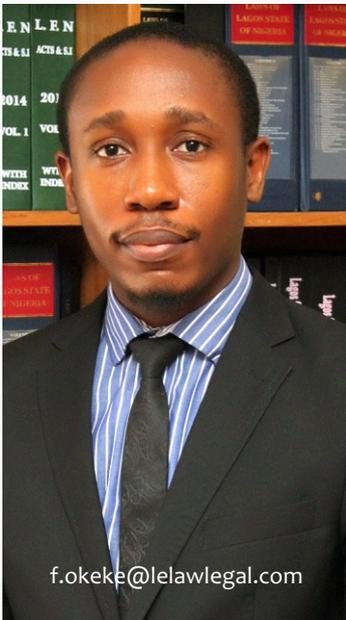


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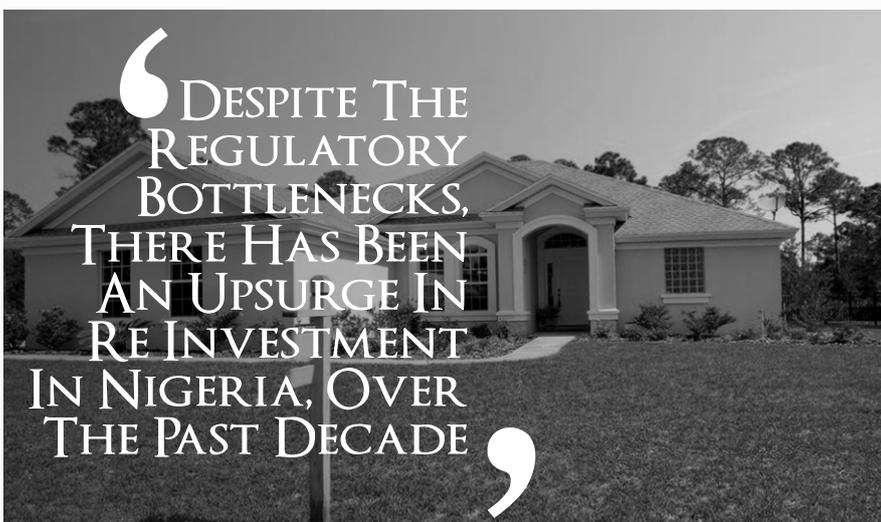
JUNE 2018



Nigeria's economy is presently challenged, albeit emergent from recession, and attention is being paid, after many half-hearted attempts in the past, to diversifying from oil dependency. Real Estate (RE), a critical factor of production, is one of the key sectors that could help re-energize our economy. This, despite the regulatory and commercial bottlenecks around RE in Nigeria - and which, incredulously government has unwittingly allowed to fester for so long - could mean that the solution we sought has always been right under our feet<sup>1</sup> but was never noticed? Incidentally, the National Bureau of Statistics' *Nigerian GDP Report Q2 2017*, reported that output growth slowed for RE activities at -3.53% vs -3.10% in Q1 2017.

To be clear, despite the regulatory bottlenecks, there has been an

upsurge in RE investment in Nigeria, over the past decade. The cranes never stopped moving, even during the recession that Nigeria is reportedly just emerging from. Established and new developers are as active as ever, completing, commissioning, commencing or continuing massive projects. Using Lagos as an example, many parts are being transformed on an ongoing basis: a visitor to Kingsway Road, Ikoyi or Ozumba Mbadiwe in Victoria Island few years ago, would barely recognise them now. Major retail, commercial and residential (especially luxury or premium) developments dot the landscape in especially Lagos, Abuja, Port Harcourt and Kano. The nagging question is: how do we debottleneck RE transactions to enable the sector realise its potential as a major contributor to the Nigerian economy?





