



The Supreme Court's Recent Decision in Yakubu v. Simon Obaje: A Coup Against Governor's Consent Under the Land Use Act?

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Introduction

In a recent decision handed down by the Supreme Court of Nigeria, in ***Yakubu Ibrahim & Ors. v. Simon Obaje***¹ (the “*Yakubu case*”), the Supreme Court, held that the provision for Governor's consent for alienation of interest in land under the Land Use Act does not apply to land not covered by statutory rights of occupancy, where the alienation is between private individuals, and there is no overriding public interest or conflict between the parties. This landmark decision was recently followed and applied by the High Court of Cross River State sitting in Calabar, (the “*High Court*”), in ***Daniel Kip v. The Government of Cross River State & 3 Ors***² (“*Kip's case*”), where, in re-echoing the pronouncement of the apex Court in the Yakubu's case, the High Court held that Governor's consent is not required for alienation of interest in land in all cases; and that private individuals are entitled, without Governor's consent, to transfer or alienate their interests in land not covered by a statutory right of occupancy³, on the same grounds as the Yakubu case.

Prior to the decision of the Supreme Court in the Yakubu's case, our superior courts had in a long-line of cases⁴, starting with the Supreme Court's decision in ***Savanah Bank v. Ajilo***⁵ (the “*Savanah Bank's case*”), consistently held that under the relevant sections of the Land Use Act, 1978 (“*LUA*”)⁶, the Governor's consent is a mandatory requirement for any transfer or alienation of interest in land within a state, and that failure to do so renders the resulting transfer or alienation null and void.⁷

Obviously, the decision in Yakubu's case represents a paradigm shift from the rule as we know it, and thus upends the established legal position laid down in *Savanna Bank*. This has created some confusion or uncertainty for landowners, businesses and real-estate practitioners who are at a loss as to the appropriate legal position that applies to the requirement for Governor's consent on the alienation of any form of interest in all land. The objective of this publication, therefore, is to clarify this seeming conflict by reviewing the law as it was, the new twist introduced by the Yakubu's case, and its impacts on real estate transactions such as mortgages, assignment, and subleases touching on alienation of interest in land in general.

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¹(2017) LPELR – 43749 [SC]; (2018) All FWLR [pt. 937] 1682.

²Suit No: HC/401/2019, Judgement delivered by Hon. Justice Professor V. A. Offiong, on 25 June 2021.

³Statutory right of occupancy refers to the right of occupancy granted by the Governor of a state under the Act in respect of land in urban areas, or the Local Government in respect of land in rural areas.

⁴These cases, discussed in the later part of this paper, include, *U.B.N. Plc v. Ayodare & Sons (Nig.) Ltd and P.I.P. Ltd. v. Trade Bank*.

⁵(1989) 1 NWLR [pt. 97] 305.

⁶Land Use Act, 1978, Cap. 202, Laws of the Federation of Nigeria, 1990.

⁷The Court in *Osho v. Foreign Finance Corporation & Anor.* [1991] 4 NWLR [pt. 184] 157, however, later held that such transfers or alienation would be 'voidable' rather than outrightly void, and the transactions to which the transfers or alienation relates, inchoate, until the consent obtained.

The Land Use Act in Perspective

The Land Use Act, promulgated in 1978⁸ (the “Act”), is the most important legislation on land tenure system in Nigeria. It was motivated by the need to make land accessible to all Nigerians; prevent speculative purchases of communal land; streamline and simplify the management and ownership of land; make land available to governments at all levels for development; and provide a system of government administration of rights that would improve tenure security.⁹ Under the Act, all land comprised in the territory of every State in Nigeria is vested solely in the Governor of the State, for the use and common benefit of all Nigerians.¹⁰

To ensure an effective administration and implementation of the foregoing policy objectives, the Act, among others, created a regime of rights of occupancy in place of the hitherto unrestricted property rights.¹¹ Specifically, the Governor is empowered under the Act to grant statutory rights of occupancy to any person for all purposes.¹² Another provision of strategic import in the Act is the requirement that any person who enjoys a statutory right of occupancy in a particular land, and who desires to transfer or alienate interest in the land, must do so with the approval or consent of the Governor of the State where the land is situate, for the transfer or alienation to be valid.

