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An Examination of the Application of the Temporal Order Rule of Priority under the Land Use Act 1978 (As Amended)

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1.1 Introduction

In response to a potential crisis in land distribution, the Federal Military Government of Nigeria promulgated the Land Use Act of March 1978¹ establishing a uniform tenure system for Nigeria. In Nigeria, before the enactment of the Land Use Act, there was no uniform land policy because the historical backgrounds of the land tenure systems of the regions were not identical. In establishing a uniform tenure system therefore, the Act intended to address the problem of lack of uniformity in the laws governing Land Use and ownership, the issue of uncontrolled speculation in urban land, the question of access to land rights by Nigerians on equal legal basis and the issue of fragmentation of rural land, to stimulate investment in agriculture by enhancing land use security, to optimize land use, to ensure sustained land use, to ensure sustained improvements to land quality and to enlighten the people on the right to use land.² The Act effectively nationalized all land by requiring land users to obtain statutory right of occupancy and customary right of occupancy from the state and Local Governments respectively³. In this regard, the innovation introduced by the Land Use Act is that it divest any claimant of radical title and limit the claim to a right of occupancy⁴. However, the Act stipulates that anyone in rural or urban area who normally occupied land and developed it before the commencement of the Act would continue to enjoy the right of occupancy and could assign his interest in the developed land⁵. It is obvious from the above and other provisions that would be considered in this paper that the Act addresses itself to the issue of priority of competing interests in land.

Generally the need to rank competing interests in land in order of priority arises when two or more persons claim to have derived title to land from the same person who previously owned that land and in such cases it could happen that the various competing interests cannot be satisfied from the total aggregate value of the land that is subject to these interests.⁶ With regard to transactions under the Land Use Act, the need to determine priority of interests in land arises when one considers the right of an occupier of land either developed or undeveloped before the commencement of the Act (otherwise known as deemed holder of a statutory right of occupancy) and the subsequent grant of a right of occupancy by the Governor over the same land without first revoking the deemed right of occupancy held before the commencement of the Act. It also seldom happen that there exist at the same time two valid rights of occupancy granted to different persons in respect of the same land by the same authority or Government and the question arises as to which of the two valid grants takes precedence over the other. Thus in all the above cases, there is a need to determine priority among competing interests in land under the Act.

The objective of this paper therefore is to consider whether the *Temporal Order Rule* of priority i.e. "he who is first in time is stronger in law" is applicable in determining priority of competing interests

¹ Cap. L5, Laws of Federation of Nigeria 2004

² See Smith, I.O, *Practical Approach to Law of Real Property in Nigeria*, Ecovatch Publication, Lagos (1999) p.302-306; James, R.N, *Nigerian Land Use Act Policy and Principles*, University of Ife Press Ltd (1987) p.206; Yakubu, M.G, *Notes on the Land Use Act*, A.B.U., Press Ltd Zaria (1986) p. 13-15; Omotola, J.A. *Compensation Provisions of the Land Use Act*, Nigeria Bar Journal (1980) p. 38; Abubakar, M.M, *Land Use Act Policies: An Overview*, JPCL vol 1 No 1 (2006) p. 71-72; Dadem, Y.Y.D, *Property Law Practice in Nigeria*, Jos University Press Ltd Nigeria, Jos (2009) p. 15

³ Section 5 (1) (a) and Sections 6(1) (a) & (b) Land Use Act, Cap L5, Laws of Federation of Nigeria 2004

⁴ See *Madam Salami & ors vs. Oke* (1981) 4 NWLR (pt. 63) p.1

⁵ Sections 34 (2), (3) & (4) and Sections 36(2) & (3) Land Use Act, Cap L5, Laws of Federation of Nigeria 2004

⁶ Jegede, M.I. *Principles of Equity*, Ethiope Publishing Corporation, Benin (1981) p. 43; Ikpo, C, *Issues and Principles in Equity*, Dimathis Objective Press Ltd Lagos, (2003) pp. 25-27 See also Fabunmi, J. O, *Equity and Trusts in Nigeria*, University of Ife Press Ltd, Ile-Ife, Nigeria (1986) p. 109

in land under the Land Use Act or whether the Act itself has evolved its own rules of priority. In achieving this objective, the paper shall examine the basic rule of priority with particular reference to the *Temporal Order Rule* and its application or otherwise to specific provisions of the Land Use Act, particularly section 40, 5(2), 34 and 36 of the Act respectively which addresses the issue of priority. The paper ends with the conclusion and recommendation of the research.