### LUA: Nigerian RE Bottleneck

The development of RE in Nigeria is fraught with numerous challenges impeding sectoral growth and downstream economic impact; some significant ones are traceable to the **Land Use Act (LUA)**'s chilling effect on RE transactions. It is now unarguable that there is a direct correlation between a nation's wealth and having an adequate property rights system. In Nigeria, too many citizens cannot access capital or leverage their RE assets because their ownership rights are not adequately recorded. According to Hernando De Soto: *"with titles, shares and property laws, people could suddenly go beyond looking at their assets as they are - houses used for shelter - to thinking about what they could be - things like security for credit to start or expand a business."*<sup>2</sup> Otherwise, those assets are *"dead capital."* Illustrative of my humble opinion that the indices obtainable in land registration in Nigeria are sub-optimal is the requirement that State Governors (or Local Government Chairmen in rural areas), consent to every transaction relating to land as a requisite condition of validity of such transactions.

**Section 1 LUA** provides: *"subject to the provisions of this Act, all land comprised in the territory of each State in the Federation is hereby vested in the*

*Governor of that State, and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act."* **Section 22 LUA** further states that: *"it shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever without the consent of the Governor first had and obtained..."*

These provisions have been variously opined on by the appellate courts. In **Brossette Manufacturing Nig. Ltd. v M/S Ola Ilemobola Limited & 3 Ors**,<sup>3</sup> an agreement was prepared in anticipation of obtaining Governor's Consent (GC). In his evidence, the Plaintiff said: *"the document was not dated because we had not yet obtained the approval of the Governor."* The Supreme Court held that the agreement though inchoate, was in substantial compliance with **section 22 LUA**. In **Adetuyi v. Agbojo**,<sup>5</sup> the Court of Appeal while holding that **section 22 LUA** is mandatory, also decided that nothing in the **LUA** prevents prior execution of an instrument before an approach is made to the Governor for his consent; the Deed will only remain inchoate until GC is obtained. This transactional mindset is a welcomed progression from the strict interpretation approach adopted in older cases such as **Solanke v. Abed**.<sup>6</sup>

In **Solanke's Case**, the Supreme Court held that the Defendant having failed to obtain consent to the tenancy as required by **section 11, Land and Native Rights Act 1916 (LNRA)**, the Government was entitled to revoke the Right of Occupancy under **section 12** of the LNRA, and consequently, recover possession. The Court further held that it was not open to the Defendant to rely upon his own

<sup>1</sup> **Cap. L7 LFN, 2004**. The **LUA** is included as an integral part of the 1999 **Constitution** by virtue of **section 31(5)**, effectively making it a 'special' legislation that can only be amended vide stringent constitutional amendment procedures.

<sup>2</sup> Hernando De Soto, *'Mystery of Capital' (2001, Black Swan)*, page 48.

<sup>3</sup> [2007] 14 **NWLR (Pt. 1053)** 109

<sup>4</sup> *Supra*, per **Katsina-Alu, JSC** at p. 135 B-C

<sup>5</sup> [1997] 1 **NWLR (Pt. 484)**, 705 at 716

<sup>6</sup> (1962) **NNLR** 92

wrongful act (of not obtaining the Governor's consent) to contend that the tenancy agreement was null, void and unenforceable under **section 11 LNRA**.

However, since the absence of GC makes the transaction incomplete, it leaves the investor in an 'unsafe' position as a dishonest seller can withdraw from an otherwise 'valid' transaction or quickly sell the same

involved (currently 1.5% of assessed value in Lagos State), some land owners neglect or prefer not to perfect their title; this creates a chain of incomplete documentation of title in respect of that particular land. The buck would definitely stop on the table of a purchaser who needs to perfect his title (for example, in order to use the property as security for a loan). He has two choices: (a) go back to the previous transferor with

accessing said loans that would have otherwise been available to support their business growth.

Where there is an incomplete or unregistered title, the value of the property could drop drastically, as prospective purchasers are most likely to factor in perfection costs in making their (reduced) offers. One way to avoid perfection costs (especially where repeated transactions are anticipated on the property or parts of it), is by utilizing investment vehicles or asset holding entities. Usually these would be single-asset special purpose vehicles (SPVs). Indirect (but effectual) transfer of ownership of the SPV's property can be effected only by corporate action: transfer of SPV's shares which is usually notified to the Corporate Affairs Commission (CAC) but would not require GC.



land to a third party. Resolution of resulting outcomes (for example, the presence of multiple purchasers with competing claims) may entail judicial adjudication, and therefore unbudgeted additional transaction costs.

