ONWUKA V EDIALA

THE SUPREME COURT ON CUSTOMARY TENANCY

UNDER THE LAND USE ACT 1978

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The Supreme Court recently volunteered lavished pronouncements on the effect of *Section 36(2) of the Land Use Act 1978* on customary tenancy. The purport of these pronouncements seems to be that customary tenancy in respect of land being used for agricultural purposes in non-urban areas survived the Act and that the latter has done nothing to modify or effect any change in the existing situation. The opportunity for these pronouncements presented itself in the case of *Gilbert Onwuka and Others v. Michael Ediala and Others*.[1]

However, we will contend in this contribution:

(1)that in view of the facts of the case under reference, the pronouncements of the Supreme Court on the effect of *Section 36(2) of the Act* on customary tenancy are necessarily obiter and that the last words are yet to be said on that issue;

(2)that the pronouncements are inconsistent with the revolutionary effect of the Act on our land tenure systems as orchestrated by the same court in recent decisions and, indeed, contrary to the opinions of other courts in earlier cases; and

(3)that, with due reference, the pronouncements are not predicated on a thorough examination of the letter and spirit of *Section 36(2) of the Act*.

Consequently, we shall conclude with a statement of the true legal effect of *Section 36(2) of the Act* on customary tenancy.

1. *ONWUKA & ORS. v. EDIALA & ORS.*[2]

The facts of the case are briefly as follows: The two parties, two communities in Oguta Local Government of Imo State, sued one another in two separate suits in the Oguta Judicial Division of the Imo State High Court. These suits were consolidated and heard by Ukattah J. In the two suits the parties claimed a Declaration of Entitlement to Customary Right of Occupancy, damages for trespass and injunction on a parcel of land called "Nwaokpekwe" by the Plaintiffs/Respondents and "Okwuagboso" by the Defendants/Appellants. After due hearing on relevant and available evidence, the learned trial Judge preferred the evidence of the Plaintiffs/Respondents to that of the Defendants/Appellants and gave judgement in favour of the plaintiffs/respondents accordingly.

The defendants appealed to the Court of Appeal and their appeal was dismissed. Hence this further appeal to the Supreme Court. Before the Supreme Court, the defendants/appellants challenged the findings of the trial court affirmed by the Court of Appeal on facts relating to evidence of traditional history, acts of ownership and possession and boundaries of the land in dispute. The appellants also challenged the finding by the trial court vis-a-vis the non-applicability of *Section 36(1), (2) and (4) of the Land Use Act 1978 and Section 45 of the Evidence Act.*

On these facts, the Supreme Court held *inter alia*.

1. *Section 36(1) of the Land Use Act* does not enlarge the right of a customary tenant to any piece of land in non-urban area which was, at the commencement of the Act in his possession and occupation. A customary tenant remains so and is subject to the conditions attached to the customary tenancy.

2. The words "holder" or "occupier" in *Section 36(2) of the Land Use Act* mean the person entitled to a customary right of occupancy, that is the customary land owner other than the customary tenant and this is in accordance with *Section 50 of the Land Use Act*. Mere possession of land as a customary tenant however so long, cannot mature to confer the rights envisaged by the Act.

3. A person or community that had title to a parcel of land before the coming into force of the *Land Use Act, 1978* is deemed to be a holder of a right of occupancy, statutory right of occupancy or customary right of occupancy, depending on

the status of the land - whether it is in urban area or in non-urban area, and this is in consonance with *Sections 34(2), (3) and (6) and Section 36(2), (3) and (4) of the Land Use Act*[3]

4.In this case, the plaintiffs who had been adjudged owners are the ones who under *the Land Use Act* can be clothed with full possession[4] and be granted under *Section 36(4)* a customary right of occupancy and not the defendants/appellants.