Specifically, Section 22 of the Act provides as follows:

“It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained.”

The implication of the above excerpts and other relevant provisions of the Act¹³, is that any transaction, which claims or purports to confer or vest any rights or interest over land outside the clear provisions of the Act, will be null and void. On the strength of the foregoing provisions, the prevailing view which had received judicial nod, was that procuring Governor's consent is a condition precedent for a valid alienation of interest in land, such as assignment, mortgages, long leases amongst others, notwithstanding the peculiarity of interest or rights that may attach to each land and the nature of parties involved in the transaction.

However, in what appears to be a judicial volte face, the Supreme Court, in the Yakubu's case departed from the above settled rule entrenched in the Savanna Bank's case. Specifically, the Supreme Court held that Governor's consent is not required to transfer interest in land, if the land is not covered by a statutory right of occupancy, and the transfer or alienation is between two private individuals, and there is no overriding public interest or conflict between the parties.

Surprisingly, despite the decision in the Yakubu's case, nothing seems to have changed as majority continued under the impression or belief that the requirement for Governor's consent for alienation of interest in all land was the norm. In a very timely fashion however, the High Court, like a Daniel who came to judgment, recently toed the path set by the Supreme court in the Yakubu's case, thereby rekindling the hope of so many involved in real estate transactions, by removing what was previously a stumbling block in completing a number of transactions.

To put the decision in the Yakubu's case and its amplification by the Kip's case in perspective, it is, perhaps, instructive to review the facts of the two cases for a proper appreciation of the philosophy which underpins the reasoning of the Supreme Court in arriving at its decision. To do this effectively, however, it is imperative to first review the Savanna Bank's case.

⁸Land Use Act, 1978, Cap. 202, Laws of the Federation of Nigeria, 1990.

⁹Preamble to the Act.

¹⁰Section 1 of the Act.

¹¹The LUA creates a right of occupancy as the primary proprietary interest of occupancy and customary right of occupancy. Both rights of occupancy may be acquired by actual grant from the Governor or the Local Government or be deemed granted by the appropriate authorities. The actual grants are found in section 5 (1) and section 6 (1) of the Act respectively, while the deemed grants are covered by the provision of sections 34 and 36 of the Act. The management and control of the actual grant of right of occupancy is well laid out in several sections of the Act as such grant is usually evidenced by a certificate of occupancy issued by the Governor. Actual grantee of a right of occupancy has a fixed tenure, liable to pay rents, subject to penal revocation of his right and subject to Governor's consent on subsequent transactions amongst other obligations.

This is provided in section 5 which reads: “It shall be lawful for the Governor in respect of land, whether or 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; (c) to demand rental for any such land granted 45 to any person.”

Section 6 vests similar powers on the Local Government Authorities to grant customary rights of occupancy in respect of land in their respective areas for agricultural, residential, and other purposes.

¹³Section 26 of the Act.

The Savannah Bank case

The first opportunity which presented itself for the Supreme Court to test the provisions of the Act bordering on Governor's consent for the transfer and alienation of the rights of occupancy (customary or statutory) in land was the Savanna Bank's case. The dispute leading to the decision arose over the question as to whether a person, who was already vested with a proprietary right or interest in land prior to the commencement of the Act and thus, deemed to be a holder of a right of occupancy pursuant to section 34 of the Act, required the consent of the Governor of the State before he could transfer, mortgage, or otherwise dispose of his rights or interest in the land.