Anyone who has ever undertaken application for GC (for example at the Lagos State Lands Registry, Ikeja), would know its strenuous nature. A prospective purchaser/investor has to jump through many bureaucratic hoops to get GC. Due to the fees

'perfect title' and request that both parties deal directly; or (b) pay the consent fees for all previous transactions including the present one ('double consent').

Another drawback on incomplete registration is that it inhibits capital formation because landowners are unable to securitize their assets. This, according to De Soto, is the scenario of dead capital. Since most institutional lenders require full proof of ownership of title before granting loans, a lot of property owners are 'disenfranchised' from

A major advantage is that such deals can be easily structured to fit business and transactional needs – bureaucratic delays and costs associated with obtaining GCs are obviated. Since parties are in “control”, structuring can address identified downsides and risks; possibility of “blow out” could therefore be

minimised.

Also, requisite documentation such as Shareholders Agreement (SHA) can be amended to address subsequent developments. For instance, where a SPV owns an estate, intending purchasers can acquire shares in that SPV in exchange for an apartment (there could be set ratios translating to different number of shares for respective apartment types). Issues of SPV management/governance is important; it may or may not outsource the facilities management function of the estate.

This method is quite common in the UK where it serves a risk isolation function as investors are able to ring-fence that property from their other assets and

liabilities. By acquiring an offshore company that owns the property (rather than buying the property directly), a buyer may make significant savings by avoiding Stamp Duty Land Tax and (until amendment proposals are enacted), the Inheritance Tax ((IHT) – IHT would have applied if the property were to directly pass under a bequest or upon intestacy). This has made this option popular in the UK notwithstanding the Annual Tax on Enveloped Dwellings (ATED) which imposes an annual tax on investment companies that own UK residential property. Based on current rates, the ATED is insignificant compared to 40% IHT exposure.

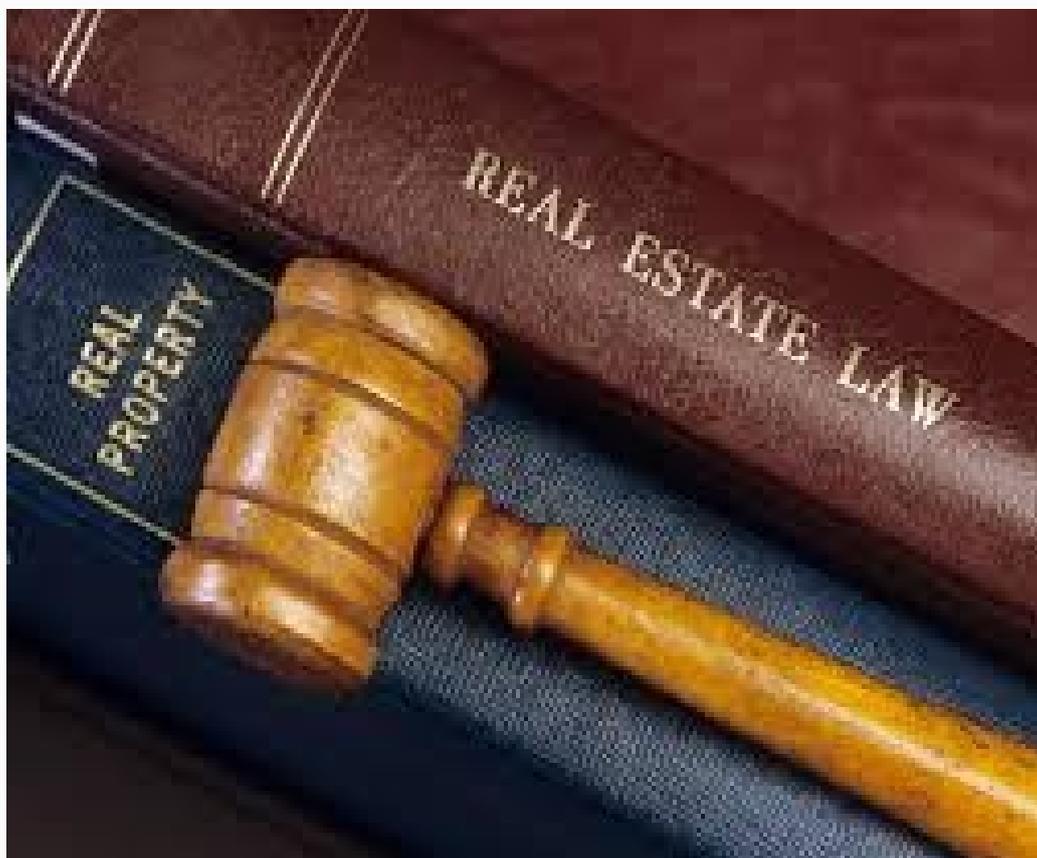
The jury is out as to whether that model can be successful in Nigeria

