

**SUPREME COURT OF NIGERIA**  
23RD APRIL, 1999. SC. 163/1992  
**CORAM:- A. B. WALI, I. L. KUTIGI, A. I. IGUH, S. O.**  
**UWAIFO, E. O. AYoola, JJSC.**

ALHAJI ABDUL-SALAMI TENIOLA & 5 ORS. .... APPELLANTS  
AND  
ALHAJI MUSTAPHA OLOHUNKUN ..... RESPONDENT

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***LAND LAW** - Conveyance - Of family land - By the head of the family  
- What is material is the capacity in which the Vendor dealt with the land  
- Rather than the knowledge of the Purchaser as to the status of the land.*

***LAND LAW** - Right of occupancy - Deemed holder - Under s. 36 (2) of  
the Land Use Act - A trespasser cannot claim to be holder of land - For  
the purpose of s. 36(2).*

***LAND LAW** - Right of occupancy - Setting aside the grant - Facts which  
may justify the setting aside of a grant - Cannot be used as a defence in  
an action for trespass - When the grant had not been set aside.*

***LAND LAW** - Rights of occupancy - Validity of the grants - A Party who  
challenges the validity of a grant - Should take steps to have it set aside  
- Rather than behave as if it does not exist.*

***LAND LAW** - Statutory rights of Occupancy - Which were validly granted  
- The Court will not treat the grants as if they have ceased to exist - In  
determining the rights of the Parties.*

***LAND LAW** - Statutory right of occupancy - The grant of it - Freed the  
land from all existing rights to use and occupation.*

***LAND LAW** - Land Tenure Law, 1962 - Distinction - Between customary  
right of occupancy and statutory right of occupancy - Under it.*

**LAND USE ACT** - *Right of occupancy - Deemed holder - Under s. 36 (2) of the Land Use Act - A trespasser cannot claim to be holder of land - For the purpose of s. 36(2).*

**STATUTES** - *Land Tenure Law, 1962 - Distinction - Between customary right of occupancy and statutory right of occupancy - Under it.*

### **FACTS**

The Plaintiff/respondent instituted an action against the defendants/appellants claiming damages for trespass committed by the defendants on his Parcel of land covered by certificates of Occupancy Nos. 13642, 573, 13255 and 10346, and injunction. The plaintiff was at all material times a Petrol dealer and the proprietor of a fuel station situate at Oke-Oyi in Kwara state. The defendants were at all material times farmers resident at Oke-Oyi. The plaintiff acquired the parcels of land subject of the Present action by virtue of sales to him of three Parcels of land, the first by one Towobola, the head of family of the 5th defendants family, another by one Buhari Nnagaji and the third by the Government of the then Northern Nigeria. Upon his application he was issued the aforementioned certificates of occupancy by the Government in respect of the parcels of land. The 5th defendant apparently aggrieved by the plaintiff's occupation of the land purchased from the Government took action against the plaintiff, first in the Upper Area Court, Ilorin and later in the Grade I Area Court, Oke-Oyi respectively in 1968 and 1974, claiming on each occasion, that the land occupied by the plaintiff was his family land. On each occasion, the court dismissed the 5th defendant's case and advised him to seek whatever remedy he might wish to pursue against the Government in the High Court. In the latter of these two cases, the Court was of the opinion that the present plaintiff (then defendant) "had a good title to the land in question and therefore the plaintiff's claim failed". The defendant however resorted to self-help and entered the land; provoking the plaintiff to institute the present action. The defendants contended at the trial that the certificates of Occupancy relied on by the plaintiff, were irregular and unlawfully obtained as the defendants or their

representatives never sold or transferred the land to the plaintiff.

At the conclusion of trial, the learned trial judge dismissed the plaintiff's claim. Dissatisfied, the plaintiff appealed and the Court of Appeal allowed the appeal. Having set aside the judgment of the High Court, the Court of Appeal therefore substituted judgement for the plaintiff and awarded him the reliefs sought. Aggrieved the defendants have now appealed to the Supreme Court. The appeal was determined based on a lone issue.

**ISSUE FOR DETERMINATION**

*Whether the rights of occupancy on which the plaintiff relied were sufficient to give him that right to be in undisturbed occupation of the land which is the essence of his claim in trespass and which was found by the Court of Appeal.*

**HELD** (Unanimously dismissing the appeal per lead judgment of **AYOOLA JSC**)

***Land Law - Conveyance***

1. It is appropriate to interpose in this narration of the events, and I venture to think, that when family land is sold by the head of the family what is important and material is the capacity in which the vendor dealt with the land rather than the knowledge of the purchaser as to the status of the land as personal or family land. Where the head of family sells family land as such, but the purchaser did not know at the time that it was family land, that should not make the sale void. The position is different where the vendor did intend and did claim to be selling the land as his personal land when he had no title to the land in his own right. (p. 762 F)