However, from the facts of the case and the findings of the court, it would appear that the case is not on customary tenancy stricto sensu. It seems to us that it was simply a dispute between two communities as to title to land and a claim for declaration of title to a customary right of occupancy. Indeed, it is remarkable that the court had found that the portion of land occupied by some members of the defendants/appellants' community with the permission of the plaintiffs/ respondents was not in dispute. Rather, the portion of land in dispute which defendants/ appellants cleared in preparation for farming was not the subject of customary tenancy. On this point, the court said:

"The respondents are not asking for forfeiture of the areas granted by them to the appellants and which the latter developed with the permission of the former, by building their houses thereon. Their complaints are related to the adjoining land on which the appellants have started trespassing by clearing it in preparation for farming the same."[5]

It follows that the holding of the Supreme Court that plaintiffs/respondents are entitled to the customary right of occupancy under *Section 36(4) of the Act* has nothing to do with customary tenancy or with their rights as customary overlords. Rather, it seems to us to be based on the establishment before the courts of plaintiffs/respondents' acts of ownership and possession of the land in dispute.[6] In the same vein, we submit that the pronouncement on *Section 36(2) of the Act* in relation to customary tenancy is necessarily obiter, since the land in dispute was not in the possession of defendants/appellants for agricultural purposes.

Unfortunately, it would appear that the trial court had taken it upon itself to formulate a case on customary tenancy for the parties and this led to these pronouncements.

According to the trial Judge:

"The plaintiffs have denied that the defendants permitted the first plaintiff to establish cocoa and palm plantations on the land in dispute. Rather the plaintiffs asserted that they allowed some members of the defendants' family to erect buildings on part of the land in dispute. The first plaintiff's cocoa plantation is very close to the houses of the defendants' people. The plaintiffs are, in effect, saying that the defendants' people who live on the land in dispute are their tenants."[7]

On the basis of this, the trial judge had proceeded to pronounce on customary tenancy, and the appellate courts followed suit!

Having regard to all the foregoing, it is submitted that the pronouncements of the courts in this case are not conclusive on customary tenancy and that the last word on the effect of *Section 36* on this issue is yet to be said.

II. THE INCONSISTENCY

All our courts appear agreed on the impact and revolutionary effect of *the Land Use Act* on the land tenure systems of this country. In *Nkwoacha v. The Governor of Anambra State*[8] Irikefe, J.S.C. (as he then was) said that the *Act* is "undoubtedly the most impactful of all legislations touching upon the land tenurial system of this country before and after full-nationhood."[9] And recently in *Savannah Bank of Nigeria Limited and Another v. Ammel Ajilo and Another*[10] Obaseki, J.S.C. was even more emphatic on the impact and revolutionary effect of the Act as he declared:

"This appeal is probably one of the earliest of contested matters that will bring the revolutionary effect of *the Act* to the deep and painful awareness of many..."[11]

Yet more specifically on customary tenancy, Ogundare, J.C.A. had declared in *Yesufu Kasali and Others* v. *Alhaji Liadi Lawal*[12] that:

"...having regard to the general tenor of *the Land Use Act*, it is my view, and I so hold that the notion and incidents of customary tenancy in relation to agricultural lands not in an urban area (such as the land in dispute is) have been swept away by the combined effect of *Section 1, 36 and 37 of the Act*."[13]

Secondly, we have authorities for the view that title/ownership immediately before the commencement of *the Act* is not the sole prerequisite for entitlement to a deemed right of occupancy under *the Land Use Act*; that is to say, that possession immediately before the commencement of the Act could form the basis for entitlement to a deemed right of occupancy. In *Akpasubi Omonfoman* v. *C.K. Okoeguale*[14]

Ajose-Adeogun, J.C.A. stated aptly that:

"A strict legal title is not necessarily the only qualification for the required declaration (of entitlement to a right of occupancy.)[15] Long possession, as in the case put forward by the respondent, either by himself or through his predecessors-in-possession, can also suffice. Under the ***Land Use Decree 1978***... the Military Governor... can grant a certificate to that effect to any person, *including an occupier* of land under a customary right of occupancy..."[16]

And in ***Chief Davies Momodu Ilo and Others*** v. ***Chief G.A. Davies and Others***[17] Nnaemeka Agu, J.C.A. also pointed out that:

"Bearing the definition of an *occupier* in *section 50* and the provisions of *section 40* in mind, it appears clear to me that a right of occupancy is not limited to a fee simple owner. A person may have a right of occupancy under the Act even though the quantum of his interest before the promulgation of *the Act* would have been less than fee-simple."