“THE DEVELOPMENT OF RE IN NIGERIA IS FRAUGHT WITH NUMEROUS CHALLENGES IMPEDING SECTORAL GROWTH & DOWNSTREAM ECONOMIC IMPACT; SOME SIGNIFICANT ONES ARE TRACEABLE TO THE LAND USE ACT (LUA)”

#### SPV Downsides

because it confers an indirect interest: under Nigerian company law, shareholders do not own the company's assets; they only own their shares.<sup>7</sup> Farwell J., in **Borland's Trustee v Steel Bros. & Co. Limited** held that: “a share is an expression of a proprietary relationship: the shareholder is the proportionate owner of the company but he does not own the company's assets which belongs to the company as a separate and independent legal entity.”<sup>8</sup>

Would purchasers (as part owners) be willing to hold on to share certificates as title documents for a



<sup>7</sup> Olakunle Orojo, 'Company Law and Practice in Nigeria', (5<sup>th</sup> ed., 2013, Lexis Nexis), page 125. This follows the locus classicus of **Salomon v A Salomon & Co Ltd** [1896] UKHL 1, [1897] AC 22.

<sup>8</sup> Farwell J., in **Borland's Trustee v Steel Bros. & Co. Limited** (1901) 1 Ch. 279 at 88 held that: “a share is an expression of a proprietary relationship: the shareholder is the proportionate owner of the company but he does not own the company's assets which belongs to the company as a separate and independent legal entity.”



property or certificate of incorporation in addition, if sole owner? Obviously some will and some will not, depending on what considerations they considered more important. Also, because of “co-joinder”, disputes could arise amongst disparate shareholder/purchasers; and conduct of others could affect the interest of other shareholders. Purchasers may be hamstrung in their ability to use their units for transactions where counterparties are unwilling to accept pledged shares. There are also start up and maintenance costs for the SPV – implicating professional and statutory fees; maintenance costs could be significant outlays in the long term.

If parties - especially purchasers - decide to unwind the SPV (corporate) structure for them to be stand-alone owners, there would be liquidation formalities and costs. If by some chance, a competing transaction occurs and is registered at the Lands Registry,

issues of purchaser for value without notice will arise and parties under this arrangement may end up holding the short end of the stick.

As can be seen from the foregoing, this is not a long term solution to our perfection challenges; it needs to be tackled head-on in order to yield positive results. Growth of the RE sector should be inversely proportional to growth of the economy; and the RE regulatory framework should be facilitative of liquidity of RE assets. This writer believes that our present operating model is unsustainable in terms of logistics involved in perfecting a title.

Other countries have streamlined their registration processes for perfecting title which increases the ease of doing business. For instance, in South Africa (SA), they have adopted a linear process which eases the time and money spent in perfecting title. In

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a typical SA RE transaction, the purchaser pays the agreed purchase price into an escrow account pending outcome of registration. Upon execution of the transaction documents by the parties, the Conveyancer takes the documents to the Deeds Registry where the Registrar confirms the validity of the transaction.