1.2 Temporal Order Rule of Priority

Whenever there are two or more competing interests in property, the priority of the rival claimants is determined by the relevant rules of law and equity. Basically, the general rule is that priority of competing interests is usually determined by the order in which they are created: *Qui prior est tempore, potior est jure*: "he who is first in time is stronger in law"⁷. This is also known as the *Temporal Order of Priority* and it is recognized both in law and in equity as a veritable rule to determine the priority of competing interests in property by ranking them in the order of their creation⁸.

Consequently, when there are two or more persons having legal interests on the same property, one who is prior in time is stronger in law⁹. In *Adu Kofi vs. G.A. Adjei*¹⁰, a particular landed property was sold at two different auctions under two different writs issued by two different tribunals sitting at different times. In this case, the two different buyers of the landed property acquired legal interest in the land though created at different times. The question for determination was which of the legal interests took precedence over the other. The court held that the plaintiff who bought the landed property in the earlier auction which was a day before the second auction, had in point of time obtained a better title and that the subsequent sale to the defendant had no effect.

Also, the *Temporal Order Rule* i.e. the first in time is stronger in law also find support in equity. Thus where there are competing interests in property and all the interests are equitable in which case the equities are said to be equal, the first of such equitable interests to be created prevails over the other. Thus equitable interests also rank in the order of their creation.¹¹ Thus in *Cave vs. Cave*,¹² a sole trustee used trust fund to purchase land which he conveyed to his brother. The brother mortgaged the land to one person by way of legal mortgage and then to yet another person by way of equitable mortgage. Neither of the mortgagees had notice of the trust encumbrance. It was held as follows:

- a. That the legal mortgagee's interests take priority over the equitable interests of the beneficiaries of the trust i.e. where there is equal equity, the law shall prevail
- b. The interest of the beneficiaries of the trust take priority over the equitable mortgagee's interest, since they were first to be created i.e. where the equities are equal, the first in time prevails.

However where there is competition between equitable interest and subsequent legal interest in a property, the subsequent legal interest take priority if it was acquired bonafide without notice of the prior equitable interest. In *John A Osagie vs. Alhaji S.O Okeyinka & ors.*¹³ it was held that a subsequent legal estate cannot be overreached by a prior equitable interest where the purchaser of subsequent legal estate purchases bonafide and for value without notice of the prior equitable interest.

1.3 Temporal Order Rule of Priority under the Land Use Act

As already demonstrated in this paper, the *Temporal Order Rule* of priority simply means that priority of competing interests in property is determined by the order of their creation. This translates to mean that the first of such interests to be created is stronger in law. This section of this paper

⁷ See Megarry, R., and Baker, P. V., *Snell's Principles of Equity* 27th ed., Sweet and Maxwell, London, (1973) p.105, Maudsley, R. H., *Hanbury and Maudsley Modern Equity* 10th ed., Stevens and Sons, London, (1976), pp. 3-30, and Megarry, R. and Wade, H.W.R., *The Law of Real Property*, 4th ed., Stevens and Sons, London, (1975) pp. 110-128. See also Kodilinye, G., *An Introduction to Equity in Nigeria*, Daybis Limited, Nigeria, Ibadan, (2001), pp.1-6. Ikpo, C., *Issues and Principles in Equity*, Dimathis Objective Press Ltd., Lagos, (2003), pp. 23-24, and Jegede, M.I., *Principles of Equity*, Ethiopia Publishing Corporation, Benin, (1981) reprint (2007) p.52.