In resolving the above issue, the Supreme Court unanimously held that every right holder in land required the consent of the Governor of the State where the land is situated before any alienation or transfer of any interest in the said land. Specifically, Karibi – Whyte JSC stated that:

*“...I think the Court of Appeal was right to hold that every holder of a right of occupancy whether statutory or otherwise is regarded as having been granted the right by the Military Governor or Local Government as the case may be, for the purpose of control and management of all land comprised in the State. **Accordingly, every such holder, whether under sections 5, 34 or 36 of the Land Use Act requires the prior consent of the Military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy.** This means that section 22 is of general application to every rights holder under the Act pursuant to sections 5, 34 or 36 thereof¹⁴.*

This decision was strictly adhered to and applied by the Supreme Court and indeed, the Court of Appeal¹⁵, in subsequent cases. For example, in **U.B.N. Plc v. Ayodare & Sons (Nig.) Ltd.**,¹⁶ the apex Court, relied on the Savanna Bank decision in reiterating the mandatory nature of the requirement for Governor's consent, when it succinctly stated that:

“By virtue of the provisions of sections 21, 22 and 26 of the Land Use Act, Cap. 202, Laws of the Federation, 1990 a holder of a statutory right of occupancy who wishes to mortgage the property by assignment must first obtain the consent of the Governor of the State where the land is situate before carrying out the mortgage transaction. Similarly, the holder of a customary right of occupancy of land not in an urban area must obtain the consent of the Local Government where the land is situated. Where the requisite consent is not obtained, the transaction or instrument which purports to confer or vest the property in any person shall be null and void.”

Similarly, the Court of Appeal in **P.I.P. Ltd. v. Trade Bank**¹⁷ applied the rule established in Savanna Bank's case, when Sankey, J.C.A.¹⁸ stated as follows:

“By the principle of stare decisis, I find that I must agree with the submissions of Mr. Jawondo, learned counsel for the appellants, no matter how unpalatable, that, in the face of the evidence before the court vis-à-vis section 22 of the Act, exhibits 5, 6 and 7 are void. The decision of the Supreme Court in Savannah Bank of Nigeria Ltd v. Ajilo Vol. 20 (1989) NSCC135; (1989) 1 [NWLR \(Pt. 97\) 305](#) is the plumblin by which all courts subordinate to the Supreme Court must be guided. In the more recent decision in Union Bank of Nigeria Ltd. v. Ayodare & Court must be guided. In the more recent decision in Union Bank of Nigeria Ltd. v. Ayodare & Sons (Nig.) Ltd. (2007) 13 [NWLR \(Pt.1052\) 567](#), the apex court restated its position taken in the Savannah Bank v. Ajilo case. It held unmistakably and steadfastly that by virtue of sections 21, 22 and 26 of the Land Use Act, Cap.202, Laws of the Federation, 1990, a holder of a statutory right of occupancy who wishes to mortgage the property by assignment must first obtain the consent of the Governor of the State before carrying out the mortgage.

¹⁴See U.B.N. Plc v. Orharhuge [2000] 2 NWLR (pt. 645) 495; FMBN v. Babatunde [1999] 12 NWLR (pt. 632) 683; P.I.P. Ltd. v. Trade Bank (Nig.) Plc [2009] 13 NWLR (pt. 1159), to name just a few

¹⁶[2007] 13 NWLR (pt. 1052) 567.

¹⁷(Nig.) Plc [2009] 13 NWLR (pt. 1159).

¹⁸At pages 642-643, paras. E-C.

In view of the foregoing faithful adherence by the Supreme Court and the Court of Appeal, the decision in Savannah Bank's case became, for the most part, an inviolable rule of law, observed by virtue of the doctrine of *stare decisis*,¹⁹ by all persons involved in land transactions including assignments, sub-leases, mortgages amongst others, across the country, until the Yakubu's case.

The Yakubu's Case

In brief, the facts leading to Yakubu's case are that the Respondent as Plaintiff, filed an action against the Appellants as Defendants, at the High Court of the Federal Capital Territory Abuja, seeking *inter alia*, damages for trespass allegedly caused by the Appellants to the Respondent's property during construction activity. The Respondent also sought a declaration of title to the property which he allegedly bought by virtue of an Irrevocable Power of Attorney covered by a certificate of occupancy issued by the Bwari Area Council in 1995.