Thereafter, the deed is prepared for registration and execution. The Registrar and the Conveyancer execute the deed at the Deeds Registry which is subsequently updated to include the current transaction. The whole process is a singular module which cannot be separated, thereby creating a certainty of procedure and ownership amongst purchasers of RE.

## Debottlenecking Land Registration: Proposed and Recent Reforms

According to the Presidential Enabling Business Environment Council (PEBEC) registering properties in Nigeria requires two times the cost and number of procedures, and three times the amount of time, compared to leading countries.<sup>9</sup> It further suggests some strategies to reduce the time required to register property from seventy seven (77) days to thirty (30) days. These suggestions include: consolidating several payments into one; consolidating and publicising complaint mechanism; reduction of time for GC; and eliminating the requirement for sworn affidavit in Land Registry search. On the *Registration of Property* ranking, Nigeria moved from 182nd position in 2017 to 179 in the 2018 *Ease of Doing Business Index* ranking based on the implementation of some of these suggestions.

Particularly in Lagos and Kano, getting construction permits and registering property have become more transparent and easier for businesses with the online publication of all relevant regulations, fee schedules and pre-application requirements online. Further steps



can be taken towards easing obtaining building approvals from planning authorities, and optimal processes for requirements like environmental impact assessment (EIAs) which are particularly necessary for dredging and land reclamation projects.

### Restricting Applicability of GC

The question also has to be asked on the necessity for GC on a sub-lease or mortgage transactions; should it be applicable to these transactions?<sup>10</sup> We think not. Whilst GC is justifiable for alienation of interest *vide* assignment or long leases call for GC, it has become prescient to relax the rule for other transactions. Such exception could be made for mortgages, unless when power of sale is being exercised. This is because, the mortgagee does not have absolute title to the property, hence the power of redemption in the mortgagor; it is not an outright assignment. Same exception could be made for powers of attorney that are not expressed to be irrevocable.

Provisions such as **section 22(1)(c) LUA** - that GC to the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sub-lease containing an option to renew the same - is an over drag. As an example, **section 26(2), Lagos State Lands Registration Law No. 1 2015** provides that subleases under three (3) years do not require registration. Such, naturally, is a boon to transactions yet the heavens have not fallen. Loss of consent fees in making the above relaxation would be compensated by upswing in RE transactions and boost to the economy which would bring money to government through taxes, higher capacity utilisation, etc. This is an additional justification for calls that the **LUA** be amended.

The all-embracing GC requirement to all alienations just adds to another clog in the wheel of loan accessibility by landowners. Whittling down the categories of RE transactions that GC applies to (pursuant to a 'need for consent' analysis) would help to

<sup>9</sup> <http://pebec.gov.ng/registering-property/> <Last visited on 12/1/2018>

<sup>10</sup> The holder of a C of O is a lessee of the Government; the question is should the Government not be interested in what he does with the land? For policy reasons, some level of transactions should be excluded, including PoAs. Maybe notification only and not consent – since in practice consent is actually focused on fees.

fast track transactions that are freed from GC requirement. A simple notification of the transaction to the Lands Registry should suffice.

In a bid to curb the cumbersome process of obtaining GC, the Directorate of Land Services in Lagos State in 2015 issued a guideline, “*The 30-Day Governor's Consent to Subsequent Transaction of Land*” (the Guidelines). The Guidelines lay down a 10-step procedure with specific timelines for completion of each step. However, in practice, these Guidelines are not being adhered to by Lands Registry officials and the status quo continues. In practice, getting a GC can extend from three (3) months and above depending on how quickly the fees can be paid and queries resolved.

