Legal Issues in Conceptualizing and Executing Real Estate Development

1.0 Introduction

In Alfred Marshall’s *Principles of Economics* written in 1890, he stated that land, labour, capital and organisation were the four factors of production. Land is a factor of production, so important that the other factors of production would be redundant without it.

For years, real estate has continued to play a vital role in the evolution of man, as well as in the development of society as a whole. Land is the bedrock upon which the satisfaction of all human needs is built: food, clothing and shelter as one way or the other, these needs are met from resources derived from land.¹ For example, agriculture, which involves the production of food, is deeply rooted to land, including the rearing of livestock. The raw materials from which clothing is processed are grown from land. Most of the supplies and equipment used in the building and construction of houses are derived from property. Land has always and will always continue to play a central role in business development, irrespective of the scale of business in question.

As important as land is, however, it is not an infinite resource. It reportedly accounts for 20% of the earth’s surface, and consequently, every economy requires comprehensive land regulations and policies to guarantee the effective usage of its land and the maximisation of resources attached to land.

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2.0 What is Real Estate Development?

Real estate development (RED) was set into motion as far back as when the early man rolled a rock into the entrance of a cave and created an enclosed space for his family, his idea being to create a shelter that was distinct from his immediate surroundings. Over time, real estate activity has been adapted to suit the needs of mankind about his society. Real estate can be defined as the space delineated by man, about a fixed location, intended to contain an activity for a set period.

RED is a unique collaborative process of balancing the characteristics of land with the complex demands of public policy and the particular surrounding environment, involving different personalities and interest groups, as well as limited resources. It is typically understood as the construction on land, and the putting in place of a legal order which would facilitate the erection and completion of the property.

RED in Nigeria is becoming an increasingly complex endeavour due to the various policies and regulations involved, as well as the scarcity of resources available. Its capital intensive nature also renders it risky, particularly in light of its illiquid nature and the slow payback period (return on investment).

RED requires one of the most intensive and complex planning structures of all human endeavours. From the conception and visualisation of the idea to the actualisation of the vision and the conclusion of the project, careful planning must be done. RED can be categorised into different types based on the use for which they are designed, such as, residential, commercial, industrial, agricultural, recreational purposes, and etcetera.²

Development is the process of carrying out works involving a change in the real use or the current intensity of use of the land or buildings involved. The Nigerian Town and Country Planning Ordinance of 1948 states in section 2(1):

Property development includes any building or rebuilding operation and any use of land or any building thereon for a purpose that is different from the purpose for which the land or building was previously being used.

### 3.0 Real Estate Financing

Proper financing is crucial to the success of any real estate development endeavour. Factually speaking, the major challenge in real estate development is funding. The large scale nature of real estate investments demands adequate financing to actualise the vision of the real estate developer.

Furthermore, the terms for the provision of the required funds would determine the trend and structure of the project. Easy access to funds would facilitate a speedy completion of the real estate project. Therefore, real estate funding is concerned with the production/provision of finance facilities for the building of houses, office complexes, and other structures on land, which are necessities in the economy. An increase in the ease of access to real estate financing in Nigeria would result in the following:

- The provision of adequate housing infrastructure for the Nigerian populace, both in the rural and urban areas;
- The development of specific sites for industrial activities in the commerce industry;
- Creation of employment opportunities, particularly for those involved in building and construction.\(^3\)

Real estate investment is an exercise that is capital intensive, and often difficult to finance from a sole source, or from an individual developer’s personal savings. As earlier stated, financing these projects are a major challenge for several reasons: the lack of stability of the economy; the strict terms imposed on borrowers by financial institutions, as well as the high-interest rates. Thus, there arises the need for other sources of funding.\(^4\)

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3 Ibid.

There are six primary methods of real estate finding used around the world: Joint Venture, Equity, and Debt financing, Sale and Lease Back Financing, Advance Payment of Key Money and Sale of Securities. The most common and basic methods, however, are the equity funding and the loan capital or a combination of both. Long term credit financing available in the form of loan capital is a more logical option as it spreads the repayment burden all through the duration of the project. Some writers have defined real estate finance as the borrowing of money to carry out real estate development.\(^5\) Real estate funding in the form of borrowing thus comes in the following forms: through loan capital; mortgage funding; debentures and contractor financing.

Before the colonial period, various sources of finance were available in different parts of Nigeria. We had the esusu and ajo systems, the age-grade associations, village development schemes, and town unions (these were for the non-native people). We also had the traditional moneylenders association. There were also social clubs such as the Aaro or Owe, who would give their contributions in kind by providing free labour on their members' building site until the circle had been completed. With a gradual increase in the volume and complexity of economic activities, these methods were eroded and replaced with more modern methods.

