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**Right of the Child to Land Acquisition in Nigeria:
The Capacity Challenge**

Linda Amarachi Oti-Onyema*

Abstract

Realizing the indispensable place of the child in the sustainability of the human race, efforts are being intensified by the international and local communities in protecting the rights of the child. It has been observed that much of these efforts have been centered on the person of the child rather than his property, particularly as a result of the traditional view classifying the child as a property of his parents. This paper examines the right of the Nigerian child to acquire and own land as contained in the principal statutes on land acquisition with a view to determining the availability of the right and the extent to which the child can enforce it. The paper found that, like adults, the child possesses a fundamental right to acquisition and ownership of property to be exercised and enforced through his guardian or trustee until he attains age of majority. However, full realization of this right is far-fetched owing to some shortcomings in our laws which include the differences in age limit of the child in the various statutes providing the child's right to property and the variation in rules of contract applicable to the grant of the different rights of occupancy over land as contained in the Land Use Act. The paper inter alia, recommends a harmonization of both the minimum age of a child and the applicable rules.

KEYWORDS: Land, Child, Property right, and Capacity

INTRODUCTION

At common law, children were treated as chattel.¹ Children were dependent on their families not only for their early existence but also for their later survival. The feudal system in Europe established a concept of ownership and articulated a hierarchy of rights and privileges. Children were at the bottom, and the children of poor families fared the worst.² Until recently in Nigeria, children's rights were conceived in terms of traditional parental rights.

The rights of children have been identified and recognized as basic and fundamental as far back as 1799, when Hannah Moore, was quoted as having said in her book titled, "*Strictures on the Modern System of Female Education*"-, that:

*It follows, according to the actual progression of human beings that the next influx or irradiation which our enlighteners are pouring on us will illuminate the world with grave descants on the rights of youths, the rights of children, and the rights of babies.*³

The world now views the child as a person endowed with human rights independent of his parents and family and capable of enjoying these rights subject only to legal restrictions, where applicable. However, unlike other rights granted to the child, no special international recognition has been given to the child's right to own immovable property. Except for the general human rights declarations and treaties providing for the right of all men to own

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¹ K N, Mailard, 'Rethinking Children as Property', (2012), College of Law Faculty - Scholarship. 75. <<https://surface.syr.edu/lawpub/75>> accessed 26/8/2019

² 'The Maltreatment of Children from a Historical Perspective', <https://catalogue.pearsoned.ca/assets/hip/us/hip_us_pearsonhighered/samplechapter/020539969X.pdf, >accessed on 26/8/2019

³ OT Uche, 'Children, Status and the Law in Nigeria', (2010) Vol. 4(3a), *African Research Review*, pp. 378-398

property, the Convention on the Rights of the child⁴ which is the kernel of international protection of the child did not make any provision for this right. The reason for this being the primordial view based on the principle of sovereignty of states over their natural resources that issues relating to property should be left to domestic laws.

In Nigeria, the child enjoys both constitutional and statutory rights to acquire and own property.⁵ Although there is a large literature on inheritance practices and right of the child is gradually gaining legal protection, there is paucity of resources addressing children's rights to land in Nigeria. The child needs land for his survival and development. Housing, health, feeding are done on the land. The child needs to be housed in a healthy environment to survive and sometimes he feeds from the proceeds from the farm. Thus, property rights are absolutely fundamental to the economic growth of the child. This paper examines the property rights of the Nigerian child over land with a view to making recommendations on how these rights can be adequately protected and enjoyed.

LEGAL PERCEPTION OF A CHILD

The legal concept of childhood is a tinker for the application of different principles in diverse aspects of law including criminal law, contract, property law, family law and even international law. However, this concept has remained a puzzle because of its lack of uniformity in Nigerian domestic jurisdiction. Childhood is characterised differently in legal instruments depending on the purpose of the particular law.⁶

⁴ Convention on the Rights of the Child (herein referred to 'CRC') adopted by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990

⁵ See Section 43 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and sections 3, 17(2)&(3) and 87 of the Child's Right Act Cap. C50 LFN, 2004 herein referred to as CRA and Sections 5, 6, and 7 of the Land Use Act Cap. L05 LFN, 2004 herein referred to as LUA

⁶ M A AjaNwachuku, 'A Legal Analysis of the Nebulous Concept of Childhood in Nigeria', (2016), Vol. 7, No.2, *BeijingLaw Review*, pp.122-126, <<https://m.scirp.org/papers/67098>> accessed on 30/8/2019

Generally, in law, who a child is, is determined by age of the person under consideration. The term usually refers to anyone below the age of majority⁷ but has been used interchangeably with terms such as infant, minor, juvenile amongst others. Laws both international and domestic have laid down different minimum age below which a person is referred to as a child.⁸ In international law, a child is any person below the age of 18 years.⁹ Section 277 of the Child's Right Act (CRA)¹⁰ adopts this same definition. Like the CRA, the Companies Allied Matters Act¹¹ fixes the age of majority at 18 years. The Land Use Act did not expressly define a child but by the provisions of section 7 of the Act which makes it unlawful for the Governor to directly grant a right of occupancy to a person under the age of 21 years, a child can be said to be a person below 21 years. This is also the age implied by the Marriage Act.¹² Also, Section 91 of the Labour Act¹³ defines a child as a person below the age of twelve. Section 2 of the Children and Young Persons Act¹⁴ defines a child as a person under the age of fourteen while a young person is defined as any person who has attained the age of fourteen years and is under the age of 17 years. Sections 50 of the Penal Code¹⁵ and 30 of the Criminal Code¹⁶, respectively, define a child on the basis of criminal responsibility, that a child younger than seven years is considered not to be criminally liable and presumed to be *doli incapax* (incapable of committing an offence).¹⁷ The

