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AN EXAMINATION OF THE NATURE OF TRUST CREATED UNDER THE LAND USE ACT

BY
O.S. AFOLABI*

Introduction

The idea of trust as a legal concept emanated from conscience¹, as in the ordinary sense, trust refers to "confidence reposed in another"². In other words the trust concept enables a property owner who intends to make a gift of the property to transfer his interest in the property to another person to hold the property for the benefit of some other person who is the beneficiary of the gift.

While it is difficult to give an accurate and sufficiently comprehensive definition that would encompass the various attributes of trust, it is necessary for our purpose to consider a few of such definitions.

The Black Law Dictionary inter alia define trust
".....as a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)"³.

Sir Arthur Underhill⁴ defined trust as "*an equitable obligation binding a person (who is called the trustee) to deal with property over which he has control (which is called trust property) for the benefit of persons (who are called beneficiaries*

or cestui qui trust) of whom he may himself be one and one of whom may enforce the obligation"⁵.

Keeton and Sheridan⁶, also define trust as the relationship which arises whenever a person (*called the trustee*) is compelled in equity to hold property whether real or personal, and whether by legal or equitable title for the benefit of some persons (*of whom he may be one and who are termed beneficiaries*) or for some objects permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust"⁷.

It is discovered that while the various definitions above differ in content, they all highlight the essential attributes of a trust. From all the above definitions, it is clear that once a trust is validly constituted, there exist contemporaneously a fiduciary relationship between the trustees and the beneficiaries of the trust. In this regard, Olayide Adigun⁸ posited that the trust splits ownership of property between a trustee and the cestui qui trust. The trustees hold the legal estate and the beneficiary holds the equitable estate.

The object of this paper is to consider whether such fiduciary relationship exists in the "trust" purportedly created under the Nigeria Land Use Act⁹ (hereinafter referred to as the "Act"). The paper shall also consider whether the nature of interest or rights of the beneficiaries created under the Land Use Act are the same with the rights of the beneficiaries under the English trust concept. It will also examine whether or not the Governor who is named the "trustee" under the Act could be compelled to act just as the trustee under the English Trust

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¹ J.O. Fabunmi, Equity and Trust on Nigeria, (1985) University of Ife Press Ltd., Ile Ife pg. 5.

² Muiz Banire, The Nigeria Law of Trust, Excel Publication, 2002 at pg. 16.

³ Black Law Dictionary 7th Edition, Bryan A. Garner, West Group, St. Paul Minn 1999 pg 1513

⁴ Under Hill and Hayton - Law of Trusts and Trustees (14th ed.) pg 1

⁵ Ibid

⁶ The Law of Trusts, 12th Ed. Law Publishers Ltd. Pg. 1 Muiz Banire in his book "The Nigeria Law of Trusts, (Supra) Pg. 26 adopts this definition by giving the characteristics of a trust

⁷ Ibid

⁸ Olayide Adigun; Cases and texts on Equity, Trusts and Administration of Estates, 1st Ed. 1987, Ayo Sodimu Publishers Ltd. Pg 246.

⁹ Cap 15 Vol. 8 Revised Laws of Federation of Nigeria 2004 (Formally Laws of Federation of Nigeria 1990).

Concept could be so compelled to deal with the trust property in accordance with the terms of the trust and for the benefits of the beneficiaries. Furthermore, the paper will consider whether or not the beneficiaries created under the Act are ascertainable class as envisaged under the English trust doctrine.

Similarities between the Trust under the Act and Legal trust Concept

Section 1 of the Act provide thus:

"Subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the Military Governor of that state and that land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act¹⁰"

Commenting on the above provision, the Supreme Court in the case of Madam Salami & Ors. Vs. Oke¹¹ held that although the Act vests all land in each state in the Governor of that state, it is held by him in trust and administered in trust for the use and common benefit of all Nigerians in accordance with provisions of the Act¹².