⁸ Ibid

⁹ See Jegede, M.I., *Principles of Equity*, Ethiopia Publishing Corporation, Benin (1981) p.43

¹⁰ (1942) 8WACA 198

¹¹ Generally on the Temporal Order Rule of Priority, See Hambury, G., *The Field of Modern Equity* (1920) 45 LQR 196 at 19; Megarry, R., and Baker, P. V., *Snell's Principles of Equity* 27th ed., Sweet and Maxwell, London, (1973) p.105, Maudsley, R. H., *Hanbury and Maudsley Modern Equity* 10th ed., Stevens and Sons, London, (1976), pp. 3-30. See also Kodilinye, G., *An Introduction to Equity in Nigeria*, Daybis Limited, Nigeria, Ibadan, (2001), pp.1-6, Ikpo, C., *Issues and Principles in Equity*, Dimathis Objective Press Ltd., Lagos, (2003), pp. 23-24, and Jegede, M.I., *Principles of Equity* op cit. at note 9

¹² (1880) 15 Ch.D 639

¹³ (1985) 3 NWLR pt.11 pg. 59 at 54, See also *Barklays Bank of Nig. Vs. Ashiru* (1978) 6-7 P. 99

¹⁴ (1985) 3 NWLR (pt.11) p. 59 at 64; see also *Barklays Bank of Nig. Vs. Ashiru* (1978) 6-7 SC p. 99

considers the application of the *Temporal Order Rule* of priority to competing interests in land under the Land Use Act 1978. While some provisions of the Act appear to retain the *Temporal Order Rule* of priority, there are other provisions therein that sounded discordant tune as if the Act had jettisoned the *Temporal Order Rule*.

In elucidating on the above position further, this paper considers the provisions of sections 40, 34 & 36 and section 5 of the Act which addresses the issue of priority under the Act and determine whether or not the *Temporal Order Rule* has been retained by those provisions of the Act.

1.3.1 Competing Interests over Right of Occupancy

Just like in other cases where it is necessary to rank the priority of competing interests, the provision of section 40 of the Act envisage that various competing interests may be struggling for a certificate of occupancy which is evidence of the title to the use and occupation of land under the Act; thus there arises the need to prioritize competing interests struggling for a certificate of occupancy under the Act. Section 40 of the Act addresses itself to the issue of competing interests and the need to rank them in order of priority. The section provide as follows:

where on the commencement of this Act proceedings had been commenced or were pending in any court or tribunal (whether at first instance or on appeal) in respect of any question concerning or pertaining to title to any land or interest therein, such proceedings may be continued and be finally disposed of by the court concerned but any order or decision of the court shall only be as respects the entitlement of either of the parties to the proceedings to a right of occupancy, whether statutory or customary, in respect of such land as provided in this Act. (emphasis mine)

It is clear from the above provision that various interests may be contending over a right of occupancy, the resolution of which of those competing interests takes priority over the others will be as provided in other provisions of the Act. Thus there is a need to look inward into some other provisions of the Act where attempts have been made to resolve such conflict one way or the other. In this regard this paper considers the combined provisions of section 34 & 36 on one hand and section 5 of the Act on the other hand respectively to determine the application of the *Temporal Order Rule* in resolving conflicting interests under the Act.

1.3.2 Sections 34 & 36 of the Act and Temporal Order Rule

Section 34 of the Act deals with land in urban area which was vested in a person before the commencement of the Act. The provision of the law is that where the land is developed, it shall continue to be held by the person in whom it was vested immediately before the commencement of the Act as if the holder of the land was the holder of statutory right of occupancy issued by the Governor under this Act

Section 34(2), specifically provides as follows:

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 this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act.

Developed land is defined by section 51 of the Act as follows:

land where there exists any physical improvement in the nature of road development services, water, electricity, drainage, building structure or such improvement that may enhance the value of the land for industrial, agricultural or residential purpose.

Also section 36 of the Act make similar provision for land held in non-urban area before the commencement of the Act. Section 36 (2) provides as follows:

any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of

this Act being used for agricultural purposes, continue to be entitled to possession of the land for use for agricultural purpose as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the customary law of the locality concerned allowed to lie fallow for purposes of recuperation of the soil.

Section 36 (4) also provide as follows:

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 this Act as if holder of the land was the holder of a customary right of occupancy issued by the Local Government, and if the holder or occupier of such developed land, at his discretion, produces a sketch or diagram showing the area of the land so developed, the Local Government shall, if satisfied that that person immediately before the commencement of this Act has the land vested in him, register the holder or occupier as one in respect of whom a customary right of occupancy has been granted by the Local Government.