⁷Black's Law Dictionary, 8th Edition

⁸ L A Oti-Onyema, 'Right to Life and Defence of Property in Nigeria: The Child's Right Act in Focus', (2019) Vol. 3, No. 2, *African Journal of Law and Human Rights*, p.49

⁹ See Article 1 of the CRC; Article 1 of African Charter on the Rights and Welfare of the Child, 1990, Article 3(d) of the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000.

¹⁰ Cap C50 LFN, 2004

¹¹ Section 20 of the Act, Cap C20 LFN, 2004

¹² See section 18 of the Marriage M 06, LFN, 2004

¹³ Cap. L01 LFN, 2004

¹⁴ 1943

¹⁵ Cap P03 LFN, 2004

¹⁶ Cap C38 LFN, 2004

¹⁷ Similarly, 'a male child under the age of twelve years is presumed to be incapable of having carnal knowledge', and a child between the age of seven and twelve years will not normally be held responsible for his/her actions unless it can be proved that at the time of committing the offence, he/she had the capacity to know that he/she ought not to do it.

Evidence Act¹⁸, leaves the determination of who a child is at the discretion of the judge. The Nigerian Constitution did not define a child, however, by virtue of its Section 29(4) (a)¹⁹, full age means the age of eighteen years and above.

THE CONCEPT OF PROPERTY RIGHT

In simple terms, Land is the surface of the earth that is not covered by water²⁰. In the legal milieu, land has been defined by both statutory provisions and judicial precedents to mean the surface of the earth and everything attached thereto. Section 18 of the Interpretation Act²¹ defines land to “include any building and any other thing attached to the earth or permanently fastened to anything so attached but does not include minerals.”²²A similar but more extensive definition of land is contained in the Property and Conveyancing Law²³ to include: the earth surface and everything attached to the earth otherwise known as fixtures and all chattels real. It also includes incorporeal rights like a right of way and other easements as well as profits enjoyed by one person over the ground and buildings belonging to another. In *Unilife Dev. Co. Ltd. v Adeshighin*,²⁴ the Apex Court, per Achike JSC, held as follows:

Land no longer means the ordinary ground with its subsoil, but surely includes buildings and trees growing thereon... Immovable property or 'lands' include land and everything attached to the earth or permanently fastened to anything which is attached to the earth and all chattels real. Land includes land of any tenure, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way), and other corporeal hereditaments, and an easement; right, privilege or benefit in, over, or derived from land

¹⁸No. 30 of 2011

¹⁹ This section is on renunciation of citizenship.

²⁰<<https://dictionary.cambridge.org/dictionary/english/land>> accessed on 26/8/2019

²¹ Cap. I 23 LFN 2004

²² This same definition was adopted by section 91 of the Nigerian Urban and Regional Planning Act No.88 of 1992

²³ Cap. 100 Laws of Western Nigeria 1959

²⁴(2001) 4 NWLR (Pt.704) 609

The above definitions birthed the Land Law principle of *quid quidplantantur solo solocedit*.²⁵The Land Use Act does not define land, but "developed land" to mean "land where there exists any physical improvement in the nature of road development services, water, electricity, drainage, building, structure or such improvement that may enhance the value of the land for industrial, agricultural or residential purposes".²⁶It presupposes that land may be developed or undeveloped.

To use land and enjoy the benefits thereon, a person seeking to so do must possess the requisite legal right usually referred to as "property right". Without going into the controversy associated with the concept of right, a right means powers, interests or benefits inherent in a human being and enforceable in law.²⁷A property right connotes the exclusive authority to determine how a resource is used, whether that resource is owned by government or by individuals. This consists of right to determining the use of a resource, the exclusive right to the services of the resource and the right to delegate, rent, or sell any portion of the rights by exchange or gift at whatever price the owner determines.²⁸In relation to land, a property right depicts the unquestionable exclusive right of a person to the ownership, use and disposal of land.

THE LEGAL FRAMEWORK ON PROPERTY RIGHTS OF THE CHILD

Law is the bedrock of enjoyment and exercise of any right in any democratic society. In the absence of law, enforceability of rights is only but a mirage. For the purpose of this discourse, law will be bifurcated into international and domestic laws.

The traditional view was that a right to property can only arise under the domestic law of a particular nation based on a fundamental precept of

²⁵Which means "whatever is affixed to the soil, belongs to the soil."

²⁶Section 51 of LUA

²⁷ L A Oti-Onyema, *op.cit.*

²⁸A A Alchian, 'Property Rights', <https://www.econlib.org/library/Enc/PropertyRights.html> accessed on 26/8/2019

international law that each nation has sovereignty over its own territory.²⁹ The logical corollary of this view is that each nation has the right to adopt its own laws regarding the occupancy and use of that territory by private actors, including laws regulating property rights.³⁰ Under this approach, sovereignty and property are inextricably intertwined; property rights are created and defined by only national law.³¹ This view has increasingly become obsolete as both national and international laws now recognize the child's right to acquire and own property.