Indeed, contrary to the position taken by the Supreme Court in *Onwuka* v. *Ediala* that as between an overlord and a customary tenant title/ownership alone entitles a party to the deemed right of occupancy under *Section 36* of the$_{Act}$, the same court had leaned in favour of possession as entitling a party to be the deemed right of occupancy in an earlier case. In ***Salami*** v. ***Oke,***[18] Obaseki, J.S.C. would appear to have taken this position when he remarked that:

"The Land Use Act was not intended to transfer *possession* of the land from the owner to the tenant by whom the owner is in possession."[19]

although it seems from this statement that his Lordship was of the opinion that it was the overlord rather than the customary tenant who was in possession of land subject to customary tenancy. We had already submitted elsewhere[20] with appropriate authority that possession at all times is reposed in the customary tenant and not in the overlord.[21]

It is regrettable that all these authorities were not thoroughly considered by the Supreme Court in ***Onwuka*** v. ***Ediala*** before embarking on the sweeping pronouncements on customary tenancy.[22]

III. THE LETTER AND SPIRIT OF SECTION 36

We may well recall the establishment of some Panels a few years before the promulgation of the ***Land Use Act***[23] The Federal Government had mandated these Panels to look into some aspects of our economy. Both the Anti-Inflation Task Force and the Rent Panel identified the land tenure systems as a major hindrance to rapid economic development in the country. Following these findings the Federal Government had appointed the Land Use Panel[24] whose recommendations provided the basis for the enactment of the ***Land Use Act 1978***. There is no doubt therefore, that the Act was enacted, amongst others, to introduce some reforms or modifications in the existing land tenure systems. The letter and spirit of ***Section 36 of the Act*** support this conclusion. The Section provides:

(1)The following provisions of this section shall have effect in respect of land not in an urban area which was immediately before the commencement of this Act held or occupied by any person.

(2)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 purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government...***"[25]

Even a cursory reading of these subsections suffices to evince the following conclusions:

(1)either a holder or an occupier is entitled to the deemed right of occupancy under subsection (2),

(2)such a holder or occupier was in exclusive possession of the land and was using it for agricultural purposes at the commencement of *the Act.*

Thus, it is clear that "possession" and "use for agricultural purposes" are the determining factors under ***subsection (2)***. We have already authoritatively asserted that possession at all times is reposed in the customary tenant,[26] and it is submitted that the customary tenant who is in exclusive possession of the land for agricultural purposes qualifies as an "occupier" for the deemed customary right of occupancy under this subsection. It is our view that the definitions of "occupier" and "customary right of occupancy" under ***Section 50 of the Land Use Act 1978*** would further support this conclusion. Under *Section 50.*

"Occupier" means any person lawfully occupying land under customary law and a person using or

occupying land in accordance with customary law."Customary right of occupancy" means the right of a person or community lawfully using or occupying land in accordance with customary right of occupancy granted by a local Government under *this Act."*

Obviously, these definitions relate to use and occupation of land not ownership of land, and it is submitted that they should be construed in that context in relation to *Section 36(2).*[27] Indeed, for an erstwhile overlord to qualify for the deemed customary right of occupancy in respect of land subject to customary tenancy under this subsection, he must be in actual possession or occupation of the land; proof of his dry radical title before *the Act* is insufficient for this purpose. In other words, he must be an "owner-in-possession" or an owner-occupier of the land to qualify for the deemed customary right of occupancy under *section 36(2).*

Also with due respect, the view of the Supreme Court in this case that "mere possession of land as a customary tenant however so long, cannot mature to confer the rights envisaged by *the Act*" seems to us to be misconceived in view of the clear provisions of *Section 36(2).* It seems that the Court's view was predicated on an uncritical reading of the principles of customary law into the subsection. It is trite that customary law does not recognise acquisition of title to land by prescription.[28] and this may have informed the latter view of the court. But it is submitted that to import this customary law rule into *the Act* is to stretch customary law too far into an unfamiliar ground to the utter neglect of the governing provisions of *the Act.* The truth is that the customary law rule against prescription is totally irrelevant under *the Act.* This is because, title to land (ownership) under *the Act* is vested in the State Governor by virtue of *Section 1* what is vested in the customary tenant under *Section 36* is a customary right of occupancy, not title/ownership of the erstwhile overlord. Indeed, the customary right of occupancy confers only possessory rights on the former tenant, not ownership, so that there is no maturity of his "mere possession" into a higher category of rights as probably feared by the Supreme Court in *Onwuka* v. *Ediala.*

CONCLUSION

Our conclusion from the foregoing analysis, which is obvious, is that, properly construed, *Section 36(2)* enlarges the right of a customary tenant to a piece of land in a non-urban area which was, at the commencement of *the Act,* in his exclusive possession or occupation for agricultural purposes. In respect of such land, the customary tenant is entitled to the deemed customary right of occupancy.[29] It is hoped that given another opportunity, the Supreme Court will overrule *Onwuka* v. *Ediala* except in so far as the peculiar facts of the case may have supported the vesting of the customary right of occupancy on the plaintiffs/respondents in that case.

