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Analysis of Tenancy under Customary Property in Nigeria

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Abstract
Generally, in most African communities and particularly in Nigeria, it is common place to see families who have excess lands granting some of it to relatives, non-relatives and other families who do not have enough. This grant may be accompanied by payment of tributes as it was called in the olden days, or rent as it may be understood now, or even by the performance of some services. This grant is generally guided by rules of customary law, norms, culture and tradition peculiar to the community and this is what Tenancy under Customary Property in Nigeria is all about. Using a doctrinal research methodology, this study examines the said practice by highlighting the nature, rights and obligations of tenants in customary land tenure arrangements. The study identifies some challenges facing customary tenancy in Nigeria including conflict with the Land Use Act, inheritance disputes and insecure tenure. The findings underscore the need for harmonization between customary and statutory land law to ensure that tenants and landowners co-exist peacefully and equitably.

Keywords: tenancy, tribute, customary, property, grantor, grantee, Nigeria.

1. Introduction

Tenancy under customary property in Nigeria is a type of unique relationship in Nigeria, and this is rooted in the various indigenous practices and customs of different ethnic groups. Tenancy under customary property can be said to be the relationship between the landlord(s) which may be a landowning family or families or even communities; and tenants which may be individuals or groups who acquire land rights under customary law. The theory behind the concept of customary tenancy is that where strangers or immigrants have been granted land for occupation and use, they are entitled to continue in peaceable enjoyment until they forfeit their rights on the basis of alienating a portion of land to others, without the prior consent of the grantors or by failure to pay the customary tributes or denying the title of the overlord.[1] While it is true that a customary tenant has perpetuity of tenure, it is arguable whether the distinction between tribute and rent are the same under customary tenancy. It was decided in the case of *Ojomu v Ajao,*[2] that both a customary tenancy and a customary lease means one and the same thing, hence the practical effect is the same. The most relevant incident is perpetuity of tenure and not whether the consideration is rent or tribute. The foregoing opinion has support from the recent decision of the Supreme Court in the case of *Audu Makinde v Dauda Akinwale*[3] where it was held that there can be customary tenancy without the payment of tribute. Therefore, the crux of customary tenancy in Nigeria, as evidenced by *Audu Makinde's case*, rests not on the form of consideration, but on the enduring nature of the tenant's occupation. This paper examines the established criteria for determining customary tenancy, and exploring the challenges facing customary tenancy in Nigeria.

2. Concept of Customary Property in Nigeria

Customary property in Nigeria is a system of land tenure deeply rooted in the nation's diverse cultural traditions. It's characterized by communal ownership, where land rights are often vested in families, villages, or communities, rather than individuals. Customary property in Nigeria refers to land and resources owned and managed according to indigenous customs and traditions. It is often held collectively by families, communities, or traditional rulers on behalf of the people. This is a fundamental

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[1] J Finine Fekumo, *Principle of Nigerian Customary Law* (Port Harcourt: F&F Publishers, 2002) P283.
[2] (1983) 2 SC NLR 154
[3] (2000) 2 NWLR (Pt. 645) P.435

aspect, as customary land tenure is indigenous to Nigeria, whereby the right of ownership of Land is vested in the family, village or community. All members of the family, village or community have equal right to the Land. [4]Unlike statutory land ownership, customary property rights are not always documented but are recognized and enforced through traditional institutions.[5]

Customary property is notable for its communal orientation. Rather than being treated as individual assets, lands are often viewed as inherited legacies passed down through generations. Typically, landholders possess usufructuary rights, granting them usage but not absolute ownership.[6] This approach ensures land remains communal, safeguarding it against unauthorized sales or transfers to external parties.

3. Nature and Characteristics of Customary Tenancy

Customary tenancy in Nigeria involves the granting of land use rights by a customary landowner to another person or group, operating within the framework of customary law. Customary tenancy arises when a customary landowner permits another person, not typically a member of the land-holding group, to use land for a specific or indefinite period. The land use will revert back to the grantor when the purpose of the grant is fulfilled. Customary tenancy establishes a landlord-tenant relationship between landowners and a third party, but it's essential to distinguish it from English law tenancy. While the relationship can be termed a tenancy, the interest created differs significantly. Unlike a mere occupational license, a customary tenant holds a proprietary right, enforceable against everyone, including the original grantor and their descendants. This right grants the tenant broad ownership privileges, except for the power to alienate the land to third parties.[7]

Moreover, the Supreme Court has described this kind of tenancy as the least onerous tenure that can be enjoyed by a person who is not the owner of the land. The nature of customary tenancy has been reiterated by the Supreme Court in *Akinlagun v Oshoboja*[8] as follows:

> *The concept of customary tenancy, which creates a relationship of Landlord and tenant, is peculiar to customary law and has no equivalent in English law. The concept connotes a situation where strangers or immigrants are granted land by the overlord to be in occupation and continue in peaceable enjoyment, subject to forfeiture of the right on certain grounds, including alienation of the land without the consent of the landlord, denial of the title of the overlord or refusal or failure to pay tribute.*

From the Supreme Court's decision in *Akinlagun's* case the following key features can be identified:

a. Communal Land Ownership: Collective ownership of property is common in African communities as such land is typically owned communally with families, clans or villages having collective ownership. With this position in place and in this kind of communal setting, it is commonplace to find that a single individual cannot hold absolute ownership over the land but possesses rights to use it.
b. Security of Tenure: Under this kind of tenancy, tenants are often granted long-term or even perpetual rights to use the land. While tenants do not own the land they however have the right to enjoy it and pass down same to their heirs as long as they abide by the terms of the tenancy.
c. Payment of Tribute or Rent: Customary property requires the tenants to pay tributes or rents in cash or kind, which could be annual or periodic. The rent is not fixed by statute but instead determined by culture and norms or prevailing tradition and custom.

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[4] M I O Nwogu, 'Ownership and Possession of Land Under the Nigerian Customary Land Tenure System: A Legal Appraisal', (2023) 19 (2) *UNIZIK, Law Journal*, 86

[5] A Oluwakemi, 'Customary *Land Tenure and Communal Rights in Nigeria: The Case for Legal Reforms' (2020) 17 (1) Journal of Land and Property Law*, 59.

[6] J Okafor & S Aluko, '*Customary Land Tenure and its Impact on Rural Development in Nigeria*. (2018) 39 (4) *African Development Review*, 385.

[7] C J Okoye, 'Customary Tenancy', https://cjokoyelawview.com/law-421-land-law-i/topic-16-customary-tenancy#:~:text=In%20cases%2C%20where%20the%20land,harvest%20of%20the%20crops%20the >

[8] (2006) 12 NLWR (Pt. 993) 60 at 87-88.

d. Transferability and Alienation: The tenant's rights under customary tenancy can be transferred to heirs, however, alienation or selling of any portion of the property to third parties requires the consent of the overlord or the community.
e. Reversionary rights: the landlord retains reversionary rights, meaning that when the tenant dies or fails to comply with the customary obligations, the land reverts to the landlord. This reversionary right, however, is subject to the tenant's compliance with the agreed terms.

3.1 Kola Tenancy as a Form of Customary Tenancy

Kola tenancy is a form of land-holding practiced in Anambra State, particularly in Onitsha.[9] Under this form of tenure, land-owners would grant unwanted portions of their land to grantees for Kola or other payment or services to be performed and sometimes for no consideration at all. Kola tenancy has the features of most customary tenancies, it creates a landlord and tenant relationship between the parties to it, and it is more than a mere occupational license which confers no interest in land. Like most customary tenancies, kola tenancy confers on the grantee full rights of possession but it confers no more than a mere possessory right. In other words, kola tenancy gives the right of occupation of the land and nothing more as was held in *Udensi v Mogbo*[10]. This position is further reaffirmed by the definition of this type of tenancy as set out in Section 2 of the Kola Tenancy Law 1935[11] which reads:

> *A right of use and occupation of any land which is enjoyed by any person in virtue of Kola or other token payment made by such a person or any predecessor in title or grant for which no payment of money or land exacted.*

It can be gleaned from the foregoing that this definition in the Kola Tenancy Law points to the fact that once it is admitted that property (or a parcel of land) is held under a kola tenancy, one thing which the holder cannot do under customary law is absolute or entire alienation of the land.[12] Additionally, it is interesting to note that during the subsistence of the kola tenancy, the grantor (Landlord) cannot alienate the same parcel of land to another without the consent of the kola tenant as was seen in the Supreme Court's decision in *Animashawun v Osuma*[13] wherein it was held that the grantor (Landlord) known as the Mgbelekeke family cannot legally transfer any interest to a third party without terminating the kola tenancy.