International Law on Property Rights

The right to own property has been globally recognized in the diverse international conventions starting from the Universal Declaration of Human Rights.³² This landmark document paved way for the development of an impressive body of legal instruments. Despite its immense contributions to the development of human rights law, the UDHR remains a non-binding document without any legal force attached thereto albeit, it has been referred to in international and regional human rights instruments, numerous national constitutions and international and domestic jurisprudence.³³ Article 17 of the Declaration acknowledged the right to property as a moral right.³⁴ It provided that: "everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property".

In 1966 two treaties namely the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁵ and the International Covenant on Civil and Political Rights (ICCPR)³⁶ were negotiated and adopted by state parties to implement the provisions of the Universal Declaration. Unfortunately, neither

²⁹ I Oppenheim, 'International Law' in J G Sprankling, "The Global Right to Property", (2014) 52 *Columbia Journal of Transnational Law*, p.464

³⁰ *Ibid*

³¹ *Ibid*

³² proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A and herein referred to as UNDHR)

³³ *Ibid*

³⁴ *Ibid*

³⁵ adopted by the United Nations General Assembly on 16 December 1966 through GA. Resolution 2200A (XXI), and came in force from 3 January 1976

³⁶ The Covenant was adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976

of the twin treaties contained a right to property.³⁷ It has, however, been argued that the omission of the right to property from these treaties should not be construed as rejecting the existence of the right.³⁸ It is submitted, however, that Article 11 of the ICESCR which imposes a duty on State Parties to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions, relates to right to property.

Regional treaties have also made provisions recognising the right to property. Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”)³⁹ provides, in part, that “every natural or legal person is entitled to the peaceful enjoyment of his possessions”. Article 21(1) of the American Convention on Human Rights (“American Convention”)⁴⁰ expressed the basic right in clear language: “everyone has the right to the use and enjoyment of his property”. In the same vein, Article 14 of the African Charter on Human and Peoples’ Rights (“African Charter”)⁴¹ provides that “the right to property shall be guaranteed”. Article 31 of Arab Charter on Human Rights (“Arab Charter”)⁴² provides in part: “everyone has a guaranteed right to own private property . . .” Thus, a right to property is a reality as it is recognized in most global and regional instruments.

Apart from the general human rights instruments recognizing the right to property, there are few international standards relating to the property rights of children. International law pertaining to children’s rights began in 1924 with the Geneva Declaration on the Rights of the Child by the League of Nations. Later, the 1959 Declaration on the Rights of the Child and the 1989 UN

³⁷J G Sprankling, *op. cit.*

³⁸L Henkin, “Introduction, in The International Bill Of Rights: The Covenant on Civil and Political Rights’ in J G Sprankling, *The Global Right to Property*, (2014) 52 Columbia Journal of Transnational Law 464

³⁹Convention for the Protection of Human Rights and Fundamental Freedoms, protocol 1, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262

⁴⁰American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123

⁴¹African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217

⁴²Arab Charter on Human Rights, Sept. 15, 1994, reprinted in 12 INT’L HUM. RTS. REP. 893 (2005)

Convention on the Rights of the Child (CRC) provide a plethora of rights for the child but do not specifically mention the property rights of children. Indeed, they only mention property insofar as children are not to be discriminated against because of their ownership or lack of ownership of property.⁴³ The first major international convention to mention property of children, is the Hague Convention on Parental Responsibility and Protection of Children⁴⁴. There is however, no express provision guaranteeing the right of the child to property in it. The Convention basically deals with areas of conflict in the jurisdiction of nation states and the applicable laws in relation to the protection of the person and property of the child. The first object of the Convention as stated in its Article 1 is ‘to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child; protect the person or property of the child’. It is very difficult for the child to rely on this Convention for claim of property right.

Nigerian Laws

The foundation of all rights in Nigeria is the Constitution⁴⁵ which has provided an array of fundamental rights to be enjoyed by the citizenry regardless of age and the enforcement of such rights in cases of breach under its Chapter IV. The right to acquisition and ownership of property is provided in Section 43 of the Constitution to wit: “subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.”

Thus, the child by virtue of his citizenship, has the constitutional right to acquire and own land which he must not be deprived of compulsorily except

⁴³ S F Joireman, ‘Protecting future rights for future citizens: children’s property rights in fragile environments’, <https://www.tandfonline.com/doi/full/10.1080/13600818.2017.1416073> accessed on 27/8/2019

⁴⁴ Officially known as Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children

⁴⁵ The Constitution of the Federal Republic of Nigeria 1999 (as amended)

in the overriding interest of the public and upon prompt payment of compensation.⁴⁶

A similar provision is contained in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act⁴⁷ as follows:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