The Appellants however, denied the claim. The High Court found in favour of the Respondent. Dissatisfied, the Appellant appealed to the Court of Appeal. The appeal was also dismissed, as the Court of Appeal upheld the decision of the High Court. Consequently, the Appellant appealed to the Supreme Court. In considering the appeal, the Supreme Court on its own, raised the issue whether it was the proper interpretation of the law that the consent of the Minister of Federal Capital Territory (“FCT”), who occupies a position akin to that of a State Governor, was required before the title to the property in issue could validly pass to the Respondent. In resolving the issue, Ogunbiyi JSC, who delivered the lead judgement put it this way:

“... I agree with the Respondent's Counsel that it is not the intendment of the legislature that section 22 of the Land Use Act, on consent would limit and deny parties of their rights to use and enjoy land and the fruits thereto in a non-contentious transaction or alienation. The section cannot be given a literal interpretation as would be seen from the preamble.”

The preambles to the Land Use Act, if looked at carefully and relating it to the case at hand, would reveal that the provision for consent of the Governor must not be applied to transfer of title or alienation of rights between private individuals where there is no overriding public interest or conflict between the parties. The application of the various sections and provisions of the Land Use Act must be done with a view to the intendment of the drafters of the law, which is expressed often in the preamble.

This decision is to the effect that the Governor's consent is not required in all situations in which private individuals transfer or alienate interest in land not covered by statutory rights of occupancy, and there is no overriding public interest or conflict between the parties. Undoubtedly, the *Yakubu's case* clearly signaled a radical departure from the earlier position established by the Supreme Court in *Savanna Bank*, which had hitherto been strictly followed by all Courts in Nigeria.

In coming to this decision, the Supreme Court invoked and relied on the general philosophy or purpose behind the enactment of the Act, as encapsulated in its preamble, which aims to preserve the rights of Nigerians to the use and enjoyment of the fruits of their land thus:

“Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law. And whereas it is also in the public interest that the right of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured protected and preserved.”

There is very little doubt that in coming to the above decision, the Supreme Court was mindful of the harrowing concerns that have trailed the implementation of the Governor's consent as a requirement for perfection of title in land transactions in the country. The modification or qualification introduced to the rule that Governor's consent is required to transfer or alienate interest in land “in all cases”²⁰ is salutary and aligns with the general intendment of the law.

¹⁹The Court in *Osho v. Foreign Finance Corporation & Anor.* [1991] 4 NWLR [pt. 184] 157, however held that such transfers or alienation would be 'voidable' rather than outrightly void

Overall, it is our view that the Supreme Court could not be more right, when it reasoned that the legislature could not have intended that **section 22 of the Act – which provides for governor's consent before alienation**, would limit and deny parties' rights to the use and enjoyment of their land or the fruits or benefits flowing from it, particularly in non-contentious transactions devoid of overriding public interest or conflicts.

In the opinion of the authors, this decision is apt as it tends to reflect the plain language or meaning of the section as well as the overall objective of the Act as expressed in its Preamble. It is thus, a much welcome development for the land tenure system in the country.

Rather unfortunately, however, notwithstanding this people/commerce-centric approach adopted by the Supreme Court in Yakubu's case, it would appear that not many people are aware of the decision and its implication. Many people still carry on as though the rule on Governor's consent for alienation of interest in land, still applies in all situations irrespective of the rights or the parties involved. This was the position until the decision in the Kip's case, where the High Court amplified the Supreme Court's position in the *Yakubu's case*.

The High Court Decision in the Kip's Case

Motivated by the radical approach adopted by the Supreme Court in Yakubu's case and the seeming lack of awareness by members of the public coupled with the inaction on the part of public authorities who have the responsibility to ensure compliance with judgment, a certain Daniel Kip, a legal practitioner, approached the High Court of Cross River to enforce and take benefit of the decision of the Supreme Court in the Yakubu's case.