***Land Law - Land Tenure Law, 1962***

2. The Land Tenure Law, 1962 (Law No. 25 of 1962) ("the Law") which repealed and replaced the Ordinance, came into operation on October 1, 1962. Section 2 of the Law brought out more clearly the distinction between "customary right of Occupancy" which was defined as meaning: "the title of a native or native community using or occupying native

land in accordance with native law and custom. "; and "statutory right of occupancy" which was defined as meaning " a right of occupancy granted under the provisions of section 6 or of any written law replaced by the Law whether by the Governor or the Minister or by any public officer or B native authority duly authorised and empowered in that behalf."(p.765 H)

***Land Law - Statutory right of occupancy***

3. Thus, by virtue of the provisions of the Law, the grant of statutory C right of occupancy freed the land from all existing rights to use and occupation of the land with the consequence that the only rights to use and occupation of the land recognised by law are those created by the grant of the statutory right of occupancy. Upon the grant of a statutory D right of occupancy under the Law, there can only be one "occupier" recognised by the law, and that is the person holding the statutory right of occupancy. He is the person who by virtue of section 19 of the Law "shall have exclusive rights to the land the subject of the right of occu- E pancy against all persons than the Minister." The scheme of the Law, and, indeed, of the Ordinance which it replaced, neither envisaged nor provided for a statutory right of occupancy to exist with a customary right of occupancy over the same land. (p. 766 E)

F ***Land Law - Right of Occupancy - Deemed holder***

4. The argument that the Certificates of Occupancy relied on by the plaintiff are invalid, is erroneously predicated on assumed existence of a right of occupancy deemed held by the defendants. The submission, trenchantly put forward as the pillar of the defendants' case on this ap- G peal, that "having regard to section 36 (2) of the Land use Act, Exhibits 3, 6, and 9 cannot be valid since there is evidence that the customary land owners (the appellants) were in possession before the passing of the Act and are deemed to have the customary right of occupancy." , is also H erroneous. The submission is neither supported by the law nor by the facts. In the face of the previous actions instituted by the 5th defendant, first in 1968 and secondly in 1974, in which he complained that the plaintiff was occupying and using the land of his father, and the fact that

the Court of Appeal upheld the plaintiff's case that the defendants trespassed on the land and adjudged them trespassers liable to pay damages to the plaintiff, it is difficult to see what evidence of possession there was in the case in favour of the defendants. The findings of possession and trespass made by the Court of Appeal have not been challenged on this appeal. A trespasser cannot claim to be occupier or holder of land for the purpose of section 36 (2) of the Act. (p. 768 G)

***Statutory right of occupancy - Which was validly made***

5. In my judgment, the grants of statutory rights of occupancy on which the plaintiff relies are potent to vest the land in him. It was erroneous argue, as counsel for the appellant had tried to do, that it was the transaction of sale alleged by the plaintiff that vested the land in him, whereas, as has been seen, the land became vested in him by virtue of grants of statutory rights of occupancy which still subsist and have not been set aside. The plaintiff being, indisputably, the holder of statutory rights of occupancy in respect of the land, and being in use and occupation thereof at the time of the tortious entry thereon by the defendants, it is difficult to see how the facts relied on by the defendants could have been of any avail to them. The grants to the plaintiff were made in exercise of statutory power vested in the Governor or, as the case may be, in the Minister. Where in the exercise of statutory power, grants of statutory rights of occupancy have been made, without want of authority or capacity, the court will not treat the grants as if they have not been made and proceed to determine the rights of the parties as if those grants have ceased to be in existence. (p. 769 D)

***Right of occupancy - Setting aside the grant***

6. There may be circumstances in which there are facts which, if established by evidence, may justify the exercise of the court's discretion to set aside a grant of right of occupancy. A party cannot, however, rely on such facts as justification for entering on land, subject of the grant, against the wish of the holder, while the grant subsisted and had not been set aside. The facts which may justify the setting aside of a grant of right of

occupancy cannot be used as defence in an action in trespass when the grant which vested exclusive possession in the holder had not itself been set aside. The proper thing to do is to advance those facts in an action to set aside the grant. (p. 769 H)

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***Rights of occupancy - Validity of the grants***

7. In my judgment, the plaintiff's counsel was right in his submissions that the judgment of the Court of Appeal should be affirmed since the rights of occupancy granted to the plaintiff have not been revoked and there has been no action to have them set aside. The requirement that a party who challenges the validity of a grant to statutory right of occupancy should take steps to set such aside, rather than ignore it and behave as if it does not exist, is by no means a mere technicality. (p. 770 B)

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**NOTABLE POINTS OF INTEREST**

**UWAIFO.JSC**

*1. Validity of a certificate of occupancy*

It is important to emphasize that a certificate of occupancy is presumed valid until it is found to have been improperly issued and then revoked or declared void. One of the reasons for holding that there has been an improper issuance of such certificate is where another person's right in the land was subsisting at the time the certificate of occupancy was issued. (p. 772 F)

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*2. Exercise of the power under s. 5(2) of the Land Use Act.*

I am not unaware of the provision of section 5 of the Lands Use Act 1978, but I cannot overlook the immense hardship, and perhaps instability socially, which subsection (2) thereof may create if the power under it was exercised without regard to its consequences. For instance, it must be a matter for concern whether a later grant may (capriciously) undermine and thereby impliedly revoke an earlier grant for which no compensation may be paid for any development undertaken on the basis of the grant since that subsection provides that:

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*"(2) 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 subject of the statutory right of occupancy shall be extinguished."*

I believe that section must, in appropriate circumstances, be read along with section 28 which deals with the power of the Governor to revoke rights of occupancy [which rights of occupancy include, in my opinion, deemed rights of occupancy derived under sections 34(2) and 36(4) ] and its effect made to be so confined to situations for making a revocation, which must recognise existing rights, in order not to needlessly defeat an earlier grant. It is only then the issue of compensation shall fairly and properly arise by virtue of sections 29, 30 and 35 of the act. It seems reasonable to say that revocation ought to precede section 5(2) where there is a subsisting prior interest. I think I should say I realise that the views expressed, obiter, in Saude v Abdullahi (1989) 1 NWLR (pt. 116) 387 at 416 and in Abioye v Yakubu (1991) 5 NWLR (pt. 190) 130 at 225 by Obaseki JSC tend to the contrary, or do not appear to take account of those considerations. (p. 774 A)

### **REPRESENTATION**

George Alao for the appellants

A.O. Adeledun Esq. with S. B. Sambo for the respondent.

### **CASES REFERRED TO**

Akande v. Kelere 1966 N.N.L.R. 113

Saude v. Abdullahi (1989)1 N.W.L.R. (Part 116)

Gankon v. Ugochukwu Chemical Industries Ltd. (1993) 6 N.W.L.R. (Part 297) 55

The Registered Trustees, Apostolic Church v Olowoleni (1990) 6 NWLR (pt. 158) 514

Ogunleye v Oni (1990) 2 NWLR (pt. 135) 745 at 784

Saude v Abdullahi (1989) 1 NWLR (pt. 116) 387 at 416

Abioye v Yakubu (1991) 5 NWLR (pt. 190) 130 at 225

**STATUTES & RULES REFERRED TO**

Land and Native Right Ordinance, Cap 105 Laws of Nigeria, 1948; ss. 4, 6, 9, 17 and 18

Land Tenure Law No 25 of 1962 Laws of Northern Nigeria; ss. 2, 6 and 19

Land Use Act, Cap 202 Laws of the Federation of Nigeria, 1990; ss 5(2), 28, 34 and 36

**LEAD JUDGMENT BY AYOOLA JSC**

C To put the issues in this appeal in their proper perspective, the events that led to the appeal need to be briefly stated. The respondent, who was plaintiff in the High Court and is so referred to in this judgment, was at all material times a petrol dealer and the proprietor of a fuel station  
D situate at Oke-Oyi in Kwara State. The appellants, who were defendants in the High Court and are so referred to in this judgment, were at all material times farmers resident at Oke-Oyi. Sometime in 1959, the plaintiff, desirous of building a petrol station and believing that he had pur-  
E chased a parcel of land for that purpose from the owners, applied for and obtained a Certificate of Customary Land Tenure over the land from the Emir of Ilorin, Alhaji Sulu Gambari. Thereafter, he applied to the Government of the then Northern Region of Nigeria for and obtained a grant  
F of right of occupancy and was issued a Certificate of Occupancy dated March 4, 1992 in respect of the land. The right of occupancy granted him was for a an indefinite term from fourteenth day of June, 1961. The Certificate of Occupancy is No. 102346. The plaintiff did not build the petrol station on the land covered by the Certificate of Occupancy be-  
G cause it was then occupied by Balfour Beatty & Company Ltd. under a Temporary Certificate of Occupancy.

The plaintiff then brought another parcel of land on which built a petrol station. That parcel of land is covered by a Certificate of Occu-  
H pancy No. 13255 dated 24th August, 1967 which shows that he was entitled to a right of occupancy over the land for a term of 99 years from the thirteenth day of December, 1965.

The third acquisition of property in the neighbourhood by the

plaintiff came about when, Costain (W. A) Ltd. having left the land on which it had built some houses, the plaintiff purchased the houses left by that company on the land from the Government and obtained two Certificates of Occupancy Nos 13642 and 573 dated 28th February, 1967 and 31st July 1970 respectively.

Apparently, aggrieved by the plaintiff's occupation of the land covered by the last two Certificate of Occupancy mentioned above, the 5th defendant took action against the plaintiff, first in the Upper Area Court, Ilorin and later in the Grade 1 Area Court, Oke-Oyi, respectively in 1968 and 1974, claiming, on each occasion, that the land occupied by the plaintiff was his family land. On each occasion, the court dismissed the 5th defendant's case and advised him to seek whatever remedy he might wish to pursue against the Government in the High Court. In the latter of these two cases, the court was of the opinion that the present plaintiff (then defendant) "had a good title to the land in question and therefore the plaintiff's claim failed."

It would appear that rather than allow wise counsel to prevail in line with the opinion of the two courts, the defendant resorted to self-help and entered the land; thereby provoking the action that led to this appeal. The plaintiff's claim in the High Court was for damages for trespass committed by the defendants "on his parcel of land ..... covered by Certificate of Occupancy Nos 13642, 573, 13255 and 10346" and injunction.