The Land Use Decree is the principal statute governing land tenure in Nigeria. The Decree vests all land comprised in the territory of each State in the Federation in the Governor of that State to be held in trust and administered for the use and common benefit of all Nigerians subject to the provisions of the Decree.⁴⁸ For the purpose of the Decree, lands in the state are designated into two areas: urban and non-urban areas. The control and management of all land in urban areas lie with the Governor while the Local Government manages and controls lands in non-urban areas.⁴⁹ Although not within the ambit of this research, there has been unresolved controversy as to the true import of section 1 of the Decree and nature of trust created therein even amongst jurists.⁵⁰ According to Afe Babalola, being a trustee of land vested in him, the Governor holds only nominal ownership of land for the purpose of accomplishing the objective of the trust. The duties of the trustee are clear and must be geared towards the best interest of the *cestuique* trust, meaning that the trustees must not benefit from the trust.⁵¹ The beneficiaries being all Nigerian citizens have the right to apply to the Governor to be granted right of occupancy. This view is in *tandem* with the position of the law in *Savannah Bank Ltd. v Ajilo*.⁵² On the contrary,

⁴⁶See Section 44 of the Constitution

⁴⁷No. 2, 1983

⁴⁸Section 1 of LUA. See also *Airtel Networks Ltd. v Attorney General Of Kwara State* (2014) LPELR-23790(CA)

⁴⁹Section 2 of the Act

⁵⁰*Abioye v Yakubu* (1991) 5 NWLR (Pt. 190) 130

⁵¹ A Babalola, *et al.*, 'Why Land Law Should Cut Governor's Powers' in C C Wigwe, *Land Use and Management Law*, (Accra, Mountcrest University Press, 2016) p.37

⁵² (1989) 1 SC (PT. 11) 90

another view was expressed by the Apex Court in *Kachalla v. Banki&Ors*⁵³ depicting that the legal estate and interest in the land within the state vest in the Governor. It does appear that the intention of the legislator would be misinterpreted if the later position is adopted. If the law intended to vest the legal interest in the Governor, the Act as well as the Constitution would have allowed the Governor the arbitrary right to acquire or revoke a citizen's interest. It has also been opined that while the interest vested in the Governor is unstated in the Act, the interest a Nigerian can lawfully acquire from the Governor is scaled down to statutory right of occupancy. In terms of known interests in land, the quantum of a statutory right of occupancy remains unclear.⁵⁴

Whatever be the interpretation of this section of the Act, one thing is clear that no one can exercise a right of ownership over any land in the state without the consent of the Governor first sought and obtained. In the real sense, the highest interest obtainable is a right of occupation (possession) and not ownership. In *Kachalla v Banki*⁵⁵, the Court succinctly stated that: "the tenor of the Land Use Act was to 'nationalise' all lands in the country by vesting its ownership in the State. The maximum interest preserved in private individual hands is a right of occupancy. The nature of interest any person can acquire is a right of occupation and no more." The statutory right of occupancy is usually granted for a period of 99 years. In *Abioye v Yakubu*⁵⁶ the court made it crystal clear that:

To the extent that it can only be granted for a specific term (see section 8 of the Act) it has the semblance of a lease. Also to the extent that a holder has the sole right to an absolute possession of all the improvements on the land during the term of a statutory right of occupancy, a holder does not enjoy more rights than a lessee under common law. When therefore section 34(2) of the Act converted the interest held by an owner to a

⁵³ (2006) 2 SCNJ 305

⁵⁴ *Abioye v. Yakubu* (Supra)

⁵⁵ (2006) 8 NWLR (Pt.982) 364

⁵⁶ (Supra)

statutory right of occupancy the Act reduces him to the position of a tenant subject to the control of the state through the governor. As a tenant, he is bound by the implied and express terms of the tenancy. As one of the terms stated in the Act is that a holder requires prior consent in writing of the Military Governor to any alienation.

A right of occupancy is a possessory right whether statutory or customary granted a Nigerian citizen over land.⁵⁷The Statutory right of occupancy is one grantable only by the Governor of a state over land in urban or non-urban areas as the case may be. Customary right of occupancy is one grantable by the local Governments in respect of lands in non-urban or rural areas.⁵⁸Obviously, the distinction between these two rights lies in the issuing authorities and area of designation of the land. While the Governor can grant statutory right of occupancy over all lands, the Local Governments can only grant customary right of occupancy within rural areas. Both statutory and customary rights of occupancy are of two classifications. The first is the statutory right of occupancy granted by the State Governor pursuant to section 5(1) (a) of the Act and customary right of occupancy granted by the Local Government under section 6(1) (a) of the Act. The second is the statutory right of occupancy deemed to have been granted under section 34(2) and (4) of the Act and the customary right of occupancy deemed to have been granted under section 36(2) of the Act.⁵⁹In both rights of occupancy therefore, there exists both actual and deemed grant. An actual grant is one expressly granted by the Governor or Local Government while deemed grant comes into existence automatically by operation of law.⁶⁰

⁵⁷ See *Ogualaji v Attorney General of Rivers State* (1997) 5 SCNJ 240

⁵⁸Section 51 of the Act defines both rights as follows:"customary right of occupancy" means the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by aLocal Government under this Act. Statutory right of occupancy means" a right of occupancy granted by the Governor".