In Nigeria today, housing is typically financed through the following institutional sources: commercial/merchant banks, insurance companies, mortgage institutions, state housing corporations, the Federal Mortgage Bank of Nigeria, etc. All these are formal finance institutions. The informal finance institutions comprise thrift and credit societies, money lenders, etc.\(^6\)

The financing component of real estate development is usually in three stages: acquisition, development and funding of the construction work. This draws a line between the purchase of land and its development, as against the construction of buildings on the land.\(^7\)

\textit{a. Equity capital}

This is the form of financing acquired from the developer’s savings. Due to the low per capita income in the economy, and unequal distribution of revenue, low savings and low investment

\(^5\) Ibid.
\(^6\) Ibid, 4.
in Nigeria, equity capital is rarely sufficient for the funding of large-scale real estate investment. It is more beneficial to the property developer to source for both equity and debt capital to guarantee high returns and sustain the viability of the project. It should, however, be noted that a developer's ability to borrow is determined by the size of equity capital that he has acquired in preparation for the project.\(^8\)

\[b. \textit{Debt Capital}\]

The real estate developer can also have recourse to loans given by various financial institutions for a particular period. These loans fall into several categories: there are short-term loans, medium-term loans and long-term loans. Commercial and merchant banks are sources of short-term finance for real estate development. Short term loans usually cover a period of two to three years. The conditions for the granting of these loans are however very stringent, and the interest rates charged on the loans are normal between 2% to 6% above the standard interest rates.\(^9\)

Medium term loans usually granted for a period not exceeding ten years, usually through direct loans or bank overdrafts from commercial banks. These loans are obtained by real estate developers to bridge the gap, pending the financing of the project by long-term loans.

Long term financing has a redeemable period of 20 to 30 years or more at a low rate of interest. Long term loan providers include the Federal Mortgage Bank of Nigeria, the Property Development Corporation of various states, and Insurance companies. These loans come in the form of mortgages or by sale and leaseback. Long term loans, due to their nature, often demand a high level of participation in the project by the loan providers, from the process of land acquisition to the completion of the project.\(^{10}\)

\[^8\] Ibid, 2.
\[^9\] Ibid.
3.1 Proper Funding Structure

In real estate development, every loan has to be individually tailored for the scheme in question, as well as the stages involved in the development of the land. There is the need to create awareness for investors in real estate development on the intricacies involved in structuring real estate transactions. Real estate structuring involves the ability to identify, mitigate and apportion the risks involved in the project, efficiently. This awareness would not only drive the success of the sector but also promote trust, precision and proper regulation of the industry.

Structuring considerations in real estate development involve the consideration of the following factors: the adequacy of the security package, the financial structure and cash flow modelling; and an exit strategy. Capital requirements that are also paramount include an understanding of the tenor of investment; the required return on investment, the level of investor risk aversion sector bias, etc. Mechanisms should be put in place to ensure that the project can survive fluctuations in cash flow and economic stability.

Market risks can be reduced by comprehensive clarity on land and property rights, construction and financing costs. A proper knowledge of the law would mitigate issues around property and land rights, and the financing risk could be reduced with a robust financial structure.

Exit strategies are also an important part of the financing structure. There must be a way for the investors to back out of the project with minimal losses in the event of a failure of the project. Examples of exit strategies include issuing securities in capital markets such as Real Estate Investment Trusts (REITS), Mortgage-Backed Securities, Asset-Backed Securities, etc.11

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3.2 Funding Requirements and Documentation of Credit Facilities

Financial institutions would normally require a set of documents from the real estate developer before the grant of a loan facility to assess the following:

- The strength of the project – the chances of success of the project and the likelihood of the developer to pay back the loan;
- Proof of the developer is income
- The legality and structure of the developer are business
- The developers’ credit history;
- The amount the developer would need for the project, and
- Tax returns of the developer.

The financial institutions would, therefore, require the following documents for the grant of the loan:

- Credit report of the developer
- Financial statements, e.g., income statements, cash flow statement, balance sheet, list of debtors and creditors, etc.
- Bank statements
- Business Plans
- Incorporation documents of the developers company/special purpose vehicle set up for the project
- Title documents of assets
- Tax clearance certificates
- Proof of insurance of collateral security
- Marketing plans
- Valuation documents
- Survey and Building plans
- Bill of Quantity
- Lease agreements/Franchise agreements

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The Central Bank of Nigeria, in its Prudential Guidelines for Deposit Money Banks in Nigeria effective from July 1, 2010,\(^{13}\) Has provided that when financing projects, to protect against the risk of physical and financial non-completion of the infrastructure project, banks are advised to observe carefully the following issues for risk mitigation:

- **The Project Funds Agreement:** The aim of this is to provide for the financing of project cost overruns. It serves as a form of provision of a standby loan or equity (financing) to cover cost overruns and prevent the abandonment of the project through additional investment.

- **Financial Completion Agreement:** Real estate development project documentation may include a financial completion agreement that specifies the initial financial projections against which the creditors are willing to invest funds.