At the trial, although the plaintiff made reference to the transactions of sale to him of three parcels of land, namely: one by one Towobola, the head of family of the 5th defendant's family, another by one Buhari Magaji and the third by the Government of Northern Nigeria, it is evident that he relied for the right he claimed, on grants to him by the Government of rights of occupancy as witnessed by the Certificate of Occupancy issued to him. The defendants, on the other hand, contended that the Certificates of Occupancy (nos. 10346, 13642 and 573), relied on by the plaintiff, were "irregular and unlawfully obtained as the defendants or their representatives never sold or transferred any land to the plaintiff." It may well be noted that the defendants laid no claim to any inter-

est in the land covered by Certificate of Occupancy No. 13255 on which the plaintiff had built his petrol station.

The learned trial judge being of the view that the plaintiff's case hinged on the three documents admitted in evidence as exhibits 1,2 and 3, proceeded to consider those exhibits and came to the conclusion that they were void. Exhibit 1 was a document titled " Land Agreement" whereby one Mr. Towobola declared that he had transferred land to the plaintiff on 4th November, 1959. Exhibit 2 was a certificate of Customary Land Tenure issued by the Emir of Ilorin to the plaintiff in January 1960 and which the plaintiff said was in respect of land mentioned in exhibit 1. Exhibit 3 is the Certificate of Occupancy No. 10346 already referred to in this judgment. The trial judge came to the conclusion that the three exhibits were void on the sole, and, I dare say doubtful, ground that the plaintiff when he was buying the land did not know that it was family land. However, from a careful reading of the judgment of the trial judge, it is clear that he found that Towobola sold the land to the plaintiff, that he was head of the family which owned the land, and that the sale would have been valid had it been ratified by the principal members of the family. In the event, he held that since the transaction was void, the defendants could not have been trespassers because they were dealing with their family land and dismissed the plaintiff's claim. What, in the opinion of the trial judge, made the sale a nullity was that the plaintiff did say that he did not know that it was family land when he was buying the land. It may well be observed that there was no evidence that Towobola claimed to have been selling the land as his personal land. **It is appropriate to interpose in this narration of the events, and I venture to think, that when family land is sold by the head of the family what is important and material is the capacity in which the vendor dealt with the land rather than the knowledge of the purchaser as to the status of the land as personal or family land. Where the head of family sells family land as such, but the purchaser did not know at the time that it was family land, that should not make the sale void. The position is different where the vendor did intend and did claim to be selling the land as his personal land when he had no**

**title to the land in his own right.**

The plaintiff's appeal to the Court of Appeal from the decision of the High Court of Kwara State was allowed. Having set aside the judgment of the High Court, the Court of Appeal substituted therefore judgment for the plaintiff, awarded him damages for trespass and ordered injunction as sought against the defendants. It is apt to note that the Court of Appeal did not share the opinion of the High Court that the transaction of sale alleged by the plaintiff, culminating in exhibits 1 and 2, was a nullity, Ogundare, J.C.A who delivered the leading judgment of the court below with which Uthman Mohammed, JCA, as he then was, and Okunola, JCA, concurred, was of the view that:

*"If one or both exhibits 1 and 2 were admissible evidence of Yoruba estate contract, since there was evidence at the trial that Towobola was head of the family of Ile Bale Ode Oke Oyi Oja, the sale would have been voidable as the hands of principal members of that family are not in it. In which case, that family would have been under obligation to bring an action to annul it, or having been sued by the plaintiff, the defendant family should have counter-claimed for its annulment, which was not the case here."*

It is evident that, in substance, Ogundare, JCA dwelt more on the evidential value of exhibits 1 and 2 and came to the conclusion that those two exhibit could not be evidence of sale of land under Yoruba Customary Law. However, the Court of Appeal held that the Certificate of Occupancy, exhibit 3, was valid. That court also held that the Certificate of Occupancy, exhibits 6,9 and 10, relied on by the plaintiff were valid and did confer rights of occupancy of the plaintiff.

On this appeal, from the decision of the Court of Appeal, the main complaint and, indeed, the substance of the defendants' appeal is that the Court of Appeal should not have held that the Certificates of Occupancy relied on by the plaintiff were valid. The grounds of the invalidity of those certificates urged by counsel for the defendants, H summarised, are:-

(i) that government having acquired the land covered by exhibits 9 and 10 for public purposes, the land ought to have been returned to the

defendants' family when it was no more needed for the public purposes for which it was acquired, and not sold to a private person;

(ii) that " the effect of the Land Use Act is now to recognise the customary land owners as the persons entitled to statutory right of occupancy and the Certificate of Occupancy issued to the respondent is (sic) therefore ineffective to pass title to the Respondent", because, having regard to section 36(2) of the Land Use Act, Exhibits 3, 6, and 9 cannot be valid since there is evidence that the customary land owners (the appellants) were in possession before passing of the Act and are deemed to have customary right of occupancy;

(iii) Since the transaction which vested the land is void and the Court of Appeal declared so, there is nothing on which the Certificate of Occupancy, Exhibit 3, could be premised and the issuing by the Local Authority of Certificate Occupancy was, therefore, improper and the same should have been declared null and void by the Court of Appeal, more so since the defendants were the landowners in possession before the passing of the Land Use Act and by the provision of section 36(2) of the Act they are deemed to have the Customary Right of Occupancy.