The hardship, if any, which such proper construction of *Section 36(2)* may cause to the erstwhile overlord can be remedied by *an amendment of the Act,* as for instance, a provision for enfranchisement of the customary tenant on payment of compensation to the overlord. But adoption of a strained construction of *Section 36* in a bid to "regain the lost glory" for the overlord is, in the face of the clear provisions of *the Section,* embarking on a voyage of discovery which is not the duty of the court.[30] There is need for caution.

ENDNOTES

1.[1989] 1 N.W.L.R. Part 96, 182.

2.Supra. The facts are as reported in the Law Report.

3.Our present contribution mainly focuses on the pronouncements on Section 36(2) of the Act.

4.The term "full possession" seems to us to be misleading. Perhaps the word "full" ought to be deleted as being superfluous!

5.[1989] 1 N.W.L.W. Part 96, 182 at p.199 (per Wali, J.S.C.)

6.Plaintiffs/Respondents had cocoa and palm plantations on part of the land in dispute, as acts of ownership and possession.

7.[1989] 1 N.W.L.R. Part 96, 182 at p.201 (quoting the trial Judge).

8.[1984] 6 S.C. 362.

9.Ibid, at p. 363.

10.[1989] 1 N.W.L.R. Part 97, 305.

11.Ibid, at p. 315

12.[1986] 3 N.W.L.R. Part 28, 305.

13.Ibid, at p.321.

14.[1986] 5 N.W.L.R. Part 40, 179.

15.The phrase in brackets is supplied for clarity.

16.[1986] 5 N.W.L.R. Part 401, 179 at p. 195.

17.(Unreported) but noted in [1986] Ibadan Univ. L. Rev. Vol. 1/1, p. 34.

18.[1987] 4 N.W.L.R. Part 63, 1.

19.Ibid, at p.13.

20.See the writer's article entitled: "The Enigma in Customary Tenancy" in New Frontiers in Law (forthcoming.)

21.Abudu Lasisi v. Oladayo Tubi [1974] 12 S.C. 71 at 76 (per Ibekwe, J.S.C.)

22.Indeed, none of these cases was considered at all.

23.For instance, the Federal Government appointed the Anti-Inflation Task Force in [1975] (see "First Report of the Anti-Inflation Task Force" (October, [1979]), and in 1976 it appointed the Rent Panel.

24.See Report of the Land Use Panel, 1977.

25. Emphasis mine.

26.See note 21 supra, "...In this type of legal situation where the grantors do not live on the land or farm thereon "possession is nine-tenths of the law." See Josiah Aghenghen and Others, v. Chief Maduku Wagboreghor and Others [1974] 1 S.C. 1 at p. 8 (per Elias, C.J.N.)

27.It is amazing that the Supreme Court sought to rely on the definition of "occupier" to support the case for the "overlord" in Onwuka v. Ediala, but it is submitted that the definition rather supports our contrary view as canvassed.

28.Kasali v. Lawal [1986] 3 N.W.L.R. Part 28, 305 at 317; Akinloye v. Eyiyola [1986] 3 N.M.L.R. 92; Isiba v. Hanson [1967] 1 All N.L.R. 8; Mora & Others v. Nwafusi & Others [1962] 1 All N.L.R. 681 at 684.

29.Quaere? Where they are in concurrent possession as sometimes happens in some agricultural communities, it seems that the overlord will be entitled to the deemed customary right of occupancy, not on the basis of his ownership, but because of his possession and use of the land for agricultural purposes.

30.Salomon v. Salomon & Co. Ltd. [1897] A.C. 22, at 38; Magor and Saint Mellons R.D.C. v. Newport Corporation [1951] 2 All E.R. 839 at 841.