- **Insurance:** The banks usually require proof of a comprehensive insurance policy which would serve to mitigate the risks involved in the development project.

4.0 **Availability and Acquisition of Land for the Project**

Acquisition of land suitable for a real estate development project is usually the developer's foremost priority towards the attainment of the vision. Many factors are beyond the developer's control at this point, as there will be external influences. The availability of a site does not necessarily translate to its acquisition by the developer.

The real estate development process is unique, and its success depends on the available opportunities. The ability to acquire land for real estate development is based on the availability of a suitable site; this is determined by various factors such as the position of the market, the planning policies in place, physical factors and the purpose for which the property is to be developed.\(^{14}\)

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4.1 Steps to take in the Real Estate Development Process (Acquisition of Land)

i. *Site Identification:* The first step in finding out the availability of land to be acquired for the project would be to identify the site for the development project. Determining the site for the project may be dependent on the geographical location that the developer has in mind, or the specific purpose to which the project is to be put. Points such as the size of the property required, the nature of the property required, as well as its location, come into play.

ii. *Initiate Site Acquisition Process:* After the site for the real estate development project has been acquired, the developer would have to initiate the site acquisition process through the use of his initiative; there would be the need for an introduction of the developer to the estate agent, the landowner would also exercise his initiative; there would be public sector initiatives. The developer, the landowner, the estate agent and the public sectors are the role players at this stage.

iii. *Site investigation:* This would be the next step to take in this regard. To determine if the site is indeed suitable for the purpose for which it is to be acquired. The developer’s findings from his investigations and search on the land would determine the terms and conditions that he shall seek to incorporate into the real estate development contracts in the acquisition of the site. Landowners and estate agents are expected to provide as much information as possible, but it is the responsibility of the property developer to ensure that the land is suitable for his use by conducting a search on the land at the lands registry, probate registry and the companies registry to ensure that the landowner has good title to the land, doing a site survey, a ground investigation, utilities cum services assessment, as well as the source of the project finance.

A few points to look out for are:

- The soundness of the root of title;
- That there is no break in the chain of ownership;
- That all documents concerning the property have been correctly created, executed, witnessed, sealed, acknowledged or delivered.
- Whether or not there are any encumbrances on the property;
- Where documents have been lost or destroyed, they must be replaced with a certified true copy;
- There must be confirmation that all ground rents and other land charges have been paid for till date;
- Check that all rents and taxes have been paid to the government;
- Confirm that all documents have been duly filed or recorded at the Lands Registry
- Finally, the individual seeking to acquire the land must ensure that he demands a statutory declaration from the vendor to the effect that he has no knowledge of any defect to his title.\(^{15}\)

iv. \textit{Site Acquisition}: This is the final stage. The documents relating to the acquisition of the land for real estate development are exchanged for an agreed consideration, and the contractual agreement is signed by all the parties involved. At this stage, it is important that all parties involved have conducted the necessary investigation in order to obtain all necessary information relating to the acquisition to reduce all risks involved to a bare minimum.\(^{16}\)

\section*{4.2 Land Acquisition Policy in Nigeria}

The primary legislation that regulates land acquisition in Nigeria is the \textit{Land Use Act of 1978}. Section 1 of the Act provides that all land in a State is to be held in trust by the Governor of the State for the benefit of all Nigerians. The law also allows foreigners to acquire land wherever it is located in the country either through the government or by individual landowners.

As land in each State is vested in the government of that State, a prospective buyer can apply to a State Governor for a Certificate of Occupancy, which expires after a period of 99 years. The Federal Government of Nigeria also has the power to grant Certificate of Occupancy in


\(^{16}\) Ibid, 14.
respect of land located within the Federal Capital Territory, Abuja, or property that vested in the Federal Government but located within the territories of the various States. Local Governments also grant a Customary Certificate of Occupancy where the land in question is not in an urban area.\(^{17}\)

Two categories of people are acknowledged by law as rightful owners of land under the *Land Use Act 1978*. On the one hand, there are those who have been granted rights of occupancy by the Federal, State or Local Government, and on the other hand, there are those who held interests in land before the commencement of the Act. The Act provides that a person in this category continues to hold those interests in the property as if a right of occupancy had been granted him by the Government.

A real estate developer can acquire land from either category of persons mentioned above. When buying land from the holder of a Certificate of Occupancy, a search must be conducted at the Lands Registry of the State where the property is located to ensure that the holder has good title and that the land is not encumbered in any way. Where the owner of the land falls into the second category of people who had their land before the *Land Use Act*, the interest of that holder will be based on one or more of the different systems of property tenure that existed and operated in Nigeria before the commencement of the Act.