⁵⁹ See *Adole v Gwar* (2008) 11 NWLR (Pt. 112); 118

⁶⁰ P I Nwafuru, 'Principles and Cases on Deemed Grant of Right of Occupancy', https://www.academia.edu/12623272/PRINCIPLES_AND_CASES_ON_DEEMED_GRANT_OF_RIGHT_OF_OCCUPANCY accessed on 27/8/2019

Section 1 of the Act constitutes a huge limitation to the enjoyment of the citizen's constitutional right to acquire and own land as such right cannot be exercised without due authorisation from the Governor. This principle runs counter to the concept of ownership defined by Niki Tobi in *Abraham v Olorunfunmi*⁶¹ as:

the totality of or the bundle of the rights of the owners over and above every other person in a thing. It connotes a complete and total right over a property. The owner of a property is not subject to the right of another person. Because he is the owner, he has the full and final right of disposition without seeking the consent of another party because as a matter of law and fact, there is no other party's right over the property that is higher than that of his. He has the inalienable right to sell the property at any price. He can give it gratis i.e. for no consideration. The property begins and ends with him unless he transfers his ownership to a third party: he remains the allodial owner or absolute owner.

In fact due to the unconscionable use of this power for personal enrichment by the present day executive against their subjects, there has been a call to amend the "vesting provision" of the Act. It has been observed that the Land Use Act as a major legislation affecting the fortunes of every Nigerian leaves a lot to be desired in its drafting. Laudable as the intention of the Act declared in the provisions of *section 1* is, it cannot be realised as long as the administrative provisions which deprive all Nigerians of the use and benefit of the land vested in the Governor remains.⁶²

While it is constitutional and lawful for citizens to acquire and own land in Nigeria, it may be unlawful for the Governor to grant a citizen a right of occupancy personally. *Sections 5* and *6* of the Act authorise the Governor and Local Government to grant statutory and customary rights of occupancy in

⁶¹ (1993) 1 NWLR (PT. 155) 53 at 74, 75

⁶² *Savannah Bank Ltd. v Ajilo* (Supra)

respect of land to any person desiring to acquire land within the state. Where however, the person seeking such acquisition is less than 21 yearsold, it is unlawful to make a direct grant of such right to him. It is pertinent to reproduce *Section 7* of the Act as follows:

7. It shall not be lawful for the Governor to grant a statutory right of occupancy or consent to the assignment or subletting of a statutory right of occupancy to a person under the age of twenty-one years; Provided that -
 - (a) Where a guardian or trustee for a person under the age of 21 has been duly appointed for such purpose the Governor may grant or consent to the assignment or subletting of a statutory right of occupancy to such guardian or trustee on behalf of such person under age;
 - (b) a person under the age of twenty-one years upon whom a statutory right of occupancy devolves on the death of the holder shall have the same liabilities and obligations under and in respect of his right of occupancy as if he were of full age notwithstanding the fact that no guardian or trustee has been appointed for him.

Contextually, a person under the age of 21 is a minor or child under the Land Use Act. It must be emphasized that, the unlawfulness in granting a right of occupancy to a child is only in respect of statutory right of occupancy grantable by the Governor. Contrary to the erroneous views held by some members of the public that a child cannot acquire and own land in Nigeria, it is submitted that the child is not precluded from acquiring land under the Act but by reason of age with its attendant mental immaturity, the Act provides for the child's right to a statutory right of occupancy to be exercised through his guardian or trustee in order to protect the child from unscrupulous, dubious adults.

The implication of section 7 is that in all other cases, a child can lawfully be granted a right of occupancy. A child can therefore, validly make a personal application for a customary right of occupancy to the local Government where the land he seeks to acquire is situate and same lawfully granted to him. The Act having expressly mentioned statutory right of occupancy granted by the Governor, by the principle of *expressio non uniusestalterius that the express mention of a thing is the exclusion of another*⁶³, customary right of occupancy is excluded. In *Abubakar v Ali*⁶⁴ the Court of appeal reiterated this principle in its decision, thus:

it is pertinent to point it out at once that in law where a Statute or Enactment or Bye Law or Rules of Court names specific things amongst many other possible alternatives, the intention of the law makers is that those things not named are not intended or included but rather excluded. This has found expression in the Latin Maxim: "Expressiouniusest exclusion alterius."

One question that calls for an answer is: why is it unlawful to grant a statutory right of occupancy directly to a child and lawful to grant the same child customary right of occupancy? The reason for the dichotomy in the lawfulness of a child obtaining statutory and customary rights of occupancy is undisclosed. The nearest possible explanation, however, is found in section 8 of the Act which provides that:

Statutory right of occupancy granted under the provisions of section 5 (1) (a) of this Act shall be for a definite term and may be granted subject to the terms of any contract made by the Governor and the holder not being inconsistent with the provisions of this Act.

There is always a contractual relationship with defined terms created between the Governor and the citizen who applies to be granted a right of occupancy. The certificate of occupancy issued herein is a *prima facie* evidence of

⁶³*A-G Bendel State v Aideyan* (1989) NWLR (PT. 188) 646

⁶⁴(2017) LPELR-41915(SC)

ownership of land by the applicant and constitutes a binding contract on both parties.⁶⁵ A community reading of sections 9, 10 and 11 of the Act shows that certificate of occupancy is only granted in respect of statutory right of occupancy. It means that customary right of occupancy not being a contract the issue of capacity of parties does not arise.

Where the statutory right of occupancy has been granted, upon the death of the holder, the right can devolve on any person including the child. In this case too, the capacity of the child does not arise as there is usually no contract in devolution of rights.⁶⁶ Section 21(b) of the Act provides that :

a person under the age of 21 years upon whom a statutory right of occupancy devolves on the death of the holder, shall have the same liabilities and obligations under and in respect of his right of occupancy as if he were of full age, notwithstanding the fact that no guardian or trustee has been appointed for him.

