 at 280. Of the two competing interests in the present case, Exhibit A was issued on the 29th January, 1986 whilst Exhibit Y was granted on the 19th June, 1986. It seems to me clear in the B circumstance that Exhibit A which ranked first in time has definite priority over Exhibit Y and that the appellant therefore has a better title to the land in dispute than the 1st respondent.

In the second place, it cannot be doubted that with Exhibit A being valid title in favour of the appellant, Exhibit Y, which was created C subsequently by a common grantor in respect of the same piece or parcel of land cannot be a valid grant. This is because after a party has fully divested himself of interest in land, no right vests in him to deal with such land by way of further alienation any more. See Okafor Egbuche v. Chief Idigo (1934) 11 NLR 140, Adamu Akeju and Another v. Chief Suenu and D others (1925) 6 NLR 87, Sanyaolu v. Coker (1983) 3 Sc. 124 at 163; (1983) 1 SCNLR 168; Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566 etc. The principle is based on another maxim, to wit, *nemo dat quod non habet* which means that no one can give that which he does not have. Exhibit A having effectively vested statutory right of occupancy in respect of the land E in dispute to the appellant on the 29th January, 1986, his grantor cannot subsequently lawfully vest the same statutory right of occupancy in respect of that same piece of land to the 1st respondent.

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Ogundare, J.S.C. that I too, allow F this appeal and set aside the judgment of the Court below. The decision of the trial court is hereby restored. I abide by the consequential orders including those as to costs contained in the leading judgment.

Appeal allowed

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