The facts of the case, in a nutshell, are that the Claimant, Daniel Kip, a lawyer, relying on the relevant provision²¹ of the Constitution of the Federal Republic of Nigeria, 1999 (as altered) which requires that the judgment of the Supreme Court shall be enforced in any part of the country by all authorities and persons, including courts with subordinate jurisdiction, sought to enforce the decision in *Yakubu's case*. In an action which he brought by way of an Originating Summons, he sought *amongst others*, a declaration that having regard to the decision of the Supreme Court in *Yakubu's case*, the requirement for Governor's consent under the Act does not apply to alienation of rights in land between private individuals where there is no overriding public interest or conflict between the parties. He further sought that the court should declare that the requirement for consent and demand for consent fees by the Cross River State Government through the Registrar of Deeds, for the registration of deed of assignments, deed of mortgages, deed of leases, debenture deeds, deed of conveyances and all other title documents between private individuals where there is no overriding public interest²² or conflict between the parties, is unlawful and illegal on the authority of the Supreme Court's decision in *Yakubu's case*.

He further submitted that the decision in *Yakubu's case* having been delivered after, and being inconsistent with the decision in *Savanna Bank* must be taken to have impliedly overruled the *Savanna Bank's case*. He argued further that *Yakubu's case* reflects the new and correct position of the law, which not only binds the High Court, but should also be applied and followed by all other courts.

Daniel Kip, who contended that as a lawyer, he had pending before the Register of Deeds, many applications for perfection of titles on behalf of his clients, prayed for an order mandating the Defendants to immediately register all such deeds including deed of mortgages, and all other title documents in respect of transactions between private individuals, where there are no overriding public interests or conflicts between the parties, and without the need for consent of the Governor or consent fees.

In opposition, the Defendants, contended that the decision in *Savannah Bank's case* remains the law. They argued that the *Yakubu's case* did not overrule the decision in the *Savannah Bank's case*, as the former was handed down by only five Justices of the Court, instead of a full panel (Seven Justices) that must sit over a matter requiring the Supreme Court to overrule itself and depart from an earlier decision. The Defendants also argued that the Supreme Court can only depart from its decision upon a specific application made in that regard adducing convincing reasons, which was not the case in *Yakubu's case*.

²¹Section 287 (1) thereof.

²²It is also noteworthy to mention that landowners whose right of occupancy are revoked for overriding public interest are entitled to compensation from the Government.

However, Justice Offiong of the High Court, dismissed the Defendants arguments and held that the Supreme Court is entitled to depart from or overrule its previous decision in any appropriate situation either expressly or by implication. In other words, the Supreme Court as the apex court in Nigeria has the power and jurisdiction to depart from and overrule its previous decision whether or not it was sitting as full court²³. Justice Offiong further held that there are now two conflicting decisions of the Supreme Court on the same subject, in which case, lower courts, such as the High Court, were bound to follow the decision that was later in time.²⁴ Accordingly, the court ruled that it was bound by the decision of the Supreme Court in Yakubu's case and granted the reliefs sought by the Claimant.²⁵

Thus, as it stands, the High Court decided that: (i) by virtue of the Supreme Court's decision in Yakubu's case, the provision for Governor's consent under the Land Use Act does not apply to transfer/alienation of rights not covered by statutory rights of occupancy which is between private individuals and where there is no overriding public interest or conflict between the parties; and (ii) the requirement of consent and demand for consent fees for the registration of title documents in respect of alienation of interest regarding such land, between private individuals where there is no overriding public interest or conflict between the parties, is unlawful and illegal.

The reasoning of the Honourable Justice Offiong is very well founded. This is because where there are two conflicting decisions of the Supreme Court on same subject, the latter case represents the position of the law and should be followed and enforced by lower courts.

Implication of Yakubu's decision, re-echoed in Kip's case for Land Transactions in Nigeria

The Supreme Court is not only set up as a court to resolve disputes or interpret laws in matters that are brought before it, but also as a court of public policy.²⁶ Thus, where there are gaps in any law following its implementation, the Supreme Court takes on the responsibility to fix those lapses when the opportunity presents itself, for the good of all, even where to do so amounts to revolting against its earlier decisions on an issue or legal point. This is exactly what has played out in the Supreme Court's pragmatic approach adopted by the Court in the *Yakubu* case, which, in the opinion of the authors, was rightly followed by the High Court in *Kip's* case.