### Amendment of the LUA

This, amongst other things such as process for revocation and consequent compensation, has led to calls for the **LUA** to be removed from the Constitution to make its amendment a less daunting task. Former Presidents Yar'Adua and Jonathan made unsuccessful attempts to amend the **LUA**, as a result of strict constitutional amendment provisions.<sup>11</sup> More recently, on 26<sup>th</sup> July 2017, another attempt to delete the **LUA** from the

Constitution failed, as the Senate rejected the Bill. Stakeholders in the RE sector need to continue to clamour for the **LUA** to be expunged from the Constitution by articulating a compelling business case for such amendment – potential massive impact on the economy. It is expedient that the **LUA**, governing land transactions, be in line with current economic realities.

### Conclusion

The RE sector is one with massive potential to boost Nigeria's economy and there has been some improvement on making it more appealing to investors. For instance, the commencement of electronic Certificate of Occupancy (e-C of O) by Lagos State which would undoubtedly reduce some of the hassles in obtaining a C of O. The e-C of O has, by its creation, reduced the occurrence of multiple C of Os being granted on one land, thereby creating security for titled landowners.<sup>12</sup> To obtain optimum value from the **LUA** as is, greater political will would have to be shown in its administration. You find situations where obtaining GC is unnecessarily delayed because some public officials expects gratification or greasing of their palms; or where a sitting government revokes a right of occupancy for political reasons and without adequate compensation to the holder.

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<sup>11</sup> The **LUA** was preserved as part of the 1999 Constitution by section 315(5) which requires that amendment of **LUA** must also follow the amendment provisions of the Constitution, which is passage by two-thirds of the members of the National Assembly, and two-thirds of the State Houses of Assembly. This is further subject to presidential assent.

<sup>12</sup> In Abuja, the lands registry systems are operated through the Abuja Geographic Information Systems (AGIS). The AGIS brought the computerization of the cadastral and land registry of the FCT and some of its project includes the introduction of SDI (Spatial Data Infrastructure) for F.C.T, the computerization of spatially related workflows in selected Federal Capital Development Agency (FCDA) departments and agencies and the build-up of the AGIS Resource Centre.



Negative and positive developments in the RE space reinforce my belief that the **LUA** should be reviewed in line with recent developments. The e-C of O is a symptom issue, it does not address the foundational issue of absence of transaction friendly RE framework.

The administrative procedure in getting a GC can be streamlined as has been done in South Africa making it a singular transaction. We can go a step further to remove the requirement for certain transactions that do not *ultimately* alienate title in a property. It is one of the reasons why Nigeria has such a low mortgage finance contribution to the GDP at 0.5%, compared to South Africa's 31%, Malaysia's 32%, UK's 80%, and US' 77%.<sup>13</sup> The loss in consent fees would be offset by the upswing in RE transactions (which could yield compensatory taxes, e.g. companies and personal income tax, VAT) and RE concomitant increased contribution to the GDP.

RE can be the mainstay of the Nigerian economy and every avenue towards maximizing its output must be explored, including making it more attractive for RE investors. In February 2017, the CEO of ShopRite, Pieter Engelbrecht stated that their expansion plans within a 15 month period in Nigeria had been scaled down from 13 stores to 2 stores due to the dearth of shopping centres in Nigeria, that Shoprite could lease.<sup>14</sup> With proper debottlenecking, there should be an increase in the level of RE investments, and firms like Shoprite will not have to 'rightsized' their plans due to adverse market conditions.

Nigeria's move to attract foreign investment gained a fillip when she liberalised her investment regime; the same approach could be employed to make Nigerian RE more optimal. If the constitutional amendment to take **LUA** out of the 1999 Constitution can be effected and the **LUA** itself further amended to streamline its provisions as argued previously, then States like Ogun and Ondo that are striving towards being the preferred investment destination in Nigeria, would have something to hang their initiatives on. In fact, subnational regulatory competition (amongst States) can only be to the overall benefit of the economy 

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<sup>13</sup> <http://mybankrate.ng/2017/02/13/nigeria-has-lowest-mortgage-finance-as-share-of-gdp-among-peers/> <last visited on 7 September, 2017>

<sup>14</sup> <https://www.premiumtimesng.com/news/headlines/224233-shoprites-nigerian-expansion-slows-despite-huge-sales-official.html> <last visited on 7 September, 2017>