Upon the transfer of title from one party to another under the *Land Use Act*, the real estate developer must ensure that his title in the land is perfected in compliance with the relevant statutes. Perfection of title involves three steps, namely:\(^{18}\)

1. **Stamping:** The Stamp Duties Act\(^{19}\) Provides that the deed of assignment must be stamped within 30 days of its execution. Failure to stamp the document would render it unacceptable for registration.

2. **Governor’s Consent:** This is provided in Section 22 of the *Land Use Act 1978*. The consent clause is tied to the instrument itself immediately after the signature of the parties. The Act provides that the holder of a statutory right of occupancy shall not be able to alienate lawfully his right of occupancy without

\(^{17}\) Section 5 and section 9 of the Land Use Act.


the consent of the Governor first had and obtained. Section 26 of the Act is to the effect that any transaction or instrument that purports to confer or vest any interest or right over land in any person without compliance with the provisions of the Act shall be null and void.\(^{20}\)

The case of Savannah Bank v. Ajilo\(^ {21}\) is illustrative of the point that the assignment of land without the Governor's consent shall be held null and void. In Awojubagbe Light Industries v. Chinukwe,\(^ {22}\) the Court held that the effect of failure to obtain the Governors’ consent would render the land transaction inchoate.\(^ {23}\)

3. **Registration of instrument:** A conveyance is an instrument that can be registered under the Land Instrument Registration Law/Act. An instrument will not be registered unless the Governor’s Consent has been obtained and it is stamped. Every instrument must be registered within sixty (60) days of execution otherwise it is not admissible in proof title and will lose priority.\(^ {24}\)

### 4.3 Joint Venture Development

A joint venture is an agreement between a landowner and a developer to embark on a real estate project. The usual scenario is that the landowner has land but lacks the expertise and funds while the developer has the expertise and resources but is not in possession of the land that is suitable for the project. By pooling their resources together, the landowner and the developer, therefore, create a mutually beneficial arrangement. There are typically, three types of joint venture arrangements:

- A joint venture arrangement between the landowner and developer
- A joint venture arrangement between the landowner, developer and financer
- A joint venture arrangement between the landowner, developer and contractor

\(^{20}\) Ibid, 18.
\(^{21}\) (1989) 1 N.W.L.R [Pt. 97] 305
\(^{22}\) (1995) 4 S.C.N.J 162.
\(^{23}\) See also the more recent case of C.C.C.T.C.S Ltd. v. Ekpo (2008) 6 N.W.L.R. [Pt. 1083] 362
\(^{24}\) Ibid.
Joint venture arrangements, in spite of their highly beneficial nature, pose a few challenges. For example, what profit sharing arrangement would be agreed on, particularly in view of the fact that one party might bring more positive ideas to the table than the other party? Would profit sharing be based on the initial investment ratio or would credit (particularly financial credit) be given to a party for his contribution to the project which goes beyond the initial stake? These are questions which arise in the course of a joint venture arrangement. In order to avoid these challenges, parties to a joint venture must insert specific provisions in the contract which cover these issues.

The agreement can be terminated in accordance with the time and mode specified in the contract, or upon the completion of the project, the death of a party, or if a court of competent jurisdiction decides that the parties to the contract are no longer able to work productively.

In recent times, notable developers such as UPDC and Megamound have adopted this strategy. A real estate development joint venture agreement clearly sets out the contributions by each party, as well as their duties, responsibilities and obligations.

A few notable examples of successful joint venture arrangements (albeit with varying degrees of internally resolvable disputes) include:

1) A joint venture estate between UACN Property Development Company (UPDC) Plc and African Capital Finance (ACA) in Apo-Wuse, an upscale neighbourhood in Abuja called Metro City. The estate comprises five-bedroom detached, four-bedroom semi-detached, and four-bedroom terrace houses, along with three-bedroom bungalows and 2- and 3-bedroom flats.

2) NICON Town (Chevron Credit Society)

This project is owned by NICON Insurance Company Limited and is strategically located along Lekki-Epe Express Way. The project was financed by Megamound and Indemnity Finance Limited, who jointly funded the infrastructures. The civil infrastructural work was contracted to the
construction giants PW Nigeria Limited. The total value of the project is estimated at N2,500,000,000 (Two Billion Five Hundred Million Naira).

5.0 Establishing Good Root of Title to Land

Root of title is the foundation on which the vendor/landowner's title is built, and it is very crucial in the determination of the question whether or not the vendor has good title. This is very important in the acquisition of land as the landowner cannot give what he does not have. Therefore, if he lacks good title to the land that is subject of acquisition, he cannot give good title to the buyer. In *Apatira v. Lagos Island LGC*. The Court of Appeal, per Denton-West JCA, held as follows:

I need not say that a person cannot lawfully give to another what he does not lawfully have. The [Local Council] not having any right in the land in dispute could not have lawfully conferred any right on the [plaintiffs].

Root of title can take place in several ways such as by grant, conquest, sale, succession, adverse possession, etc.