3.2 Rights of Tenants under Customary Property

A Customary tenant including a kola-tenant has three major rights as seen from the jurisprudence and case law on this topic. These are the right to exclusive possession which has been established over the years and equally upheld by Nigerian courts. It is trite law that once property is granted to a tenant in accordance with native law and custom, whatever the consideration, full rights of possession are conveyed to the grantee. In this regard, full rights of possession is construed to mean exclusive possession or occupation. Therefore any unlawful entry is actionable as a trespass as was held in *Nauwaro v Ogegede*.[14]

Again, a customary tenant has the right against the grantor not to derogate from the grant. In this context, it has been decided in *Esi v Itsekiri Communal Land Trustees,*[15] that any grant in derogation of the grant is bound to be declared null and void apart from being a trespass as was seen in this case wherein the grantors, contrary to the grant leased out the land to others and the court declared the lease null and void. Furthermore, in *Aghenghen v Waghoreghor*,[16] Elias C.J.N referring with approval to the case of *Esi v Itsekiri Communal Land Trustees observed as follows:*

> *A very important factor is that the grantor of the land, once it has been given to the grantee as customary tenant, cannot thereafter grant it or any part of it to a third party without the consent or approval of the tenants. The grantor is not allowed to derogate from his grant.*

[9] Fekumo (n 1).
[10] (1976) 6 E.C.S.L.R 354 at P.359
[11] CAP 49 of the Laws of Eastern Nigeria 1963
[12] As stated in Udensi's case (supra)
[13] (1972) 2 E.C.S.L.R (Pt. 1) 274
[14] (1971) NMLR 413
[15] 1961 WNLR 15 at 21
[16] (1974) 1 SC 1 at p.9

Moreover, a customary tenant has a right to apportionment**.** Under English law, apportionment means dividing of a legal right into proportionate parts, according to the interests of the parties concerned. For the present purposes, apportionment comes into play upon sharing of compensation arising from the compulsory acquisition of land for public use or damages arising from petroleum operations. In the case of *Aghenghen v Waghoreghor,*[17] the Supreme Court held that the principle of apportionment forms part of Nigerian Land Law, and that it does not arise from contract but based on equity.

However, a customary tenant has several obligations, including the duty not to deny the grantor's title, the obligation not to alienate the property without the grantor's consent, the responsibility not to use the property for a different purpose, and the duty to pay customary tributes or rent.[18] Also, in the case of *Ojomu v Ajao*,[19] Obaseki J.S.C observed that it is a well-settled law that a customary tenant's obligations include the payment of rents, which have replaced the tributes formerly paid in olden days, maintaining good behavior at all times, and consistently acknowledging the title of the landlord.

3.3 Determination of Customary Tenancy

A customary tenancy can primarily be determined by three ways, these are:

a. **Accomplishment of the purpose of the tenancy:** A customary tenancy may be for a specific period or specific purpose for example for a farming season. However, the parties may choose to renew the tenancy. If the customary tenancy was entered into for a specific purpose, then the tenancy is determined when such purpose has been accomplished. So when a tenancy for seasonal farming is entered into, the tenancy subsists during the period of cultivation of the crops but is determined after the crops are harvested.

b. **Forfeiture**: Forfeiture can be referred to as punishment for some illegal act or negligence on the part of the tenant. To this end, the Supreme Court in *Olanade v Sowemimo,*[20] held that a party claiming forfeiture must prove the misconduct of the person they put into possession as an overlord before such a party can be entitled to the rights of forfeiture and to regain possession. In this regard, some acts of misconduct which may warrant forfeiture include refusal to pay rents or tribute, use of the land for different purposes other than initially granted, or denial of the overlord's title.[21] The grant of the remedy of forfeiture is not discretionary, it follows on the breach of customary tenancy. It is also not in all cases of misconduct that forfeiture will be granted. Thus, where the landlord fails to take steps to enforce his right, forfeiture may be elusive. Furthermore, forfeiture may be refused on equitable ground if it is going to cause untold hardship.

c. **Abandonment:** It is settled law that when a customary tenant abandons the land, the possession automatically reverts to the grantor or the overlord. This means the grantor's right automatically revives as was held by the West African Court of Appeal in the case of *Oloto v. John*.[22] Similarly, the Supreme Court buttressed this principle of determination by abandonment in the case of *Ukwa v Ukwa Local Council*[23], where Onyeama J.S.C. observed that:

> *We do not think the question is whether the appellants resumed possession, for in our view, their right to recover possession revived when the area was abandoned in respect of the use for which it was originally given. Unless the Grantors made a fresh grant or agreed to the land being used for some other purpose.*

Therefore, it can be deduced that once abandonment can be inferred or proved, any attempt at re-entry of the abandoned land by the tenant or occupier will attract trespass. The converse is also true of the overlord or the owners of the land. If a wrong inference is drawn on the abandonment by the customary tenant and the landlord overlord enters into possession, he will be liable for trespass. This is well illustrated by the case of *Baillie v Offiong,*[24] where the tenant satisfactorily proved that he left his house and went to another place

