

# NAVIGATING THE MINEFIELD OF AGRIC LAND ACQUISITION

## Ownership of Land Under Customary Law

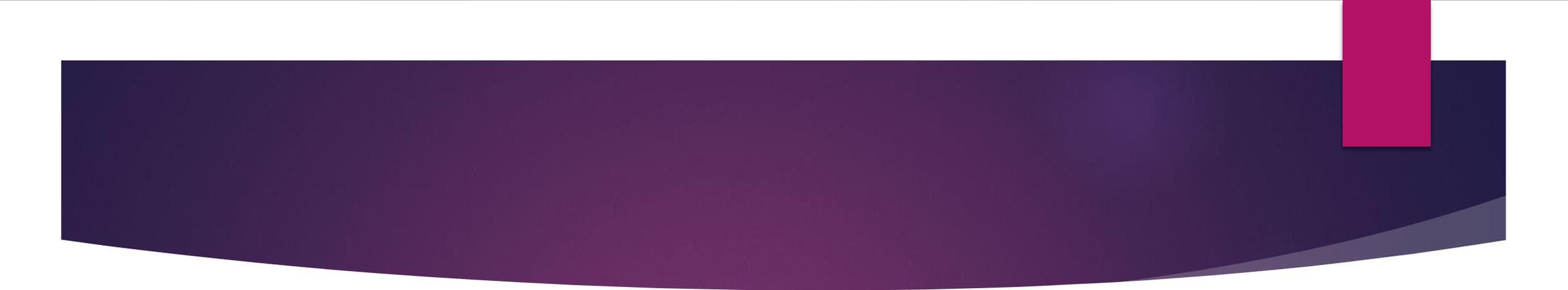
- ▶ The nature of customary ownership of land is settled by law. It was vested in a community as a whole, the Village or in the family (the extended family) as a group.
- ▶ **All the members of the community, village or family have an equal right to the land**
- ▶ The Family Head is in effect the position of a trustee and expected to allocate the land recourse equitably among the family.
- ▶ The Customary law provisions are as relevant today as they were before independence. The rural areas is generally most sought after for Agric land and even for large Agro Allied industries.

# Due diligence and Investigation

- ▶ Conducts searches at the Lands Registry
- ▶ Conduct investigation at Surveyor General's office to check land is free from Government acquisition and exact location of land
- ▶ Cross check location with any relevant Government Gazette
- ▶ Make inquiries at the Ministry of Lands – see lands officer in charge
- ▶ Investigate land history from sources close to the sellers
- ▶ Inquire as to applicable customary law of the area
- ▶ allow time to negotiate – don't be in a hurry to close. Time exposes the covered pitfalls

# The Problem with Customary Law

- ▶ Customary law has no durable mode of recording transactions or evidence of title
- ▶ It depends mainly on unreliable human memory and stories passed from generation to generation as root of title.
- ▶ This was a recipe for multiple sale to innocent purchasers, fraudulent dealings and endless litigation

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- ▶ Typically, litigations involved questions of legal status i.e. who is the head of the family under what conditions is a land held;
  - ▶ Boundaries between two Communities, individuals and families; disputes as to ownership of land and whether a customary tenancy existed between two neighbouring Communities.
  - ▶ There are also disputations within a family over the right to alienate land;
  - ▶ Effect of a defective alienation may be void, voidable or valid.
  - ▶ litigations over distribution of rights between the group and the individuals for example, whether the head of the family is to be held to account by the members of the family.