In the case of *Ogunleye v. Oni* title was defined as the existence of facts from which the right of ownership and possession can be inferred. It refers to the degree of control, forms of control, use of enjoyment that are recognised and protected by law.

A good root of title must on the face of it, show the following:

- That the document deals with the while legal and equitable interest in the property;
- That the document contains a proper and sufficient description of the property;
- That the document does not contain anything that casts doubt on the title.

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Examples of documents that constitute a good root of title are:

- A duly registered deed of assignment;
- A duly registered deed of legal mortgage;
- A deed of gift;
- Registered titles;
- Certificate of title.

Documents that indicate a bad root of title include: a lease, an equitable mortgage, a power of attorney and a conveyance subject to a mortgage.  

**5.1 Proof of title to land**

The case of *Idundun v. Okumagba* is the locus classicus on the modes of proving title to land in Nigeria. There are five ways of proving title to land:

- By traditional evidence in the form of traditional history;
- By the production of duly authenticated title documents in the sense that their due execution must be proved unless they are produced from proper custody in the circumstances giving rise to the presumption in favour of due execution in the case of documents 20 year old or more at the due date;
- Acts of persons claiming the land, for example, selling, leasing, renting out all of – part of the land, farming on the land, provided such acts extended over a sufficient length of time and are numerous and decisive enough as to warrant the inference that the person is the true owner;
- Acts of long possession and enjoyment on the land;
- Proof of possession of land, in circumstances that make it probable that the owner of such property would also be the owner of the disputed land.

**5.2 The application and effect of “Quic Quid Plantatur Solo, Solo Cedit” maxim**

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29 Ibid, 15 at 342-343.
30 (1976) 10 SC 227
The rule at common law is that all things attached to land form a part of that land and therefore entitled to the same rights of property as the soil itself. This, therefore, means that any property and fixtures that are attached to the land belongs to whoever owns the land. For example, in the case of Francis v. Ibitoye, the plaintiff erected a building on the defendant's land without the prior consent of the defendant. The court held that the building, based on the circumstances in which it was erected, became the property of the landowner and without any obligation to recompense the builder.

There is no general rule in a customary law which supports the doctrine. However, the rule was applied in respect of customary land in the case of Okoiko v. Esedalue where the Supreme Court held that a pledgee of land under customary law could not reap the improvements on by him when the land was redeemed by the pledgor. In Islamic law, a person has no title to the buildings erected on his land by a trespasser, but may require that the land is restored to its original state or claim compensation for the restoration to be done by him. The maxim does not apply at Islamic law so that ownership of buildings attached to land or crops or trees planted on the land are separate from the land itself.

The maxim also does not apply to holders of statutory right of occupancy since the enactment of the Land Use Act of 1978 as the Act vests title to land in the Governor of the State where the land is located. The holder of a statutory right of occupancy on the land has the sole right to improvements made on the land and is entitled to dispose of same with the requisite consent of the Governor. Moreover, also to compensation in the event of a revocation of his statutory right of occupancy.

Where the possessor’s title to land is defective, the law would not protect the possessor. In the case of Apatira v. Lagos Island LGC (supra), the plaintiffs erected stalls on land that was granted to them by the defendants. The land however rightfully belonged to the New Nigeria Bank. Later, the stalls were demolished by the defendant. The Court held that the plaintiffs had no right over the stalls that they erected. The land belonged to the bank, and the bank could do with the land as it pleased.

31 (1976) 12 SC 99
32 (1974) 3 SC 15
33 Section 15 of the Land Use Act 1978
34 Section 29 of the Land Use Act 1978
Exceptions to the Rule

a. Contract: the application of the maxim can be excluded by a contract entered into by the parties to the effect that none of them would be able to rely on it in support of a claim. *Section 6(2) of the Tenancy Law of Lagos State 2011* is to the effect that a tenant, with the previous consent in writing of his landlord, can go ahead to make improvements on the land and upon the determination of the tenancy, the tenant shall be entitled to claim compensation for such improvements.\(^{35}\)

b. The Doctrine of Equity: the rules of equity will come into play to protect the interests of the possessor where the landowner encouraged the possessor to make improvements on the land without giving notice of his intention to dispute the possessor’s title. The rules would also be excluded where the owner is guilty of latches. In *Folami v. Cole*\(^{36}\) the defendant was sued by the plaintiff in an action for declaration of title to land nine years after the purchase. In addressing the indolence of the plaintiffs that lasted for almost a decade, Belgore JSC wrote:

> Equity must be considered, where were the plaintiffs since 1966 when the defendant purchased the land and erected a duplex house thereon? Nobody builds on open or empty land in secret, and a person with an interest in land surely must be vigilant as to what happens to it. *Vigilantus non dormientibus jura subveniunt.* There was no evidence that from the time the defendant purchased...in 1966 to the time he erected the duplex house to the time he occupied part of the building and leased part of it; he was challenged. It was in 1975 the plaintiffs went to court. Equity aids the vigilant and not the indolent.\(^{37}\)

In *Adeboyejo v. Salami*\(^{38}\) the appellant purchased a parcel of land on the awareness that a house had been built of it. The vendor sold the land and not the house to the purchaser. The appellant thereafter sought to oust the respondent from the possession

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\(^{35}\) See also Sections 14 and 15 of the Recovery of Premises Act No. 45 of 1945.