The combined effect of all the above provisions i.e. section 34(2) and sections 36(2) and 36(4) of the Act is an affirmation of the *Temporal Order Rule*. This is more so that they provide that the land will continue to be held by those in whom it was vested prior to the commencement of the Act and if by virtue of section 34(4) of the Act, the land is subject to any encumbrance in form of mortgage, lease etc., the land shall continue to be subject to such encumbrance. It therefore mean that a person in whom land is vested before the commencement of the Act is deemed to be a holder of a right of occupancy in respect of the land and the existing encumbrance on it shall accordingly be noted. Since the word 'vested' is capable of including both legal and equitable interests in any land, the question of priority becomes important so as to determine which of the holders of both interests will be entitled to the statutory Right of Occupancy. The Act appears to resolve this problem with the general rule of priority, which is to the effect that "where there is equal equity the law prevails". Accordingly, Section 34(4) provides that a lesser interest which is regarded in law as an encumbrance will merely be noted on the certificate of occupancy which is to be issued to the person with the larger interest. Therefore to all intent and purpose the deemed grant as provided under section 34 and section 36 satisfy the prerequisite for a valid grant of a certificate of occupancy and is conclusive since there was not in existence the valid express title of another person with legal or equitable interest in the same land at the time of the grant¹⁴

1.3.3 Section 5 (2) of the Act and Temporal Order Rule

As already noted under section 40 of the Act, it is envisaged that various competing interests may be struggling for a certificate of occupancy which is the evidence of title to the use and occupation of land under the Act. It has also been demonstrated that the combined provision of section 34 and 36 of the Act affirmed the Temporal Order Rule of priority. However, it is possible that there would be competition between the deemed grant under section 34 and 36 and other subsequent express grant by the Governor over the same parcel of land¹⁵. The provision of the Act which fits into the above scenario is section 5 (2).

Section 5 (2) of the Act provides as follows:

upon the grant of a statutory right of occupancy under the provisions of subsection (1) of this section, all existing right to the use and occupation of the land which is the subject of the statutory right of occupancy shall

¹⁴ See *Olohunde vs. Adeyoju* (2000) 10 NWLR (pt.676) p. 562 at 597; *Gankon vs. Ugochukwu Chemical Industries Ltd.* (1993) 6 NWLR (pt. 297) p. at 55

¹⁵ The difference between "deemed grant" and "express grant" is that while the deemed grant is acquired the express grant is a product of formal application which has been duly considered and approved after fulfilling the requirement for a grant. See *Abioye vs. Yakubu* (1991) 5 NWLR (pt. 190) p. 130 and for further reading on the distinction between "deemed grant" and "express grant", see Smith, I.O., *Practical Approach to Law of Real Property in Nigeria*, Ecovatch Publications (Nigeria) Limited, Lagos (1999) pp. 307-311; Imhanobe, S.O., *Legal Drafting and Conveyancing*, Temple Legal Consult, Abuja (2002) p. 279

be extinguished.

Literarily interpreted, the section will appear to have a drastic effect between the already existing interest and newly granted interest as envisaged under the provision of section 5(1) of the Act. The provision of section 5 of the Act portends that once a grant has been made by the Governor, no interest whether equitable or legal which exists prior to the grant shall have priority over the grant made by the Governor. In other words, the legal estate created by the Governor will prevail over any other interest which hitherto existed in the land and it is immaterial that the grantee of the Governor under section 5(1) had notice of those interests¹⁶. It is however submitted that the above literal interpretation of section 5(2) cannot not be the correct position of the law as it does not have the type of overreaching effect on existing right as envisaged by such literal interpretation¹⁷.

13.4 Effect of the Provision of Section 5(2) on the Transitional Provisions in Sections 34 & 36 of the Act

It is apparent that there is inconsistency between the provision of section 5 (2) of the Land Use Act and the transitional provisions as contained in section 34, and 36 of the same Act. For while the latter provisions purport to preserve the *Temporal Order of Priority* by preserving the existing interests prior to the commencement of the Act, the provision of section 5(2) of the Act on the other hand has the effect of overreaching all existing interests in the land whenever a grant is subsequently made by the Governor pursuant to section 5(1) of the Act.