Oretuyi S.A.,¹³ support the above view when he says that :

"..... it is clear from the above quoted provision (referring to section 1 of the Act) that the Governor of each state is the legal owner of all the land comprised in his state. He is not an

absolute owner as such since he holds such land on trust for the use and benefit of Nigerians"¹⁴

On the surface, a conclusion would easily be drawn from the wordings of section 1 of the Act and the above decision of the Supreme Court that a trust relationship has been created from the commencement of the Act since all essential attributes of a trust could be found in it. For example the land in the territory of each state is the subject matter of the trust; the Governor as the trustee of the land while Nigerians are named as the cest-qui trust (*beneficiaries*) of the trust. The seeming similarities between the provisions of section 1 of the Act stated above and the legal trust concept prompted the comment of Irikefe J.S.C. In the case of Nkwocha .vs. Governor of Anambra State¹⁵ that "by this piece of legislation, a legal trust affecting every inch of Nigerian land is created constituting every Governor trustee in respect of the Land within the limits of his state¹⁶"

However, such conclusion as made above may be premature as a critical look at the nature of rights and interests in the two concepts would reveal that significant differences exist between the trust concept under the English Law and the "trust" created under the Act.

Differences between the "trust" under the Act and the Legal trust Concept

It should be pointed out that: "*the public trust in the Act was introduced in order to stop the unwarranted craze for materialism*"¹⁷ and therefore not intended to equate it with the

¹⁰ Land Use Act (Supra)

¹¹ (1987) 4 NWLR (pt. 63) pg. 1, see also Aigbona vs. Suleja Local Government & Ors (1985) HCNLR847

¹² Ibid

¹³ Oretuyi S.A., Public take over of land – Federal and State Government Rights over land – The conflicts "in Omotola J.A. (ed.) The Land Use Act pages 90 and 91. See also Niki Tobí, Cases and materials on Nigerian Land Law, 1st Ed. Mabrochii Books, pg. 179.

¹⁴ Ibid.

¹⁵ (1984) 6 SC 362 at 364.

¹⁶ Ibid pg. 11

¹⁷ Olayide Adigun (Supra) pg. 265, see also Ogunbambi vs. Abowab 13 W.A.C.A 222. See generally, Elias, Nigeria Land Law; Coker, Family Property among the Yorubas' Obi, on Igbo Law of Property- Before the colonialist came to Africa, land was regarded as the common wealth to be used for the benefit of the dead, the living and the unborn.

legal trust concept. There are therefore significant differences between the trust under the Act and the legal trust concept.

Firstly, the trust under the English law is an equitable creation whereas the "trust" purportedly created under the Act is a creation of the statute. For instance, the rights enjoyed by the beneficiaries under the English trust concept are essentially equitable as those rights were not recognized under the common law. As Professor J.O. Fabunmi¹⁸ aptly put it "the institution of trust can be said to have originated from conscience, but the common law still regarded the trustee as the legal owner of the trust property and the beneficiary's interest was not recognized. Equity while recognizing the trustee as the legal owner of the trust property regarded the beneficiary as the equitable owner, for it would be unjust to enrich himself with the property belonging to other person"¹⁹. In other words, under the common law, the beneficiaries of a trust cannot maintain an action even where it is clear that the trustees are dealing with the trust property contrary to the terms of the trust or in a manner to unjustly enrich themselves. Equity however had intervened and the rights of beneficiaries under a trust are now given due recognition. The provision under the Act seemed to be in tandem with the common law position since the trust under the Act is a legal creation.

The Act preserves in private owners, an interest stated to be a "right" of occupancy²⁰. This right may arise consequent to an express grant by the governor to a person who had no previous rights in the land,²¹ or through a "deemed" grant to a person who previously owned, or was in occupation of the land²². In effect, a person who owned land before the commencement of the Act was entitled to continue in

possession under a "deemed"²³ right of occupancy. The Governor may also grant a right of occupancy to a person who had no previous interest in the property²⁴. In essence, the right of occupancy gives the holder a right to the occupation or beneficial enjoyment of the land upon which the right of occupancy had been granted.

Therefore, the interest of a beneficiary (holder of right of occupancy) under the Act is legal in contradistinction to the equitable rights of a beneficiary under the English trust concept. This means that under the Nigeria Act, the maxim is always "first in time first in law"²⁵. Thus where the Governor purport to grant a right of occupancy in a land in which a prior right of occupancy exist in another person, the later grant will not confer on the grantee, any right superior to the right of the original owner even if he gave consideration for that grant²⁶. This is not the case under the English trust concept as there is a clear separation between legal interest of the trustees and the equitable rights of the beneficiaries. This is clearly demonstrated by the doctrine of bonafide purchaser for value without notice. Thus a person who purchases a legal interest in a trust property would be free of any prior equitable interest attaching the property provided he has no notice of the prior equitable interest²⁷. Therefore where a trustee sell the trust property to a bonafide purchaser who gave consideration and had no notice of the beneficiary's interest in the same property, the beneficiary's interest which is mere equitable is defeated and the subsequent legal interest takes priority²⁸.