[17] (1974) 1 SC 1 at p.9
[18] B O Nwabueze, *Nigerian Land Law* (Enugu: Nwamife Publishers, 1982).
[19] 1983 2 SCWLR 156 at 173.
[20] (2014) 14 NWLR (Pt. 1428) 472 at 506
[21] *Mabiau Onoitare v Bnite Onokpasa* (1984) 12 SC 19 at 135; see also *Onisiwo v Gbamgboye* (1941) 7 WACA 69 at 70; *Asani Taiwo v Adamo Akinwuni* (1975) 4 SC 143 At 184 - 185
[22] (1942) 8 WACA 127
[23] (1966) NMLR 41
[24] (1923) 5 N.L.R 29

because he was ill, but that he had always intended to return; and further explained that he had allowed his house to fall because he intended to build a new and better house. The Court held in this case, that the plaintiff never intended to abandon the land, thus the re-entry by the defendant (the landlord) made him liable to damages for trespass.[25] Additionally, it is important to note that notice is not necessary to determine a customary tenancy as this is predicated on the fact that custom governs its processes.

4 Legal Status and Judicial Recognition of Customary Tenancy

In Nigeria, customary tenancy is a legally recognized relationship, where a landlord grants land to a tenant for an indefinite or specified period, subject to mutually agreed terms. This type of tenancy operates under customary law, with variations across different ethnic groups in the country. Through judicial decisions, Nigerian courts have consistently reinforced the principles governing customary tenancy, highlighting the responsibilities of tenants, the rights of landlords, and the conditions under which land can be forfeited. Thus, in *Lasisi v Tubi,* [26] the Supreme Court held that a customary tenant is entitled to undisturbed possession of the land as long as they fulfill their tenancy obligations, such as acknowledging the landlord's title and paying the agreed tribute or rent. Similarly, in *Dokubo v Bob-Manuel,*[27], the court reaffirmed that a customary tenant's right to possession is subject to compliance with traditional obligations. Any breach, such as denying the landlord's title or engaging in acts inconsistent with tenancy terms, may lead to forfeiture. Furthermore, in *Obaseki J.S.C v Adediran,*[28] the Supreme Court restated the obligations of a customary tenant, which include the duty to pay rent (historically in the form of tributes), maintain good conduct, and acknowledge the landlord's title at all times.

Indeed, customary tenancy has been recognized by Nigerian courts. Courts in Nigeria respect the customary practices that govern land tenure, provided they do not conflict with statutory laws. However, there are cases where statutory law and customary law clash, particularly in urban areas, due to the introduction of the Land Use Act of 1978. Under the regime of the Land Use Act, all land in Nigeria is vested in the Governor of each state, making the Governor the trustee of land, converting customary rights into rights of occupancy. However, customary tenancy continues to operate, particularly where traditional practices remain entrenched, and statutory provisions are not strictly enforced.

5. Challenges Facing Customary Tenancy in Nigeria

A. Conflict with the Land Use Act

The Land Use Act of 1978 vested all lands in the state governors, who hold the land in trust for the people. Under customary tenancy, land is typically owned and managed by traditional authorities or families, but the Land Use Act introduced a statutory framework that often disregards these customary arrangements.[29] This results in legal conflicts, as customary landlords and tenants struggle to align their traditional practices with statutory requirements. As such, customary tenants and landowners frequently encounter difficulties when attempting to register land or obtain formal titles, as the Act's provisions may not align with customary practices. The Act's emphasis on certificates of occupancy as the primary form of land title can marginalize customary tenants who lack the resources or knowledge to navigate the bureaucratic process. [30]This situation creates ambiguity surrounding land ownership and tenure, particularly in rural areas where customary law remains dominant. Consequently, customary tenants and landlords may face difficulties when attempting to navigate statutory frameworks that do not fully recognize their arrangements.

B. Fragmentation of Land

Communal ownership, while a core principle of customary tenure, can lead to land fragmentation over generations. Over time, customary land tenure systems tend to result in the continuous subdivision of land, particularly due to inheritance practices and increasing population pressure.[31]This fragmentation can hinder agricultural productivity, as small plots may not be suitable for modern farming techniques or large-scale

[25] See also *Ezeilo v Obi* (1960) 4 ENL 19
[26] (1974) 12 SC 71,
[27] (1967) 1 All NLR 113
[28] (1992) 6 NWLR (Pt. 250) 690
[29] Udoekanem, N. B. (2013). *The impact of the Land Use Act on customary land tenure in Nigeria: A critical appraisal*. Journal of African Property Law, 11(1), 43-65.
[30] Omirin, M. M., & Antwi, A. (2004). *Informal land transactions in Nigeria: Realities and policy implications*. Journal of African Real Estate, 8(1), 32-50.
[31]A Adewopo, O Fashanu, & B Aluko, 'Land Tenure Systems and their Implications on Agricultural Productivity in Nigeria', (2017) 5 (2) *Journal of African Land Studies*, 78.