\(^{36}\) (1990) 2 NWLR [Pt. 133] 445

\(^{37}\) Ibid at 456.

\(^{38}\) (1976) FNLR 16
based on the maxim of *quicquid plantatur*. The Western State Court of Appeal dismissed the appeal, while holding that:

The maxim of *quicquid plantatur, solo cedit* is not of general application... in the case at hand... the appellant bought land over on which there was already a house known to have been built by the respondent after a judgment confirming her possession of the house, but not the land.

The respondent is entitled to continue in possession of the house even though title to the land is in someone else. This position is strengthened by the fact that the appellant bought the land subject to the house on it. The maxim *quicquid plantatur, solo cedit* does not, therefore, help him.

c. Statutory exceptions: a few Nigerian statutes have created some exceptions to the Rule. For example, *section 15* of the *Land Use Act 1978* gives the holder of a Statutory Right Of Occupancy the right to improvements on the land; ownership of mineral deposits in or over land is vested in the Federal Government pursuant to *section 1(1)* of the *Minerals and Mining Act*, etcetera.

6.0 The Roles of Town Planning Authorities in Approving Usage of Properties

Prior to colonial administration in Nigeria, the traditional rulers in the different regions controlled development according to the traditional modes of environmental control. There were no formally established regulations/laws but every form of development was in line with the consent of the family and the community through the traditional rulers under the Nigeria customary law.

During the Colonial era of government, there were plans set out for development and welfare within the period of 1946-1956 which became the new era of systematic development plan in Nigeria. This gave birth to the *Town and Country Planning Ordinance No 4 of 1946*, the law

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39 Cap M12, Laws of the Federation of Nigeria 2004
set to provide for the planning, development and improvement of different parts of the Country via planning schemes made by planning authorities.

Other laws which were applicable during the Colonial period were Mineral Act of 1945, which related to drainage and pollution, Land Development Law 1948 on places of worship, acquisition, and disbursement of land and Building Line Regulations of 1948.\(^{40}\) The law was merely designated to make provisions for building positioning and other structures in consideration of the roads.\(^{41}\)

### 6.1 Town Planning Authorities

Town planning authorities were established by law to enable planning activities that will bring about growth and development in urban areas. The town and country planning laws were adopted from the *United Kingdom Town and Planning Act 1932*. Preliminarily, its essence was to improve and control development by the use of various planning schemes made by the authorities but approved by the Governor.\(^{42}\)

There are numerous planning authorities with different classifications, but by the law establishing each of them, there are specific functions designated for each to perform. The authorities are required to control and manage their finances and may even buy and sell or let, hire, lease, exchange or otherwise dispose of any property, moveable or immovable. In line with above fact, the following are the duties carried out by planning authorities:

- To make reviews on the impact on environmental development and other courses of action set to protect such as politics to preserve the natural environ of the Country;
- Rehabilitation of old/abandon communities to put them in good states;


- Qualitative use of transportation demand and land use through technological geographic information systems.
- Implementation of state and regional growth management programs as well as master plans, zoning ordinance, etc.

However, the National Planning Administration of Nigeria is established at three levels, namely the Federal level, State level and Local Government levels.

At the Federal Level, the following are examples: Federal Planning Authority (FPA), Federal Housing Authority (FHA), Federal Ministry of Transportation and Federal Ministry of Works, Ministry of Environment and others, who have the duty to perform planning functions except were such functions are beyond the Federal jurisdiction.

At the State level, the following are the functions of planning authorities:

- Urban Plan
- Local Plan
- Formulation of Regional Plan
- Subject Plan
- Sub-Regional Plan

At the Local level, the following are the functions of planning authorities:

- Subject Plan
- Formulation of Town Plan
- Rural Area Plan

These planning authorities under the 1946 Ordinance outlines the function of the planning authorities concerning their activities ensuring that there are no loop holes in the distribution of basic infrastructure and development control. The assumption of master planning as a form of guide to control or influence development is an idea suitable in achieving all forms of development in the country. In sustaining this objective, the authorities are expected to effectively control every form of development.