# Limitations of Customary Title

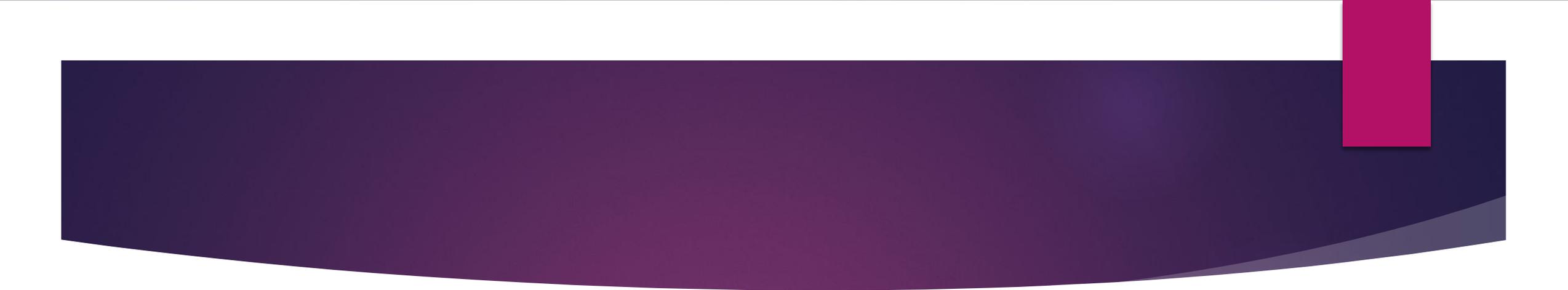
- ▶ Under customary law, the only tenure which a member of a Family may hold, charge or pledge as security is limited to the right to the use of the land subject to the overriding rights of the Family as a whole.
- ▶ It is in applicable to even the most rudimentary commercial transactions for the purpose of raising money
- ▶ There is no time bar to challenging a customary title. So long undisturbed possession of customary land cannot give you peace of mind because customary law does not recognise the equitable principle of Lashes and Acquiescence and the Statue of Limitations don't apply.

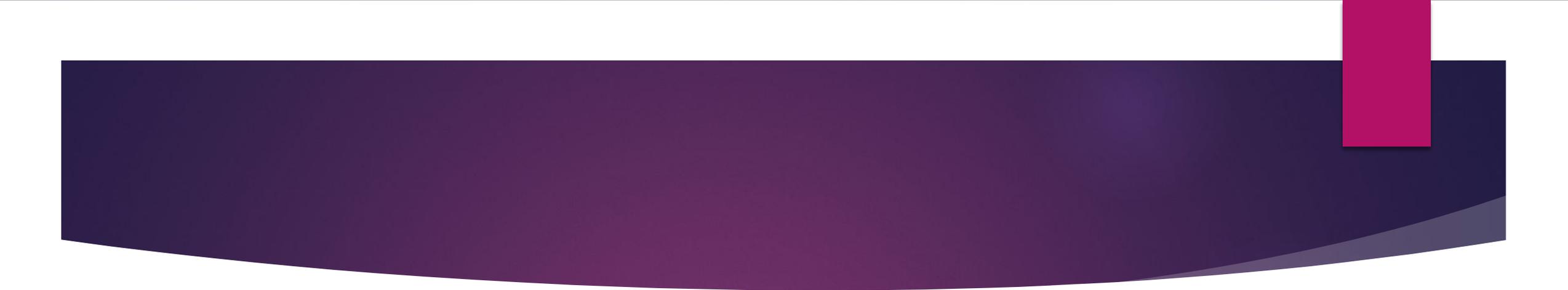
# Intervention of The Land Use Act 1978

- ▶ In 1975- failure of access to land due to the exiting land tenure regime was blamed as the primary reason for national development stagnation. Land reformation through the Land Use Act was introduced.
- ▶ It aimed at transformation of lands from a customary land tenure regime to a statutory tenure in land by through three main strategies.
- ▶ **By expropriating land originally owned by Families and Communities and vested same in the State;**
- ▶ **by replacing proprietary rights in land with usufructuary rights;**
- ▶ **and by adopting an administrative system of allocation and control of land, instead of market driven system.**
- ▶ Most commentators will conclude that the Land Use Act has failed in so far as it has not achieved any of the objectives it set out to address. I will just highlight some of the areas of most concern.

# The Certificate of Occupancy

- ▶ **Section 1** of the Act provides that all lands within each state territory is vested in the Governor of the State to hold on trust and administered for the use and common benefit of all Nigerians
- ▶ under **Section 5 (1), Sections 8 and 15 of the Act** the Governor to grant statutory rights of occupancy to citizens who are to have sole right to and absolute possession of all improvements on land.
- ▶ The existing rights and title held under the customary tenure and English tenure were converted into rights of occupancy by the transitional provisions of **Sections 34 (2) and 36(2) of the Act.**
- ▶ By these sections the existing title holders are **deemed** to have been granted Certificates of Occupancy by the Governor (and are here called '**deemed grantee**').
- ▶ These Certificates are reckoned on the same footing as Certificates expressly granted under section 5(1) in order to get grant deemed holder to register their title.