cultivation.[32]The process of fragmentation can also lead to disputes over boundaries and ownership, exacerbating land conflicts within communities. Moreover, the lack of a formalized system for land consolidation under customary tenure further exacerbates this issue, leaving many rural communities unable to fully utilize their land for economic growth.[33]

C. Inheritance Disputes

Disputes usually arise especially when customary laws of inheritance come into play because heirs disagree on the distribution of land often. Gender bias in inheritance rights under customary law is also a significant challenge, as women may be denied their share of family land, reinforcing gender inequality in land ownership.[34] Moreover, the involvement of multiple customary authorities with differing interpretations of inheritance rights further complicates matters, sometimes leading to prolonged legal battles and community tensions.[35]

D. Insecure Tenure

Customary tenants may face insecurity of tenure, particularly where local power dynamics shift, or when more powerful actors such as companies or government officials lay claim to the land.[36] Unlike statutory land ownership, which provides clear documentation of property rights, customary land tenure is largely based on verbal agreements and communal recognition.[37] This leaves tenants vulnerable to eviction, especially in cases where more powerful individuals, private developers, or government authorities lay claim to the land. In some instances, traditional rulers or family heads may attempt to seize land or arbitrarily revoke a tenant's rights, particularly if land values increase or if the land is earmarked for commercial projects, leaving tenants vulnerable. [38]

E. Lack of Documentation

Customary tenancies are often informal and lack documentation, which makes proving land ownership or rights difficult in a court of law. This presents a challenge when customary land is expropriated for public or private purposes, and compensation is required. This lack of documentation can also hinder access to credit and investment, as financial institutions may require formal proof of land ownership. The absence of formal records also makes it easier for fraudulent claims and land disputes to arise, further weakening land security under customary tenure.[39]

6. Conclusion

Nigerian courts have since recognized the importance of customary tenancy and have developed a robust body of case law surrounding the concept. For instance, in case of *Animashawun v* Osuma,[40] the courts have upheld the rights of customary tenants, provided they meet their obligations under the tenancy. It can be gleaned from case law on the subject that the courts have often emphasized that customary landlords cannot arbitrarily evict tenants if the tenant continues to diligently abide with the customary dues and keep the property in decent condition.

Customary tenancy in Nigeria plays an important role in land management, particularly in rural and semi-urban areas. While legislation such as the Land Use Act, have attempted to formalize land ownership and tenure, customary practices remain deeply rooted and are recognized by the courts. However, the coexistence of customary and statutory land tenure systems creates significant challenges, including conflicts over land ownership, tenure security, and inheritance. These issues underscore the need for clear legal frameworks and reforms to harmonize the relationship between customary and statutory land law, ensuring that tenants and landowners can co-exist peacefully and equitably.

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[32] Y L Fabiyi, 'Land *Tenure and Agricultural Development in Nigeria'* (1990) 35 (2) *Agricultural Systems*, 135.

[33] J C Nwosu, 'Land Fragmentation and Agricultural Productivity in Nigeria: Evidence from Rural Communities', (2020) 14(2) *African Development Journal*, 101.

[34] C Duruigbo, Gender Inequality in land Inheritance under Nigerian Customary law: A Critical Review,' (2021) 8 (3) *African Journal of Gender Studies,* 90.

[35] P A Ubom, 'Customary land law in Nigeria: Issues and reforms' (2014) 9 (2) *Journal of African Legal Studies,* 9(2), 79.

[36] B T Aluko, & A R Amidu, 'Women and Land Rights in Nigeria: The Customary Law Dilemma' (2006) 9 (1) *Journal of African Studies*, 45.

[37]J Onuoha, '*Land rights, tenure security, and sustainable development in Nigeria*', (2010) 7 (3) *African Land Policy Review*, 7(3), 55.

[38] C O Ogunleye-Adetona, & A Oladehinde, 'Land Tenure Security and Investment in Nigeria's Agricultural Sector' (2013) 6 (1) *Nigerian Journal of Land Management*, 45.

[39] C C Umeh, *Customary land Tenure and Rural Development in Nigeria*', (2020) 6 (2) *African Journal of Land Studies*, 112.

[40] (1972) 2 E.C.S.L.R (Pt. 1) 274