It is however submitted that to give a literal interpretation to section 5(2) would be inconsistent to the general intendment of the Act itself. Thus where a particular land is subject to a deemed right of occupancy, a subsequent grant by the Governor of a statutory right of occupancy to another person over the same piece of land may not necessarily entail overreaching the already existing deemed right as envisaged under section 5(2)¹⁸.

Although it could be construed but very wrongly, that the new grant under section 5 (1) may operate as a revocation of the deemed right under section 34 or 36, it is submitted that this is not possible as there can be no such implied revocation unless the provisions of the Act relevant to revocation are strictly complied with¹⁹. The contention above has Judicial support exemplified in some decided cases. The first of such cases although decided under the land Tenure Law, bear some relevance to the position taken above²⁰. Of particular relevance to the issue under consideration is the statement of Bello, J. on the effect of the grant to the appellant on the respondent's interest in the land. He said:

*(We) consider the purported grant of customary right of occupancy to the appellant over the land occupied by the respondent as a revocation of the respondent's right. Such revocation can only be lawful if the native authority requires the land for public purposes under Section 38 of the law... the evidence shows that the land was not required by the Native Authority for public purpose but for private purpose of the appellant. For this reason we hold the purported grant to be null and void.*²¹

The power to revoke under native law and custom, section 5(1) of Land Tenure Law, requires the Native Authority to observe the provisions of Section 38. The position taken in the above case although emanated from a decision under land tenure law, it also represent the correct interpretation of section 28(1) of the Land Use Act over the power of a Governor of a state to revoke right of occupancy²².

The Supreme Court has taken very bold decisions in recent times on the effect of section 5(2) of

¹⁶ Adeoye, F.O., and Ogunniran, H. *Priority of interests under the Land Use Act* (1986), JB & PL, vol. 2, no. 10 p.23

¹⁷ In *Finnih vs. Imade* (1993) 1 SCNJ 87 the Supreme Court held that the position of the law is that the certificate of occupancy is and remain valid and effective in law as documentary evidence until legal steps are taken to have it revoked by an order of a court of competent jurisdiction on the ground that the Governor was initially misled into granting it, see also *Dabo vs. Abdullahi* (2005) 7 NWLR (pt. 923) p.181

¹⁸ See *Adole vs. Gwar* (2008) 5 MJSC p.42

¹⁹ See *Olohunde vs. Adeyoju* (2000) 6 SCNJ p.470

²⁰ See *R.A. Akande vs. Omodehin Kelere* (1966) NNLR p.43

²¹ *Ibid* P.50

²² See *Osho vs. Foreign Finance Corporation* (1991) 4 NWLR (pt. 184) p. 157, where it was held that by virtue of the provision of section 28(1) of the Land Use Act, the Governor of a state has power to revoke a right of occupancy for overriding public interest. The power of the Governor to revoke a right of occupancy must be for overriding public interest and for requirement by the Federal Government for public purposes. Therefore, any revocation for purposes outside the ones prescribed by section 28 of the Land Use Act is against the policy and intention of the Act and can be declared invalid, null and void by a competent court.

the Act on existing rights. Existing rights in this case include deemed rights under section 34(2) and section 36(2) of the Act respectively²³ and rights created by the grant of a customary right of occupancy by the Local Government before the exercise of the power of the Governor under section 5(1) of the Act over the same land²⁴. Existing rights also arise where the Governor had earlier granted certificate of occupancy over a particular parcel of land and subsequently in exercise of his power under section 5(1) of the Act purport to grant a certificate of occupancy to another person in respect of the same parcel of land²⁵. In all the above cases, the Supreme Court made it clear that whether a deemed right under S. 34(2) and S. 36(2) which is a vested right recognized by the Act itself or an earlier grant of a customary right of occupancy or statutory right of occupancy respectively cannot be extinguished by operation of the provision of section 5 (2) of the Act by the issue of a statutory right of occupancy over the same plot.²⁶ The right can only be revoked as provided under section 28 of the Act²⁷.

In arriving at its decision, the Supreme Court opined that

*a deemed grant cannot be revoked by merely the issuance of a certificate of occupancy without more. In the instant case, the Governor has not expressly revoked the deemed statutory right of occupancy of the Respondent, accordingly he has no power to grant the Appellant a right of occupancy over the same land without complying with constitutional provisions. The Respondent being deemed to be a holder of a statutory right of occupancy has vested right and cannot be extinguished by merely the issuance of a right of occupancy to the Appellant under section 5 of the Act without first validly revoking the Respondent's deemed right of occupancy*²⁸.