²³ See for example, Omotola, *Essays on the Land Use Act* (1980) pp. 19-20; James, *Nigerian Land Use Act: Policy and Principles* (1987), p. 104

²⁴ Ss. 5 & 6, Land Use Act.

²⁵ M.I. Jegede, *Principles of Equity*, Ethiope (1981) p. 43.

²⁶ *Supra* pg. 20. See also R.A. Akande V. Omodehin Kelere (1966) NNLR 113; *Dantubu Vs. Adene* (1987) 4 NWLR 314.

²⁷ *Dzungwe V. Ghishe* (1985) 2 NWLR (pt. 8) 528 and *Ogunleye Vs. Oni* (1990) 2 NWLR (pt 135) 745.

²⁸ *Ibid.*

¹⁸ *Supra* Pg. 5

¹⁹ *Ibid.* pg. 6.

²⁰ Sec. 5 Land Use Act. (*Supra*)

²¹ *Ibid*

²² S. 34 Land Use Act (*Supra*) (Urban land) and s. 36 Land Use Act (*Supra*) (non-urban land).

The doctrine of "bonafide purchaser for value without notice" is not applicable under the Act as only legal interests are created under the Act. Therefore where there is an existing grant of right of occupancy over a piece of land, a subsequent grant of right of occupancy over the same piece of land for value and without notice does not defeat the right of the existing holder of right of occupancy in respect of the same land. Thus the applicable maxim is "when the equities are equal, the first in time prevail"²⁹.

Also there is a clear distinction in term of duties imposed on a trustee by equity and the duties assigned to the Governor in respect of the vested land under the Act.

The Governor under the Act 1978 does not owe the holder of a right of occupancy any fiduciary duties and cannot be called to account as the beneficiaries under a legal trust can call the trustees to account. Where there is breach of duty, the Act does not provide the holder of a right of occupancy with such remedies as available for the beneficiaries under the English Trust concept.

It has been pointed out earlier in this paper that the trustee having duties of a fiduciary nature would not be permitted to enter into transactions in which his personal interest conflict with his duties as trustee³⁰ What amount to conflict of interest vary from one situation to the other. A situation where the trustee deals with the trust property in such a manner as to derive personal benefit from the dealing or where fraud is committed or where the trustee takes step to deny the beneficiaries their beneficial interest in the trust property will all be regarded as conflict of interest.

The Governor is empowered under the Act to revoke a right of occupancy already granted for overriding public interest³¹. What amount to overriding public interest include

alienation by the occupier by assignment, mortgage etc without requisite consent as provided under the Act; the requirement of the land by the Government of the state or a local government, or government of the federation for public purpose; the requirement of the land for mining purpose etc³².

Whereas, under the English trust if the beneficiaries of a trust contemplate a breach or that the trust property is endangered, the court may act on behalf of the beneficiaries to prevent the breach. In this regard and upon the application of the beneficiaries, the court would grant an injunction restraining the breach³³.

Unfortunately, even where a beneficiary under the Act become aware of a contemplated breach of the fiduciary duties (if any) by the Governor, he appear helpless as the court will not be able to restrain a governor who purport to revoke the right of occupancy of a holder for overriding public interest.

Another interesting issue to note is the object of the trust as provided under the Act. Section 1 of the Act³⁴ provides that all Nigerians shall be beneficiaries of the trust created. It is submitted that the stated object or beneficiaries appear too weird and is devoid of certainty as required under the English Trust concept. In IRC – VS- Broadway cottages Trust³⁵, the court of Appeal held that a trust for such members of unascertained class as the trustee should elect was void.

The rule that the beneficiaries of a trust must be ascertained imply that it should be possible to draw up a complete list of all the beneficiaries at every point in time or at a regular interval. While it could be argued that it is possible to have a comprehensive list of all Nigerians through head count, experience had shown that successive attempts to get an accurate figure of the total population of Nigeria had failed. To

²⁹ M.I. Jegede (Supra) p. 43.

³⁰ Madam Alice vs. Oluseyi V. F.A. Lawal (1986) 2 NWLR 417 at 421.

³¹ SS. 28 Land Use Act (Supra).

³² SS 29 (Supra).

³³ Milligan V. Mitchell (1883) /my & K 446.

³⁴ Land Use Act (Supra).

³⁵ SS 16-20 Land Use Act (Supra).

this extent, the "trust" created under the Act equally fail for uncertainty of object.