The strict application of the requirement for Governor's consent to transfer interest in land resulting from the decision of the apex Court in *Savanna Bank's* case, evolved into an albatross which for so long, made the ease of doing business regarding real property transactions, cumbersome, expensive, and unattractive. There is no doubt that the huge cost of procuring Governor's consent, coupled with delays from the unwieldy bureaucratic bottlenecks at the various land registries across the country, rendered the lofty objectives for the enactment of the Act, almost irrelevant.

Thus, with the decision in *Yakubu's* case, re-enforced by the High Court in *Kip's* case, it is apt to say that there is light ahead, given that there is no longer the requirement to obtain Governor's consent in a land transaction between private individuals, where the land is not covered by a statutory right of occupancy, and where there is no overriding public interest or conflict. This is now the law going forward unless and until it is overruled again by the Supreme Court or amended by legislative intervention!

Conclusion

Law is an instrument of social engineering and can only provide optimal benefits to the society when it is interpreted and applied in a manner that fulfils its objectives. This is exactly what the Supreme Court has done in the *Yakubu's* case, which has now been amplified by the High Court in the *Kip's* case.

²³*Adisa v. Oyinwola* (2000) 10 NWLR (Pt. 674) 116 at 170, paras. F-G; 181, paras. E-G.

²⁴*See Osakue v. F.C.E., Asaba* (2010) 10 NWLR (Pt. 1201) 1 at 29, paras. G.-H; 34, paras. B & Atolagbe v. Awuni & Ors (1997) 7 SCN.J.1 AT 20, 24 AND 35; (1997) 9 NWLR (Pt. 522) 53.

²⁵The Court however did not grant one of the Claimant's reliefs which was for damages.

²⁶*See Saleh v. Abah* (2017) 12 NWLR (Pt. 1578) 100 at 133, para. E.

State Governors cannot continue to impose or charge consent fees or refuse to register instruments or title documents conveying interest in all land, on non-contentious land transactions between private individuals where there is no overriding public interest. Otherwise, such States will see a barrage of law suits akin to the *Kip's case* where there is an unwillingness to follow the decision of the Supreme Court in the *Yakubu's case*. All authorities of the respective State Governments and the Federal Government in charge of the administering consent on behalf of the State Governments across the country, and the FCT, have a duty under the Constitution, to enforce this decision and are enjoined to take steps to ensure compliance.

Notwithstanding the potential revenue loss that may arise from the inability of these States and the FCT to generate revenue from consent fees paid to obtain Governor's consent, the decision of the Supreme Court in the *Yakubu's case* will lead to more land transactions in States, which will invariably lead to an increase in the applicable capital gains tax and stamp duties to be received by the States as it pertains to the disposal of chargeable assets by private individuals, business names, partnerships within a state. More so, the *Yakubu case* has introduced a regime in Nigeria's land tenure system which will remove the huge cost of procuring Governor's consent in the affected land, delays from unwieldy bureaucratic bottlenecks at the various land registries across the country, which have rendered the lofty objectives of the Act, almost irrelevant, and promote the ease of doing business in the real estate and banking sectors. As such, States and private parties alike, should embrace the new order of the day, as it relates to the requirement for Governors' consent in Land!

Overall, to put the bubbling issue on the requirement for Governor's consent to rest and to ensure certainty in the law, it is recommended that the Act should be amended to remove the Governor's consent completely in all land transactions. While this view may not be popular amongst States due to revenue loss, a cost-benefit analysis ("CBA"), if undertaken by States, will reveal that they stand to benefit more from such an amendment, relative to the revenue loss. We encourage States to conduct the said CBA, perhaps, this will make them realize what they stand to gain from the suggested amendment to the Act.

Disclaimer

The article provides general information relating to the requirement for Governor's consent in Land transactions in Nigeria. It is meant for general information only. It is not, and should not be relied upon as legal advice. If you require any assistance or enquiry relating to the above subject, please contact info@templars-law.com or Templars Real Estate Key contacts:

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