The next class of cases to be considered relates to a situation in which the Governor, while making a grant under S.5(1) issues a certificate of occupancy under his hand to a person other than the deemed holder of a statutory or customary right of occupancy. There is now a plethora of authorities indicating the method of resolving the ensuing conflict in such cases. It now seems quite clear that the issuance of a certificate of occupancy in respect of any land would not validate the defects, if any, in the title of the holder. This is consistent with the rule that "*Nemo Dat Quod, Non Habet*" which means "no one can give what he does not have". Thus, the relative strength of the title of competing claimants in such cases will not necessarily depend on the acquisition of a certificate of occupancy by one of the contestants.²⁹

In *Adetokunbo Ademola vs. John Amo & ors*,³⁰ the plaintiff was entitled to a deemed right of occupancy by virtue of section 34 of the Act. The defendant relied on a certificate issued in his favour in respect of the land in dispute by the Governor of Ogun State. In a very brief but carefully reasoned judgment, Odunlami J. held *inter-alia* that:

*Since the land vested in the plaintiff before the commencement of the Act, he is deemed to be the holder of statutory right of occupancy, although he did not apply for one but if he applied for one it shall be issued to him. It therefore follows that by virtue of section 34(2) of the Land Use Act, the plaintiff is deemed to be the holder of a statutory certificate of occupancy in respect of the Land in dispute which has not been revoked by the Governor and to any of the 5th, 6th and 8th defendant in respect of any portion of the land in dispute and if any issued, it will be a nullity, and of no affect.*³¹

A similar conclusion was reached in the case of *Saidu Chiroma vs. Markus Yeam Suwa*³² wherein

²³ See *Olohunde vs. Adeyoju* (supra) at note 19

²⁴ See *Dabup vs. Kolo* (1993) 9 NWLR (pt 317) p. 254; see also *Dantumbu vs. Adene* (1987) 4 NWLR p.314

²⁵ See *Adole vs. Gwar* (supra) at note 18

²⁶ See *Olohunde vs. Adeyoju* (Supra) at note 18; *Nigeria Engineering works Ltd vs. Denap Ltd Anor* (2001) 12 SCNJ p.251

²⁷ Further see, *S.O. Adole vs. Boniface B. Gwar Supra* at note 18

²⁸ See also *Nigeria Engineering Works Ltd vs. Denap Ltd. & Anor* (2001) 12 SCNJ p.251

²⁹ See *Utuma A.A., Certificate of Occupancy: A worthy monument of this title?* (1986) 5 J.P.P.L. pp.74, at 76; *Ezejiofor, G.* Interpreting section 5 of the Land Use Act (1994) JPPL Vol. 19, p.27; *Madaki A. M.* The relevance or otherwise of Section 5(2) of the Land Use Act, (2011) University of Benin JPPL Vol.2, p.180. See also *Dzungwe vs. Gbishe*, (1985) 2 NWLR (pt. 8) p. 258.

³⁰ Suit No AB/8/8 of 2nd August, 1982; reported in *Omotola J.A., Cases on the Land Use Act*; Lagos University Press Lagos(1983) p. 131

³¹ *Ibid* p. 132

³² (1986) 1 NWLR (pt. 19) p. 751

the Court of Appeal dismissed the action of the appellant for trespass against the respondent in respect of the land in which the appellant held a certificate of occupancy, when the evidence adduced showed that prior to the acquisition of the certificate to the appellant, he had sold the land to the respondent. Commenting on the question of priority as between appellant's legal estate and the interest of the respondents, Ogundare J.C.A. posed the question and answered it in the following succinct terms:

Should the legal estate of the plaintiff/appellant defeat the equitable interest of the defendant/respondent? The answer to that is that a person with an equitable interest in land and in an undisturbed long possession, be it a customary law title or under an agreement, without a conveyance, cannot have his right defeated by a subsequent holder of a legal estate in land..... The plaintiff/appellant must not be allowed to approbate and reprobate. He must not be allowed to set up his real estate in fraud of his grantee of an equitable interest. The respondent's equity, in the circumstances prevails over the legal estate of the appellant in so far as the land in dispute is concerned³³