In any case, it is not only Nigerians as provided under the Act that take benefit of the land entrusted in the hands of the Governors as evidence abound that Non-Nigerians are equally benefiting from the use of such land either through direct grant by the Governor or by becoming beneficiaries through assignment by previous holder of certificate of occupancy.

It should be noted also that the beneficial interest in the trust created under the Act doesn't automatically devolve on the beneficiaries even where they are "suijuri". Notwithstanding the fact that all Nigerians are stated to be beneficiaries of the trust, a Nigerian can only benefit from the trust if he apply and was granted a right of occupancy by the Governor subject to payment of appropriate rental fee. In other words, the rest Nigerians who are stated to be beneficiaries of the trust under section 1 of the Act and are willing but could not afford the rental fee are disqualified from enjoying the beneficial interest in the "trust" (i.e. the land).

The English trust concept does not impose rental rates or penal rent on the beneficiaries of the trust as they take the trust property beneficially.

It is not lawful for the beneficiaries (i.e. holder of right of occupancy) under the Land Use Act even after payment of necessary rental fee as at when due to alienate their beneficial interest by way of assignment, mortgage, transfer or sublease without the consent of the Governor. That is to say they cannot transfer their beneficial interest in the property without the consent of the Governor³⁶. It goes to show that they would apply for such consent as many times as they would wish to alienate their interest in the land. The consent may be refused as the Governor has discretion whether or not to grant it.

However, under the English Trust concept, once the beneficiaries are "suijuri", they do not require the consent of the trustee to alienate, assign, mortgage or sell their beneficial interest in the trust property. This is moreso that equity has entitled them to determine the trust once they become suiuri³⁷.

One striking distinction between the trust created b the Act and the English trust concept is the restrictive nature of the subject matter of the trust created under the Act³⁸.

According to the provisions of the Act, land (i.e. real property) is the subject matter of the Act. On the contrary the English trust is not restrictive as any type of property (i.e. real and personal) can constitute the subject matter of the trust.

CONCLUSION

It could be seen from the various distinctions made above that although section 1 of the Act purports to create a "trust", the trust purportedly created cannot be compared with the English trust concept. The duties imposed on the Governors by the Nigeria Act are not fiduciary in nature as those fiduciary duties imposed on the "trustees" under the English trust. Similarly all the remedies available to the beneficiaries under the English trust whenever there is a breach or contemplated breach of those duties by the trustee are not available to the beneficiaries (i.e. Holders of right of occupancy) under the Nigeria Act.

As Muiz Banire aptly put it "there was no trust in the true sense and the trust referred to in section 1 of the Act, if it could be called a trust at all was a trust in a loose or higher sense"³⁹.

³⁷ J.O. Fabunmi; (Supra) pg. 181.

³⁸ Muiz Banire (Supra) pg. 21-22

³⁹ Muiz Banire (Supra) pg.

³⁶ Ss. 26 Land Use Act (Supra).

The recent supreme court decision in Ibrahim V. Mohammed⁴⁰ appear to have settled the controversies surrounding the use of the word "trust" under section 1 of the Act to the effect that the Governor merely exercise "administrative control" or "power" over the land comprised in a state only.

In the light of the above, it then necessarily follows that the trust arrangement envisaged under the Nigeria Land Use Act 1978 is not the same as we have in equity. Borrowing from the words of Megary V.C.⁴¹, the word "trust" employed in the Act mean "no more than a governmental obligation " thus could be said to be "trust in the higher sense and not trust in the lower sense"⁴²

At best, section 1 of the Land Use Act 1978 can be said to have given the Governor power to deal with or dispose of land comprised in his state. As was expressed by the Supreme Court of Nigeria in Ibrahim's case⁴³, he merely exercises "administrative power or control over the land and not as a trustee in the strict legal sense of the word".

Following from the above it is therefore erroneous and misleading to assume that a trust in the strict legal sense of the word was created under the Nigeria Land Use Act 1978 (now Cap 15, Revised Laws of Federation of Nigeria 2004).

In conclusion, it is suggested that the word "trust" be expunged from the provision of section 1 of the Act and be replaced with another word that would reflect the mere "administrative power or control" exercised by the Governor over the state land vested in him.

⁴⁰ (2003) FWLR pt. 156 pg. 902

⁴¹ Per Megary V.C. in *Tito .Vs. Waddell* (No. 2) 1971 Ch. 106

⁴² Ibid.

⁴³ *Ibrahim .Vs. Mohammed* (Supra).