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- ▶ The intension was to give the deemed grant the same status as a certificate holder
  - ▶ Like the Certificate holder a deemed grantee cannot alienate his rights without the Governor's consent and his right is also subject to revocation in accordance with section 28 of the Act.
  - ▶ In practice, however there is no parity of rights between a holder of a Certificate of Occupancy and a deemed grantee.
  - ▶ Unlike a Certificate holder who holds same under certain terms and conditions contained in the Certificate i.e. payment of rents, charges and duration of tenure (usually 99 years), a deemed grantee has no such conditions imposed on him.

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- ▶ The Act does not provide for the renewal of an expiring Certificate of Occupancy, whereas a deemed grantee has no need to renew his deemed grant. His title is likend to a freehold.
  - ▶ As a consequence of these perceived advantages, deemed grantees are loath to apply for Certificates of Occupancy since there is no statutory obligation to do so and often seek to avoid official record of post Act transaction on their land.

# Legal Nature of the Right of Occupancy

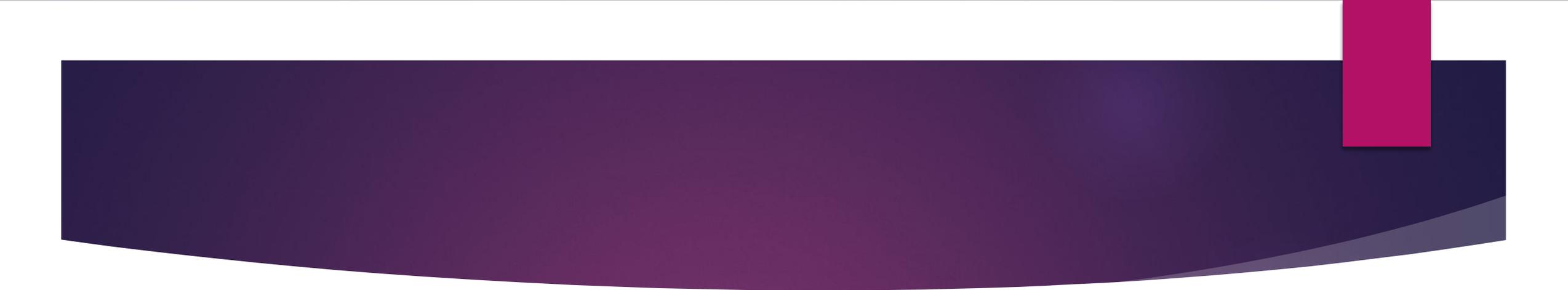
- ▶ The nature of the rights granted by the right of occupancy and the legal protection it offers is uncertain **i.e. whether it is a lease or contractual licence.**
- ▶ *Prima facie* the rights granted under Section 15 of the Act amounts to no more than a **contractual licence to use for a term of years.**
- ▶ The fact that compensation payable in the event of a revocation is limited to **un-exhausted improvements on the land shows that no monetary value is placed on the bare land**
- ▶ For lawyers this means that a right of occupancy cannot be subject of a mortgage since the holder has not legal title in the land. Therefore land cannot be used as collateral to borrow money.

- ▶ However and thankfully in *Savannah Bank's* case and later in **Osho V Foreign Finance Corp**, the Supreme Court was prepared to treat the right of occupancy as a leasehold interest.
- ▶ It opined that to the extent that the right was granted for a specific term it had the semblance of a lease.
- ▶ It is now generally accepted that a right of occupancy is treated more as a lease than as a mere licence to use land.

## Right of Occupancy vis-a-vis Existing Tenures

- ▶ the Courts have construed a Certificate of Occupancy issued by the Governor **as mere evidence of a right of occupancy, which does not of itself confer title on the holder. It is not a conclusive proof of title.**
- ▶ Section 5(2) of the Act states that upon the grant of a right of occupancy all prior existing rights over the land is extinguished. But the effect has been watered down by the courts.
- ▶ In cases where customary tenants who were in physical occupation of land procured Certificates of occupancy in their favour (pursuant to sec 36 (2) of the Act) in order to divest their overlords of ownership
- ▶ The court refused to accept that sec 5(2) expropriated the right of the original title holder.