In *Alhaji Aminu Dantsoho vs. Alhaji Abubakar Mohammed*³⁴ the Supreme Court took the position that a latter grant by the Governor under Section 5(1) cannot ipso facto by operation of section 5(2) extinguished an earlier right either in form of a deemed grant or an earlier grant of a right of occupancy unless such earlier rights are revoked for any of the reasons as specified under section 28 of the Act. In this case, the respondents sued the appellant at the High Court, Kano praying the court for a declaration that the appellant is not entitled to the premises in dispute situated at plot 79, Sharada Layout, Kano, in Kano municipality, in such manner as to dig trench and put heaps of sand on the land. The respondent also prayed the court for an order of injunction restraining the appellant from continuing to keep the sand and the trench on the land. It was not in dispute that both the respondent and the appellant are holders of a statutory right of occupancy over the same piece of land. The respondent was issued a Certificate of Occupancy No. LKN/CON/RES/RC/82/632 by the Governor of Kano State. The commencement date was 15th May, 1978 and it was signed by Mohammed Kabir, the then Commissioner for Lands and Survey on 11th August, 1982. The appellant was also issued Certificate of Occupancy No.LKN/CON/18/00082 by the same Governor. Its commencement date was 18th December, 1981, also it was signed by the same Commissioner, Mohammed Kabir on 7th October, 1982. At the conclusion of hearing, the trial court in its judgment found in favour of the respondent. It declared the appellant's Certificate of Occupancy which was later in time nugatory. The court ordered the appellant to remove the nuisance he created on the respondent's land without delay and also awarded the sum of N50, 000.00 as damages in favour of the respondent. It was also the trial court's order that if the appellant failed to remove his structures on the land within three months, the maxim *quic quid plantatur solo solo cedit* should apply. The appellant was aggrieved with the judgment and he appealed to the Court of Appeal which in its judgment affirmed the first and second orders of the trial court. The third order that the appellant should remove his structures on the land in dispute was set aside on the ground that the relief was not pleaded.

The appellant was dissatisfied with the decision of the Court of Appeal, and he appealed to the Supreme Court. The respondent cross-appealed against the setting aside of the order that the appellant remove his structures on the land within 3 months. In resolving the appeal, the Supreme Court considered the provisions of section 5(2) and 28 of the Act and came to the conclusion that section 5(2) of the Act should not be read or interpreted in isolation but must be read together with other sections of that Act or the intendment of the said Act. The power of revoking any right of occupancy conferred on the Governor under section 28 of the said Act is subject to the terms and conditions set out therein. It is not intended that the Governor should revoke a right of occupancy arbitrarily or at will and for the purpose other than "overriding public interest" or where the terms of the grant was contravened by the grantee". The Supreme Court further held that:

once a grant of right exists over a piece of land, it can only be

³³ Ibid p.757; The Supreme Court, in *Dzungwe vs. Gibshe* (Supra) at note 28, had also expressed the view, albeit obiter, to the effect that the issuance of a certificate of occupancy simpliciter is not capable of superceding the interest of a rival claimant.

³⁴ (2003) 6 NWLR (Pt. 817) at p. 460

extinguished by a lawful revocation and not by another grant to a different person. The appellant's purported certificate of occupancy was invalid in the instant case in view of the respondent's earlier certificate of occupancy granted by the Governor which conferred on the respondent title to the land. Unless the respondent's certificate of occupancy was revoked as required by section 28 of the Act, the Governor had no title to confer on any other person by the grant of another certificate of occupancy. As the appellant had no title when he entered on the land, he was a trespasser and remains so for as long as he remains on the land.³⁵

1.4 Conclusion and Recommendation

This paper examined the Temporal Order Rule of priority under the Land Use Act 1978. The paper had highlighted that in given circumstances, there may be two or more interests competing over the same property. Specifically the paper considered that under the Land Use Act competing interests may arise between deemed grant under section 34(2) and 36(2) of the Act and subsequent express grant under section 5(1) of the Act. The paper also examined that competing interests under the Act may also arise between two grants made by the same or successive Governments at different times as in the case of *Alhaji Aminu Dantsoho vs. Alhaji Abubakar Muhammed*³⁶. It is clear from the foregoing consideration that the Land Use Act consciously or unconsciously addresses itself to the question of priority of interests.