Since the application of both, the planning legislations (the Lagos Town Planning Act of 1928 and the 1946 Nigerian Town and Country Planning Ordinance No. 4) have empowered the
authorities to administer the laws; however the authorities find it challenging to perform effectively the statutory powers granted them by the law. It is pertinent to note that at both State and Local levels enforcement of planning ordinances and standards by the planning agencies at these levels is geared at revenue generations, of which were there were defaulters; fines in forms of penal fees or total demolition of their development would be placed upon them.43

For instance, the Lagos State Development and Property Corporation (LSDPC) has been saddled with the sole authority for town planning in Lagos state, as stipulated in the provision of the ordinance. However, the most recent legislation for Urban and Regional Planning in the Country is *Urban and Regional Planning Decree No.88 of 1992*. This is said to have substituted the *1946 Town and Country Planning Law* after forty–two years of its operations. This influenced the creation of Lagos State Edict called the Urban and Regional Planning Edict 1997 which became operational from January 1998. It is saddled with the following responsibilities;44

- Establishment of Urban and Regional Planning Board, currently Lagos State Physical Planning Development Authority (LASPHYDA)
- Formulation of state policies for urban and regional planning and physical development including the longitudinal location of infrastructure;
- Initiation and preparation of regional and sub-regional plans for the state, master plan for each local government, urban master plan for major urban centre, district plan, and outline development plan;
- Advising the state government and initiating activities towards the establishment of local planning authorities;
- Other development plans and schemes embracing spatial distribution of major roads, location of industrial, commercial, residential, and recreational facilities;
- Formulation and adoption of programme for the coordination and progressive preparation and review of master plans as at when due;

43 Ibid, 40.
- Receipts of comments to draft master plans and hearing of objection and their adoption for public exhibition; and,
- All plan applications made by the federal, state, and the local governments or their agencies such as LSDPC housing estates.

Also, the Edict also made provision for the establishment of the local planning authority in each local government area as the primary urban development controller at the grassroots level to perform the following functions.\(^45\)

- Preparation of town, rural, local and subject plans
- Preparation and submission of annual report of the national physical development plan and regional state plan to the board
- Commissioning of development control within its area of jurisdiction with approval, delegate planning power to the Chief Executive Officer, other offices or a duly registered professional for the purpose of planning and development control.\(^46\) The local planning authorities are expected to approve plan for the following developments:
  - Residential development of not more than 2000 sq. m
  - Residential structure of not more than six flats
  - Residential structure of not more than three floors

Other developments outside these three are the responsibilities of LASPHYDA, such as:

- Skyscraper building of more than three floors or larger than 2000 sq. m.;
- Development plans applications for commercial, industrial, recreational, institutional and civic or public buildings; and
- All plans applications made by the federal, state, and the local governments or their agencies such as LSDPC housing estates.

Interestingly, Lagos state having the smallest proportion of land amidst its vast population has enacted a new state law, *Physical Planning Law of Lagos State 2010* which has taken cognisance of all the various laws to suite the modern plan of the state. Particularly, concerning approval of development permits and other related matters. In this regards, both

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\(^{46}\) See section 45-48 of the Physical Planning Law of Lagos State 2010.
the Decree No.88 of 1992 and the State Law provide for conditions that must be met to grant Certificate of occupancy or customary right of occupancy by the Development and Control Department (DCD).47

In the foregoing, the Law provides for the authority for the DCD to approve or reject development permission on matters overriding public interest, conditions for compensation for revocation when the application was given the provision of Law. However, the Law and Decree No.88 of 1992 enacted a Commission in charge of physical planning at federal, state and local government with the authority to revoke occupancy about approved urban or rural development plan.48

Therefore, as crucial as it is to implement the various Land legislatives in respect to the development of both urban and rural areas of the country, it is pertinent that consideration should be given to the Land Use Act to achieve a successful outcome.

7.0 Legal Documentation and Registration of Titles of Land in Nigeria

By virtue of the Land Registration Act 1924, a registrable instrument is defined as:

“A document affecting land whereby one party called the grantor confers, transfers, limits, charges or extinguishes in favour of another party called the grantee any right or title to the interest in land and includes a certificate of purchase, a power of Attorney under which any instrument may be excluded but does not include a will”.

This, therefore, indicates that a registrable instrument is a document, which transfers or proffers a right, title or interest in land to or on behalf of the grantee. However, not all documents are presumed as registrable instruments in this respect; for instance any document that on the face of it is a mere acknowledgement or proof of payment e.g. a receipt is not considered as a legal Document that transfer's title/interest in land. Examples of such registrable documents are:

- Lease/sub-lease

48 See section 75 (2) of the Decree and Section 2(m) of the Physical Planning Law of Lagos State 2010.
- Certificate of Occupancy
- Deed of Assignment
- Power of Attorney

Consequently, it is a mandate for anyone who holds an interest in land who desires to transfer to another have registered documents registered at the designated land registry. The essence of which will help any purchaser of such land determine if the owner/seller has the genuine land title document to sell the land and all encumbrances that are attached to the said property.