This provision is a bit ridiculous. A statutory right of occupancy once granted remains a contract between the holder of the right and the Governor. It is presumed that devolution of the right upon the death of the holder transfers the terms the deceased subscribed to under the contract to the inheritor and binds him as though he were the original party to the contract. A child who has been declared incapable of being granted a statutory right of occupancy by reason of immaturity, has been imputed maturity to carry out the terms of the contract which he could not be a party to. If the contract continues after the death of the holder and passes on to his successor-in-title, is the successor not expected to have the legal capacity to be a party to the contract before same can bind him? Unlike the provisions of section 7, the child need not be represented by a guardian or trustee. There is need to bring this provision in conformity with section 7 of the Act.

The Child's Right Act

⁶⁵ See Section 10 of the Act

⁶⁶ See section 24 of the Act

By virtue of Section 3 of the Act which incorporates the fundamental rights enshrined under Chapter IV of the 1999 Nigerian Constitution into the provisions of the Act, the right to own immovable property or interests thereon is recognized and guaranteed. Inheritance right of an unborn child conceived during the lifetime of his parents to share in their estate upon their death intestate is also guaranteed.⁶⁷ Section 87 of the Act which provides for the powers of a child's guardian over his estate presupposes that the child has a right to own estate.

CAPACITY OF THE CHILD TO ACQUIRE LAND IN NIGERIA

“Capacity” is synonymous with “competency.”⁶⁸ They both refer to the ability of the individual to make a decision. Competency is central to an understanding of children's rights and responsibilities. Rights flow from our unique ability, as human beings, to reason and rationalize. Rights are “only thought appropriate for those who possess the capacity for rational choice: a criterion commonly held to exclude children.”⁶⁹ The law cares in most instances about whether children are capable of exercising certain rights or being held accountable for their actions. Every minor regardless of individual capacity, misrepresentations about his age or the fairness of an individual bargain has a right to disaffirm most contracts entered into during minority, upon reaching the age of majority because he is presumed incapable of navigating the adult marketplace.⁷⁰ Thus, except for contract for necessities, a child is precluded from entering into contracts of any form. Section 1 of the Infant relief Act⁷¹ which is a statute of limitation incorporated into the Nigerian legal system, renders void all contracts, entered into by infants for

⁶⁷ Section 17(1) and (2) of the CRA

⁶⁸ J L Woolard *et al.*, ‘Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts’, (1996) 20 *LAW & HUM. BEHAV.*, p. 219

⁶⁹ L E Teitelbaum, ‘Children's Rights and the Problem of Equal Respect’ in L Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law*, (2006) *UC Davis Journal of Juvenile Law & Policy* Vol. 10:2, pp. 278-279

⁷⁰ L Cunningham, ‘A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law’, (2006) Vol. 10:2, *UC Davis Journal of Juvenile Law & Policy*, pp. 278-279

⁷¹ 1874

the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities).⁷² No right of action exists against such a person at majority age for recovery of debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. Like the Infant Relief Act, the Child's Right Act which is considered as a more comprehensive legal document regulation the affairs of the child equally restated the incapacity of the child to enter into contracts except for necessities.⁷³ The infancy defense or doctrine has been justified on the grounds that unsophisticated minors are likely to enter into foolish contracts, squander their wealth, and be taken advantage of by crafty adults.⁷⁴

Most transactions relating to acquisition of land are conducted through negotiations and agreements in form of contracts which makes the capacity rule on children applicable. In order not to entirely deny a child the right to acquire land, Nigerian legal jurisprudence on property rights generally permits the child to enter into contracts for acquisition of land through their guardians or trustees.

The Land Use Act provides that a child through his guardian⁷⁵ or trustee⁷⁶ duly appointed can be granted a statutory right of occupancy or consent to assignment or subletting of one.⁷⁷ A statutory right of occupancy having the

⁷² Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

⁷³ Section 18 of the CRA

⁷⁴ *ibid*

⁷⁵ The word 'guardian' is defined in Black's Law dictionary as a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect of age, understanding, or self-control, is considered incapable of administering his own affairs. See <https://thelawdictionary.org/guardian/> accessed on 31/8/2019

⁷⁶ A trustee is any type of person or organization that holds the legal title of an asset or group of assets for another person, referred to as the beneficiary. A trustee is granted this type of legal title through a trust, which is an agreement between two consenting parties. See <https://www.investopedia.com/terms/t/trustee.asp> accessed on 31/8/2019

⁷⁷ See section 21(1)(a)

effect of a contract, a child is precluded except through his guardian or trustee from being granted same.⁷⁸

A guardian may be appointed either for all purposes or for specific purposes.⁷⁹In Nigeria, under the Child's Right Act, there is no distinction between guardian of a child and his estate. In other words, what we have is full or plenary guardianship. Section 87 of the Act clearly reveals this:

A guardian under this Act shall have all such powers over the estate, as the case may be of a child as a guardian appointed by will or otherwise by virtue of the rules of common law, equity or appropriate personal law.