The core of the plaintiff's counsel's submission, admirably summarised in the conclusions in the respondent's brief of argument, even now much more succinctly stated without doing any justice to its weight, is that the plaintiff's claim having based on the Certificates of Occupancy, exhibits 3,6, 9 and 10, which have not been revoked and which had not been challenged by any counter-claim, the judgment of the court below should be affirmed. Leaving aside, for a moment, some peripheral issues raised in the appeal, such as whether the Court of Appeal was right to have used a letter written to the defendants by the Minister of Land, exhibit 14, " to validate Exhibits 9 and 10" and whether the judgments in the previous action instituted by the 5th defendant operated as estoppel, I turn, straight away, to a consideration of the issue that is decisive of the appeal which is, whether the rights of occupancy on which the plaintiff relied were sufficient to give him that right to be in undisturbed occupation of the land which is the essence of his claim in trespass and which was found by the Court of Appeal.

Although much issue was made, by the trial judge and by counsel for the defendants, on this appeal, of the question of the validity, or otherwise, of the sale by the family of the 5th defendant of part of the land to the plaintiff, and the Court of Appeal ruled that the documents, exhibits 1 and 2, had no value and were inadmissible, it seems evidence B to me that the appeal falls to be determined on the efficacy of the grant of statutory rights of occupancy to extinguish all right to use and occupation existing on the land prior to such grant.

In this regard, three statutes whose provisions call for consideration are the Land and Native Rights Ordinance Cap 105 Laws of Nigeria, 1948, ("the Ordinance"); the Land Tenure Law, 1962, No. 25 of 1962 (Laws of Northern Nigeria, 1962) ("the Law"); and the Land use Act, (Cap 202 Laws of the Federation of Nigeria, 1990) ("the Act". The plaintiff had a grant of right of occupancy of part of the land pursuant to D section 6 of that Ordinance as witnessed by the Certificate of Occupancy, exhibit 3. Section 4 of the Ordinance having declared all native lands and all rights over the same to be under the control and subject to the disposition of the Governor, provided that "no title to the occupation E and use of such land shall be valid without the consent of the Governor ." Section 6(a) of the Ordinance empowered the Governor to grant rights of occupancy to natives and to non-natives either for definite or for indefinite terms, while section 17(1) of the Ordinance empowered the F Governor to issue certificates of occupancy. One of the implied conditions in such certificate was as provided by section 18(1) of the Ordinance: "That the occupier binds himself to the Governor to pay compensation for any damage caused to native individuals or communities in the exercise of the rights granted to him, and to accept the ruling of the G Governor as to the amount of such compensation." Section 9 of the Ordinance provided that: "..... the occupier shall have exclusive rights to the land the subject of the right of occupancy against all persons other than the Governor." H

**The Land Tenure Law, 1962 (Law No. 25 of 1962) ("the Law") which repealed and replaced the Ordinance, came into operation on October 1, 1962. Section 2 of the Law brought out more clearly the**

distinction between "customary right of Occupancy" which was defined as meaning: "the title of a native or native community using or occupying native land in accordance with native law and custom."; and "statutory right of occupancy" which was defined as meaning " a right of occupancy granted under the provisions of section 6 or of any written law replaced by the Law whether by the Governor or the Minister or by any public officer or native authority duly authorised and empowered in that behalf." The right of occupancy witnessed by the Certificate of occupancy, exhibit 3, having been granted under the provisions of the Ordinance was, by virtue of section 6 of the Law, a statutory right of occupancy. The rights of occupancy witnessed by the certificates, exhibit 6, 9 and 10 being granted under the provisions of section 6 of the Law were also, by virtue of section 2 of the Law, statutory rights of occupancy. Section 6(I) of the Law empowered the Minister to grant rights of occupancy to "natives" and "non-natives" and sub-section 3 of section 6 of that Law provided that: "Upon the grant of a right of occupancy under the provisions of subsection (1) all existing rights to the use and occupation of land which is the subject of the right of occupancy shall be extinguished." Thus, by virtue of the provisions of the Law, the grant of statutory right of occupancy freed the land from all existing rights to use and occupation of the land with the consequence that the only rights to use and occupation of the land recognised by law are those created by the grant of the statutory right of occupancy. Upon the grant of a statutory right of occupancy under the Law, there can only be one "occupier" recognised by the law, and that is the person holding the statutory right of occupancy. He is the person who by virtue of section 19 of the Law "shall have exclusive rights to the land the subject of the right of occupancy against all persons than the Minister." The scheme of the Law, and, indeed, of the Ordinance which it replaced, neither envisaged nor provided for a statutory right of occupancy to exist with a customary right of occupancy over the same land. In the case of Akande v. Kelere 1966 N.N.L.R. 113, Bello, J., as he then was, accepted the argument that the combined effect of

section 6(3) and section 19 of the Law was to divest the previous holder of a customary right of occupancy of his rights and vest them in the holder of a statutory right of occupancy. In the case of Saude v. Abdullahi (1989)1 N.W.L.R. (Part116) 387 Obaseki, J.S.C. commenting on section 5(2) of the Land Use Act which was substantially in pair materia with section 6(3) of the Law described section 5 (2) of the Land use Act as creating " a statutory revocation of all existing right on the grant of a statutory right of occupancy." Although the views of Bello, J. (as he then was) and Obaseki. JSC, were obiter dicta, I am of the view that they represent the law, subject to the qualification that the provisions of section 6(3) of the Law and section 5(2) of the Act would not preclude the court from setting aside the grant to a statutory right of occupancy in appropriate cases such as for instance, when it had been issued in error or has been obtained by fraud.