To execute such transfer of interest, it is required that the title holder applies for Governor’s consent,\(^{49}\) Stamp the document at the stamp duties office and then register the documents at the Land Registry. In line with the above facts, by virtue of the *Land Use Act 1978*, all land situated in the territory of each state in Nigeria are vested in the Governor of that state where the land is situated, whose prior consent is essential for the legal validity of any transfers or alienation of interest in landed property.\(^{50}\)

The essence of registration of title document is that such holder of a registered title will have a legal title upon any other claim on that same property and takes priority over an unregistered document.\(^{51}\)

**Registration of Title Documents - focus on Lagos and Federal Capital Territory**

The procedure for registering assignments, transfers, leases, subleases or other documents conferring title under the Registration of Titles Law (RTL) applicable in Lagos State is as follows\(^{52}\):

- Applicant must obtain Governor’s consent.
- The document must have been stamped at the Stamp Duty Office.
- The original Land Certificate must be attached to the document and endorsed at the investigation section of the registry.
- Notices are issued to the parties to the transaction and the registered owner of any interest on the property.

\(^{49}\) See section 22 of the Land Use Act CAP L5 LFN, 2004

\(^{50}\) See section 1 of the Land Use Act 1978, Cap L7, LFN 2004

\(^{51}\) See Ashiru v. Olukoya (2006) 11 NWLR (pt.990) 1

- These notices are posted by registered mail (this can be done through the internet to reduce the 14 days period of grace).
- After 14 days (in the absence of objection to the registration), a draft entry is prepared and approved by either the Deputy Registrar or the Registrar of Titles.
- A new Land Certificate is typed reflecting the new transaction, and this is sent to the plan section where final indexing and description of the property is reflected.
- The new Land Certificate is collated and sent for signature by the Deputy Registrar or Titles and the Registrar of Titles.
- The applicant collects the new Land Certificate.

The required documents to when carrying out registration is as follows:

- Duly completed application form.
- Certified true copy of title document is attached. The sum of N500 is charged per page.
- Government receipt of up-to-date payment of ground rent is attached.
- Government receipt for the payment of current tenement rate if the property is developed.
- Three (3) years Current Tax Clearance Certificate of the assignor.
- Three (3) years Current Tax Clearance Certificate of the assignee.
- Six copies of Deed of Assignment.

In the Federal Capital Territory of Nigeria (Abuja), the ownership of land is vested in the President of the Republic and has been delegated to the Minister for Federal Capital Territory of Abuja. The required documents include:

- Application letter prepared by the lawyer;
- Copy of the deed for which the consent is being sought;
- Proof of settlement of outstanding ground rates;
- Tax clearance certificate;
- Letter of clearance of the title holder and the Board’s resolution in case of a corporate body;
- Memorandum and articles of association. However, the requirements for assignment, lease and Power of Attorney are different in Abuja at Abuja Geographic Information (AGIS) System which is as follows:
Requirements for Registration of Deed of Assignment
- Application to register to Director of Lands
- Original and copies of title documents (Certificate of Occupancy)
- Evidence of payment of outstanding bills
- The subject plot must be developed
- Consent letter to register from the Assignor
- Original and copies of Executed Documents
- 8% of value of property. (Valuation is done by valuer from the Land Registry)
  Note: Time line for conclusion of registration is between 3-4 Months (if all things are in place)

Requirements for Registration of a Lease / Sub-lease
- The Land for the lease/sub-lease must be developed
- An application letters for registration to the director of lands
- The Original title document and photocopy of same to be presented
- Evidence of payment of outstanding bills on the land (property)
- Four (4) original copies of the duly executed and stamped document
- Payment of registration fee. This fee is 2% of the consideration and an assessor from the land registry (AGIS) would visit the property to confirm that the stated consideration is appropriate.

Requirement for registration of a Power of Attorney
- Original and copies of title documents
- Bill and Evidence (Receipts) of payment of outstanding bills
- Statutory Right of Occupancy Bill
- Ground rent over the years
- An original and copy of Executed Documents
- Power of Attorney processing fees (by e-collection)
- N102,000.00 in favour of AGIS
- N2,000.00 for any extra copy
8.0 Conclusion

It goes without saying that Nigeria as the ‘giant of Africa’ has adequate land to accommodate its entire population and foster the development of its urban and rural areas into modern metropolitan cities. This paper has enlightened the essence of engulfing real estate conceptualization by focusing on the numerous issues on availability of land, funding, registration and approvals by town planning authorities through the ambit of the law.

Every country wants to be referred to as a developed nation and not an under-developed or developing nation. For real estate development to brew into a massive scale of Nigeria's economy, both land owners and developers/contractors have to ensure that in going through all the segments of development, they are guided by the roles each authority plays, such as ensuring good title to land, finances adequately backed by security, and that designated town planning authorities work hand in hand with government officials who monitor compliance with development plans.

Putting all these mechanisms in place would guarantee a rise in foreign direct investment in the real estate sector in Nigeria, which would in turn, foster economic development.
9.0 References