The natural guardianship of a child resides with the parents.⁸⁰ There are cases where such parental responsibility is transferred to persons other than the parents of the child. By *section 83* of the Act such persons can be appointed by an order of the court or by deed. Where one of the parents of the child is dead, the surviving parent may by deed appoint a guardian to take care of the child at his or her death.⁸¹ This also applies to a single parent.⁸² A court of law can make the appointment where the parents of the child have been found unfit to take care of him. The court can appoint a person as a joint guardian with the child's parents or a sole guardian where the person as a joint guardian has discovered that the parents of the child are unfit to remain in custody of the child.⁸³

To ensure continuous protection of the child, the Act gives power to a guardian to appoint by deed another guardian for the child in the event of his

⁷⁸The Act does not provide the procedure for appointment of a guardian or trustee for a child. Recourse shall therefore be had to the CRA

⁷⁹ Guardianship and Custody of Children; Customary Perspective Delivered at the Refresher Course for Judges and Kadis, on Monday The 11th Of March, 2019 at the National Judicial Institute, by Hon. Justice Folashade O. Aguda-Taiwo, the President Customary Court Of Appeal Ondo State

⁸⁰See section 83(1) of the CRA

⁸¹Section 83(3)

⁸² See Section 83(4)

⁸³Section 83(2) and (5)

death.⁸⁴This constitutes an exception to the age long principle of *delegatus non-potest delegare*. *Albeit*, laudable, it is recommended that the appointment of a guardian by another guardian be made subject to the supervisory powers of the court to scrutinise and approve such appointment in the best interest of the child.

It is necessary to obtain the consent of a person to be appointed a guardian before such an appointment is made.⁸⁵ The consent of the child in whose favour the appointment is made is not necessary but the child can make an application for the revocation of the guardian's appointment with the leave of the court.⁸⁶It is observable that apart from revoking his appointment,⁸⁷ no other sanction is provided where the guardian is in breach of his duties under the Act or misappropriates the estate of the child.

The effect of guardianship in land acquisition is that it rips the child off the right to directly enforce the contract entered into by his guardian based on the doctrine of privity of contract. In *Thomas Chukwuma Makwe v Chief Obanua Nwukor*⁸⁸, the Apex court per Iguh, JSC held that:

It is trite law that as a general rule, a contract affects only the parties thereto and cannot be enforced by or against a person who is not a party to it. In other words, only the parties to a contract can sue or be sued on the contract and, generally, a stranger to a contract can neither sue nor be sued on the contract even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.

⁸⁴Section 84(1)

⁸⁵Section 85

⁸⁶ See section 86 of the Act.

⁸⁷ The power to remove a guardian is similar to the power to remove a trustee. The court in exercising its power to remove a trustee under the Trustee Law of Ogun State held in *Ademola v Sodipo* that: "The Court may remove a private trustee if the Court is satisfied that the continuance of the existing trustee in office may be detrimental to the execution of the trust notwithstanding that misconduct or maladministration has not been proved against him." Misconduct amounting to dishonesty or crime need not be proved before a Court can exercise its power under section 29"

⁸⁸(2001) 10 SCM 69

The child's right is, therefore, only protected as long as there is a guardian or trustee in existence. Good a thing, there is provision for appointment of more than one guardian to fill the vacuum in the absence of any of them⁸⁹ but there are no strict rules regulating the manner in which the power of guardianship is exercised to avoid likely abuse of the position unlike what is obtainable in the United States of America. In US, the appointment of a guardian of estate suitable for the child is the judicial function of the Probate Court. Where however, a minor is 12 years or older he is allowed to indicate his or her preference regarding who will serve as guardian, if he wishes to do so. The court may require the guardian of the estate to furnish a probate bond for the protection of the minor's property. The amount of the probate bond is usually equal to the value of the minor's assets. When a bond is required, the appointment of a guardian of the estate is not effective until the probate bond is filed with the court.⁹⁰ The minor's assets must be held in separate accounts from the guardian's personal assets. Investments of a minor's property by a guardian are strictly limited by law. The guardian of the estate should file copies of the Fiduciary's Probate Certificate with financial institutions at which the minor's assets are held. The certificate provides notice that the minor's assets are under the jurisdiction of the Probate Court and that the guardian of the estate has authority to manage the assets. If the minor owns real estate, notice of the guardianship should be recorded on the land records. Within two months of appointment, the guardian must file an inventory with the court listing all of the minor's assets at fair market value as of the date of the appointment. The guardian must provide copies of the inventory to each party and attorney of record. If the guardian of the estate wishes to sell or mortgage any real estate belonging to the minor, the guardian must file a petition in the Probate Court. The court will hold a hearing after notifying interested parties. The court may authorize the sale if it determines that it will be in the best interests of the minor. The guardian must file periodic financial reports or accounts with the Probate Court to report on the guardian's

⁸⁹ See section of the CRA

⁹⁰ <<http://www.ctprobate.gov/Documents/User%20Guide%20-%20Guardians%20of%20Minors.pdf>> accessed on 31/8/2019

management of the minor's assets. The court may remove a guardian of the estate who becomes incapable, neglects to perform the required duties or mishandles the minor's assets. The court will then appoint another guardian of the estate. The guardianship of the estate will terminate when the minor reaches age 18. The guardian must file a final financial report or account upon termination of the guardianship and transfer all remaining assets to the minor.