The third statute to consider is the Land Use Act. Where, as in the present case, the right which the plaintiff claims over the land in question is founded on grants of statutory rights of occupancy made under the statutes applicable before the Act came into operation, the true path of enquiry is to find in whom the land was vested immediately before the commencement of the Act, that is to say, before 29th March 1978. Where the land is in an urban area, the person in whom the land was vested is, by virtue of section 34 (2), deemed to be the holder of a statutory right of occupancy issued by the Governor under the Act. By virtue of section 36(2) of the Act any occupier of land not in an urban area, "whether under customary rights of otherwise however", shall, if that land was on the commencement of the Act being used for agricultural purposes, continue to be entitled to possession of the land for use as agricultural purposes as if customary right of occupancy has been granted to the occupier or holder thereof by the appropriate Local Government. By virtue of section 36(4), where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of the Act as if the holder was the holder of a customary right of occupancy issued by the Local Government.

In the present case, the defendants had proceeded on the footing

that by virtue of section 36(2) of the Act, their family were deemed occupiers of the land. To my mind, that was an erroneous position to have taken. There is, palpably, a flaw in the argument of counsel for the defendants when he assumed, without any shred of evidence of the designation of the area in which the land is pursuant to section 3 of the Act, that the land had been proved to be in a non-urban area, and submitted that the defendants were the holders of the customary rights of occupancy of the land in dispute and that having retained possession thereof any grant to any person in disregard of the defendants' customary right is invalid. There was nothing to show that section 36(2) of the Act was the applicable transitional provision.

Besides the fact that there has been no evidence of the designation of the area where the land is, an obvious misconception in the argument advanced by counsel on behalf of the defendants, is in regard to the effect of a grant of a statutory right of occupancy under the Law, as under the Act, which is to extinguish all existing rights to the use and occupation of the land. In this regard, in addition to the two cases already referred to in this judgment, reference may as well be made to the case of Gankon v. Ugochukwu Chemical Industries Ltd. (1993) 6 N.W.L.R. (Part 297) 55 where Karibi-whyte, JSC, stated as follows:

*"Mr. Daudu has submitted that an existing customary occupancy must be revoked before a statutory right of occupancy can be valid. This is misreading of section 9 (1) (b) of the Land Use act. A statutory right of occupancy automatically extinguishes all existing rights in respect of the parcel of land over which it is granted - See Titiloye v. Olupo (supra)."*

That passage is, in my opinion, apt for the purpose of the present case.

**The argument that the Certificates of Occupancy relied on by the plaintiff are invalid, is erroneously predicated on assumed existence of a right of occupancy deemed held by the defendants.** The submission, trenchantly put forward as the pillar of the defendants' case on this appeal, that "having regard to section 36 (2) of the Land use Act, Exhibits 3, 6, and 9 cannot be valid since there is evidence that the customary land owners (the appellants) were in

possession before the passing of the Act and are deemed to have the customary right of occupancy." , is also erroneous. The submission is neither supported by the law nor by the facts. In the face of the previous actions instituted by the 5th defendant, first in 1968 and secondly in 1974, in which he complained that the plaintiff was occupying and using the land of his father, and the fact that the Court of Appeal upheld the plaintiff's case that the defendants trespassed on the land and adjudged them trespassers liable to pay damages to the plaintiff, it is difficult to see what evidence of possession there was in the case in favour of the defendants. The findings of possession and trespass made by the Court of Appeal have not been challenged on this appeal. A trespasser cannot claim to be occupier or holder of land for the purpose of section 36 (2) of the Act.

In my judgment, the grants of statutory rights of occupancy on which the plaintiff relies are potent to vest the land in him. It was erroneous argue, as counsel for the appellant had tried to do, that it was the transaction of sale alleged by the plaintiff that vested the land in him, whereas, as has been seen, the land became vested in him by virtue of grants of statutory rights of occupancy which still subsist and have not been set aside. The plaintiff being, indisputably, the holder of statutory rights of occupancy in respect of the land, and being in use and occupation thereof at the time of the tortious entry thereon by the defendants, it is difficult to see how the facts relied on by the defendants could have been of any avail to them. The grants to the plaintiff were made in exercise of statutory power vested in the Governor or, as the case may be, in the Minister. Where in the exercise of statutory power, grants of statutory rights of occupancy have been made, without want of authority or capacity, the court will not treat the grants as if they have not been made and proceed to determine the rights of the parties as if those grants have ceased to be in existence. There may be circumstances in which there are facts which, if established by evidence, may justify the exercise of the court's discretion to set aside

a grant of right of occupancy. A party cannot, however, rely on such facts as justification for entering on land, subject of the grant, against the wish of the holder, while the grant subsisted and had not been set aside. The facts which may justify the setting aside of a grant of right of occupancy cannot be used as defence in an action in trespass when the grant which vested exclusive possession in the holder had not itself been set aside. The proper thing to do is to advance those facts in an action to set aside the grant.