The paper however finds that the Temporal Order still appears to continue to subsist under the Act despite the discordant tune in section 5(2) of the Act. Thus the Act has not significantly displaced the basic rules of priority of interests. In fact all the cases examined fortified the basic principle of the Temporal Order that "the first in time is stronger in law".

In support of the above position, the paper finds that the provisions of section 5(2) of the Act cannot be given its literal interpretation as to enable a second grant by the Governor to overreach the subsisting right of occupancy in the disputed land; whether granted by the Governor or Local Government or deemed grant pursuant to section 34 and 36 of the Act. In this regard, the paper further finds that the mere issuance of a certificate of occupancy in favour of a claimant by the Governor cannot help him in a competition for priority. This is because it is possible that there are other existing interests on the land, the mere issuance of subsequent certificate of occupancy will not extinguish the already existing interests³⁷. The paper finds that although by virtue of the provision of section 5(2) of the Land Use Act 1978, upon the grant of a statutory right of occupancy under the provisions of section 5(1) of the Act, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy are extinguished; however the revocation of those existing rights and payment of adequate compensation ought to precede a grant of a statutory right by the Governor even where the prior right is a customary right of occupancy³⁸. It is therefore submitted that section 5(2) of the Land Use Act should not be read or interpreted in isolation but must be read together with other sections of the Act or the Act as a whole so as to give body and soul to the intendment of the Act. Therefore where there is in existence a right of occupancy either in the nature of a statutory or customary right of occupancy or through a deemed right of occupancy by operation or sections 34 (2) and 36 (2) of the Act, a later grant of a right of occupancy under section 5(1) cannot *ipso facto* by operation of section 5(2) extinguish the earlier existing rights already vested in the land³⁹.

Given the consensus of judicial opinions on the issues raised in this paper, particularly the fact that section 5(2) of the Act cannot be given its natural effect as to enable a second grant by the Governor to overreach the subsisting right of occupancy on a disputed land granted by the Governor or a local government or deemed grant pursuant to section 34 or 36 of the Act, it can be asserted that the applicable rule to determine priority of interests of rival claimants under the Act is *qui prior est tempore*

³⁵ Per Kalgo JSC at p.492

³⁶ Supra at note 34

³⁷ See *Ogunleye vs. Oni* (1990) 2 NWLR (pt. 135) atp. 745

³⁸ See *Dantsoho vs. Mohammed* (Supra) at note 34

³⁹ See *Olohunde vs. Adeyoju* (supra) at note 19

potior est jure, that is, he who is first in time is stronger in law, otherwise referred to as the *Temporal Order Rule*.

The paper therefore recommends an amendment to section 5(2) of the Act in such a way that the existing rights that can be extinguished by operation of its provision does not include legally vested rights such as deemed grant pursuant to section 34 and 36 respectively or already existing express grant made by the Governor or Local Government before the subsequent grant pursuant to section 5(1) of the Act. In this regard the rights that perhaps may be envisaged under section 5(2) will then be limited to a right to occupation of land in form of license or usufruct right which is merely a right to enjoy benefit of land without having property interest on the land⁴⁰ Although, the Supreme Court, after a sober reflection had held that section 5(2) of the Act was misconceived and inelegantly worded. However, since the Supreme Court took its current position as analysed in *Dantsoho vs. Mohammed*²⁴⁹ and other similar cases, there has not been opportunity to amend section 5(2) of the Act to conform with the judicial activism of the Supreme Court. This is what informed the proposed amendment so that the interests that can be extinguished by section 5(2) of the Act will be limited to usufruct rights and licenses which are not property interests on the land but not vested rights as preserved under section 34 and 36 of the Act.

In conclusion, it has been demonstrated in this paper that the Temporal order Rule of Priority is relevant in determining priority among competing interests in Land under the Land use Act, however the application of the Rule should be in line with the judicial activism and the overall intendment of the Act.

⁴⁰ Per Kalgo JSC in *Dantsoho vs. Mohammed* (supra) at note 34