The Land Use Act provides for appointment of a trustee as an alternative representative of the child in land acquisition. Unlike the guardian, the CRA does not provide for the appointment of a trustee or the procedure for such appointment. A trustee is responsible for the proper management of all property and other assets owned by the trust for the benefit of a beneficiary.⁹¹ A trust can include an outline of how the assets would be managed. The trustee must distribute them according to terms laid out in the trust. Trustees have some latitude, however, in executing long-term financial planning: they can decide to invest trust assets to preserve them for the beneficiary; make decisions, sometimes at their discretion, within the boundaries of the provisions of the trust; and they're required to prepare records and tax returns, among other duties.⁹² In contradistinction from a guardian, a trustee is only appointed with respect to property management.

There are several remedies available to an aggrieved beneficiary in the event of a breach of trust by a trustee. Such remedies include claims for damages, injunction to restrain a breach, tracing and/or recovery of the trust property, criminal prosecution, amongst others. Notwithstanding the foregoing, the right of a beneficiary to seek certain remedies is subject to existing Nigerian limitation laws. For instance, *Section 32 (1) of the Limitations Law, Laws of Lagos State*⁹³, any action by a beneficiary to recover money or other property, or in respect of any breach of trust, must be commenced within 6 years from the date on which the beneficiary's right of action arose. Any action instituted after the expiration of 6 years will not be entertained by any court of Law in

⁹¹<<https://www.investopedia.com/terms/t/trustee.asp>> accessed on 31/8/2019

⁹²<https://anselmolindberg.com/blog/guardian-trustee-same-person/> accessed on 28/8/2019

⁹³ 2015

Nigeria. This is a big snag in the realization of the child's right. It means that if the breach of trust was committed when the child was ten years old, he cannot bring an action 11 years after he has become an adult with the requisite ability to understand and enforce his rights.

Breach of trust also constitutes a crime usually referred to as criminal breach of trust. The Apex Court in *Ademola v Sodipo*⁹⁴ held that: "Conduct which is detrimental to the execution of the trust, and whether misconduct or maladministration has been proved against a trustee may range from criminal conduct to mere moral turpitude⁹⁵. The conduct may not constitute an actual breach of trust, yet it could be sufficient to ground his removal.⁹⁶ Misconduct need not amount to dishonesty or criminal conduct to ground removal."

A contract entered into with a child for the acquisition of land contrary to section 7 of the Land Use Act is void and unenforceable. Section 26 of the Act categorically stated that: "any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void.

This provision received judicial credence in *Corporate Ideal Ind. Ltd v Ajaokuta Steel Company Ltd & Ors*⁹⁷, where the Supreme Court, per Okoro, JSC held that: "It is crystal clear that any contract or transaction entered into by parties, which contract or transaction is expressly or impliedly prohibited by statute, is illegal and unenforceable"

While we commend the use of trustees or guardians to represent the child in land transactions, a major problem that arises is the differences in the laws relating to the right of the child in this respect. Under the LUA, the age is 21 while under the CRA, it is 18 years. A person above 18 years and below 21 under the CRA is already an adult with full legal capacity to enter into contracts without the necessity of appointing guardians or trustees for him.

⁹⁴(1989) 5 NWLR (Pt. 121) 329

⁹⁵See also *Letterstedt v Brookers* (1884) 9 App. Cas. 371, 386

⁹⁶See *Moore v. M Glynn* (1894) 1 I. R. 74

⁹⁷See also *Ebhota v Plateau Investment & Property Development Company Ltd* (2005) 1-5 NWLR (Pt 948) 266

Conversely, such a person cannot claim capacity under LUA. The implication is that the lawfulness or otherwise of contracts involving a child depends on the applicable statute. This situation poses a major challenge in the determination of the actual age a child is entitled to the protection of his property rights.

CONCLUSION

In this part of the world where the culture of making Will is lacking and increase in death rate of parents, countless incidences of property right violations against the Nigerian child regularly occur without prosecutions. This is evident in the dearth of judicial precedents in this regard. Lack of interest in the implementation of the rights of the child over land is as a result of the mistaken belief that these rights are futuristic in nature and inure only when he attains majority age. Another major setback in realizing child's property right is lack of awareness and understanding by victims of these violations, of rights available to them and enforcement procedure in the event of such violations. Many children who are orphaned very early in life are oblivious of estate left behind by their parents. It has been established that a child has both a constitutional and statutory right to acquire and own property. However, a lot needs to be done for this right to be adequately protected.

Like in grant of statutory right of occupancy, it is recommended that the Land Use Act be amended to provide for appointment of guardians to represent the child in the grant of customary right of occupancy for effective protection of the child from deceitful adults. The provision on devolution of liabilities contained in a statutory right of occupancy inherited by a child on that child even in the absence of a trustee or guardian should be amended to bring it in conformity with section 7 which precludes a child from grant of statutory right of occupancy except through his guardians or trustees.

The age of majority contained in the Act should be harmonised with the age in the CRA. Although the use of guardians is laudable, the power granted the guardian can easily be abused if not checked. It is therefore recommended that strict rules on the management of the child's estate by a guardian in USA

particularly with the guardian entering into a bond for the protection of the child's assets be adopted in Nigeria. A child who is capable of understanding his right to property, albeit, less than the majority age should be allowed to make a choice as to who becomes his guardian with serious guidance from the court.

The power to appoint a new guardian in the event of death of an existing guardian should be the sole responsibility of the court like in USA or at least the appointment by the current guardian should be subject to judicial scrutiny and approval. High level of sensitization should be embarked on to constantly enlighten the child, his family and members of the public on the existence of this right.