In my judgment, the plaintiff's counsel was right in his submissions that the judgment of the Court of Appeal should be affirmed since the rights of occupancy granted to the plaintiff have not been revoked and there has been no action to have them set aside. The requirement that a party who challenges the validity of a grant to statutory right of occupancy should take steps to set such aside, rather than ignore it and behave as if it does not exist, is by no means a mere technicality. A party who seeks the intervention of the court to set aside a grant of statutory right of occupancy may not necessarily obtain relief where there are circumstances precluding relief, such as, the conduct of the party and unreasonable delay in seeking a remedy. An action to set aside a grant affords the defendant in such an action an opportunity to canvass the existence of circumstances which disentitle the plaintiff in such an action to a remedy. To treat the grant as annulled when no such remedy has been sought in the action and to hold that the party challenging the grant has a right to enter the land as if the holder of a right of occupancy had at no time been granted to the plaintiff, cannot at all be right.

The question whether or not the judgments in the previous actions instituted by the 5th defendant constituted estoppel or not is not of any importance in this appeal. It suffices to point out that had the defendants understood the purport of the judgment, they would have realised that what the judgments in those actions had implied was that the challenge to the exercise by the plaintiff of rights conferred by the grants of rights of occupancy would remain futile until and unless those grants are first set aside.

Ignoring inconsequential digressions that appeared to have found their way into the judgment of the court below, I feel no hesitation in holding that the Court of Appeal came to a correct conclusion on the material and decisive issue when it held that the certificates of occupancy Exhibit 3, 6, 9 and 10 were valid and did confer rights of occupancy on the plaintiff. In the result, I would dismiss the appellants' appeal with N10,000 costs in favour of the respondent.

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### WALI JSC

I have had the privilege of reading before now, the lead judgment of my learned brother Ayoola, JSC and I agree with his reasoning and conclusion for dismissing the appeal. I adopt same as mine.

As elaborately stated in the lead judgment of my learned brother Ayoola, JSC where the Governor or the Minister [as in the present case] had granted a statutory right of occupancy over a piece of land, within the area of his authority, all existing customary rights over that piece of land became extinguished, unless the statutory right so granted is set aside by a court of competent jurisdiction by due process of law. Entry into such piece of land under the pretext that the person making the forcible entry has a customary right to do so, is a clear actionable act of trespass. Both Exhibits 3, 6 and 9 in this case confer on the respondent over the disputed parcels of land statutory right as the grants are still valid and subsisting.

The appeal lacks merit and I accordingly dismiss it. I affirm the judgment of the Court of Appeal with N10,000.00 costs against the appellants in favour of the respondent.

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### KUTIGI JSC

I read before now the judgment just delivered by my learned brother Ayoola, J.S.C. I agree with his reasoning and conclusions. The appeal is accordingly dismissed with costs as assessed.

**IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ayoola, J.S.C. and I agree entirely that this appeal is devoid of substance and ought to fail.

The certificates of occupancy, Exhibits 3, 6, 9 and 10 were at all times material to this action valid and subsisting and conferred on the respondent, statutory rights of occupancy over the parcels of land in dispute. In the circumstance, I entertain no doubt that the appellants' entry on the said land was unlawful and constituted an act of trespass and the court below was right in so holding.

This appeal lacks merit and it is hereby dismissed with costs to the respondents against the appellants which I assess and fix at N10,000.00.

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**UWAIFO JSC**

I had a preview of the leading judgment of my learned brother Ayoola JSC. I think he has given much thought to the issues raised on the appeal and I completely agree that the appeal is without merit. I shall only make some comments on the issue raised as to whether the certificate of occupancy granted to the respondent is valid upon the facts of this case. I do not need to go over those facts in any detail. They have been admirably stated by my learned brother.

Before dealing with the said issue (i.e. issue 2), it is important to emphasise that a certificate of occupancy is presumed valid until it is found to have been improperly issued and then revoked or declared void. One of the reasons for holding that there has been an improper issuance of such certificate is where another person's right in the land was subsisting at the time the certificate of occupancy was issued. This view was held in the Court of Appeal in a case which subsequently came on appeal to this court, The Registered Trustees, Apostolic Church v Olowoleni (1990) 6 NWLR (pt. 158) 514. In the Court of Appeal, Wali JCA was reported to have said:

*"The right of an existing holder or occupier of a parcel of land is not automatically extinguished by the mere issuance of a certificate of occupancy to another person under colour of a person in occupation. It does not automatically extinguish the right of any other person having a customary right as the respondent in this case."*

This passage was reacted to by Nnaemeka-Agu JSC at pages 535-536, inter alia, as follows:

*"Worse for the appellants, the certificate of occupancy which they are relying upon to support their right to possess the land has been sufficiently impugned..... it is clear that the certificate of occupancy was granted to them by the Minister of Works, Lands and Survey over land which was held customarily by the respondent without any notice of revocation of her right of occupancy, as required by law ..... I therefore agree with Wali, JCA (as he then was) that a certificate of occupancy is only prima facie evidence of title or exclusive possession and that the exclusive rights provided for in favour of a person in possession of such a certificate under section 20 of the Land Tenure Law of Kwara State is available only to a person who is entitled and has been lawfully granted a certificate of occupancy."*

On the same reasoning, Olatawura JSC who read the leading judgment observed at page 527:

*"If the issuance of a certificate of occupancy is not in accordance with the Land Tenure Law, certainly the certificate is defective and the holder has no basis for a valid claim. In other words to be valid there must not be in existence at the time the certificate was issued a customary owner who has not been divested of his/her title."*

Also, in Ogunleye v Oni (1990) 2 NWLR (pt. 135) 745 at 784 Nnaemeka-Agu JSC had earlier said:

*"Where . . . a certificate of occupancy has been granted to one of the claimants who has not proved a better title, then it has been granted against the letters and spirit of the Land Use Act ..... indeed a certificate of occupancy properly issued under section 9 of the Land Use Act ought to be a reflection and an assurance that the grantee has to be [or has been] in occupation [or in possession as a holder] of the land. Where*

*it is shown by evidence that another person had a better right to the grant, the court will have no alternative but to set aside the grant, if asked to do so, or otherwise to ignore it."*

(Brackets and words in them added by me)

B I am not unaware of the provision of section 5 of the Lands Use Act 1978, but I cannot overlook the immense hardship, and perhaps instability socially, which subsection (2) thereof may create if the power under it was exercised without regard to its consequence. For instance, it must be a matter for concern whether a later grant may (capriciously) C undermine and thereby impliedly revoke an earlier grant for which no compensation may be paid for any development undertaken on the basis of the grant since that subsection provides that:

D *"(2) 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 subject of the statutory right of occupancy shall be extinguished."*

I believe that section must, in appropriate circumstances, be read along E with section 28 which deals with the power of the Governor to revoke rights of occupancy [which rights of occupancy include, in my opinion, deemed rights of occupancy derived under sections 34(2) and 36(4) ] and its effect made to be so confined to situations for making a revocation, which must recognise existing rights, in order not to needlessly F defeat an earlier grant. It is only then the issue of compensation shall fairly and properly arise by virtue of sections 29, 30 and 35 of the act. It seems reasonable to say that revocation ought to precede section 5(2) where there is a subsisting prior interest. I think I should say I realise G that the views expressed, obiter, in Saude v Abdullahi (1989) 1 NWLR (pt. 116) 387 at 416 and in Abioye v Yakubu (1991) 5 NWLR (pt. 190) 130 at 225 by Obaseki JSC tend to the contrary, or do not appear to take account of those considerations.

H Having said that, I shall now consider the second issue for determination raised by the appellants who are referred to as defendants in the leading judgment. It is:

*"Was the Court of Appeal correct in validating Exhibit 3 when*

*the same is premised (on) and relate to a nullification of purchase of the same land declared so by the Court."*

The argument of the defendants is that a person cannot have a valid certificate of occupancy over land when the documents relied on by him to support his right to the land are declared void and that the lower court B having declared such documents void, there was no basis for accepting that the certificate of occupancy is valid, or it must follow that it must be held invalid. Exhibits 1 and 2 were such documents declared void by the lower court but the certificate of occupancy (exhibit 3) which the C plaintiff was given in respect of the said land was held valid. That argument does not, in my view, go beyond mere logic, and it is unhelpful. The defendants have not shown what entitles them to question the validity of the said certificate of occupancy. In the first place, on two occasions did the defendants, through 5th defendant, sue the plaintiff in two D Area Courts in 1968 and 1974 respectively claiming that the plaintiff was on their family land. They failed on both occasions and their actions were dismissed. So it would not matter whether or not exhibits 1 and 2 were held invalid. Exhibit 1 is a receipt purportedly issued to the plain- E tiff in respect of the land in question by someone the defendants say was their head of family but that he sold the land without the concurrence of the principal members of the family. Exhibit 2 is a certificate of customary land tenure obtained on the basis of exhibit 1. Exhibits 3 (certifi- F cate of occupancy) was eventually issued by the Government. Since, as it would appear from the results of the two cases in the Area Courts, the defendants cannot be seen to have a subsisting prior interest in the land, their cavil at the lower court's view of exhibit 3 is futile. Secondly, the G defendants did not counterclaim in the present action to have the certificate of occupancy in question declared void. They must have felt, perhaps on good grounds, that if they did that their earlier unsuccessful actions in the Area Courts would be used as estoppel against them. H Whatever reason there may be, they have not in the proper manner challenged the validity of that certificate of occupancy (exhibit 3). It follows that there is no basis for the said issue as to the validity of exhibit 3 which they have raised on this appeal.

I am satisfied partly for the above reasons and for the fuller reasons given by my learned brother Ayoola JSC that this appeal lacks merit. I, too, dismiss it with N10,000.00 costs to the plaintiff/respondent.

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