- ▶ Section 1 of the Act does expropriate the ownership (i.e freehold title) vested in the Communities, **yet there remained a Customary right to use and control of the land. This right was not expropriated and so it was held that Section 36 does not enlarge the right of a Customary Tenant to ownership of land which he occupied before the Act.**
- ▶ **Consequently, it is now settled that where a Certificate of Occupancy is granted to a person who had no title to the land before the Act, such Certificate is liable to be set aside at the instance of someone with better title.**
- ▶ In **Ogunleye v Oni** the Court held that a weak title is not strengthened merely by the issuance of a Certificate of Occupancy. While the Certificate of Occupancy does raise a presumption in favour of the holder; it is only *prima facie* evidence of 'right' which shifts the onus of disproving this right on a person who asserts the contrary.

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- ▶ The Courts also rejected the literal effect of Section 5(2) of the Act as being to divest the existing title holder.
  - ▶ In **Dantsoho v Mohammed** two Certificates of Occupancy had been issued in respect of the same land and the court had to determine priority.
  - ▶ The Supreme Court rejected the contention that under Section 5(2) any existing rights accruing under the prior Certificate was extinguished by the grant of a subsequent Certificate.
  - ▶ This is because a certificate of occupancy can only be revoked by the provisions of section 28 of the Act

- ▶ It soon became clear that the Act made no real difference to a Customary or English tenure.
- ▶ **Justice Belgore JSC ( former Chief Justice of Nigeria)** said as much in **Abioye v Yakubu**. He said: **The Land Use Act has been variously described as a revolutionary law... or a law to change the land management in Nigeria....But as a the result of this decision, the Act which appeared like a volcanic eruption is no more than a slight tremor...section 36 has not divested the traditional holders of their land unless such land is legally acquired by the government or local authority”**.

# Alienation and Collateralisation under the Act

- ▶ Section 15 and 22 provides for the alienation of a right of occupancy by assignment mortgage etc subject to the subject to the consent of the Governor first had and received.
- ▶ ***The consequence of failure to obtain prior Governor consent to a transaction transferring interest in the right of occupancy is that such transaction is null and void under Section 26 of the Act.*** These provisions were initially applied strictly by the Court.
- ▶ in **National Bank of Nigeria v Adedeji**, the **Court of Appeal refused to follow the letter of sec 26 and refused to set aside a mortgage deed (alleged to be void for lack of consent) on the ground that it was the duty of the customer to obtained consent.** Therefore he could not rely on his own illegality to invalidate the mortgage.

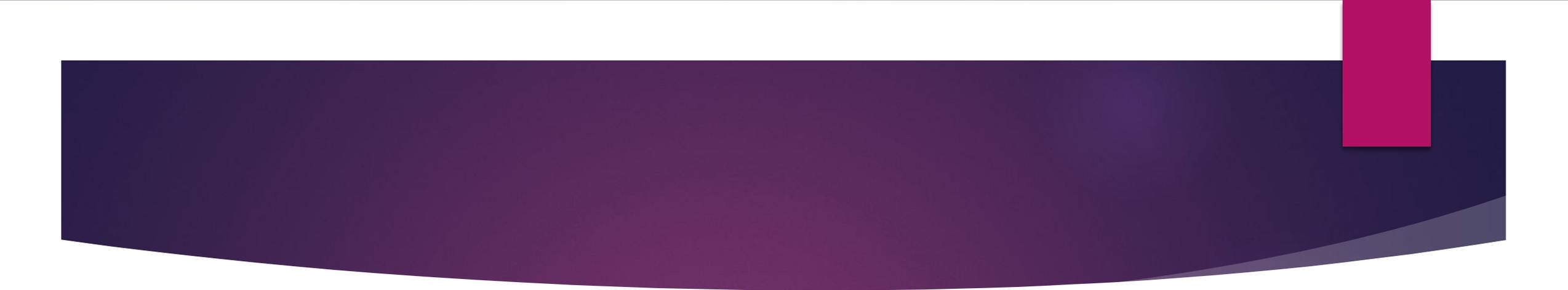
- ▶ **Awojugbabe Light Industries v Chinukwe** It was held that at the date of executing the mortgage or agreement, there was an implied term that it was made 'subject to Governor's consent' and so the mortgage was not void, but the rights of the parties was inchoate until Governor's consent is eventually obtained.
- ▶ The mortgage becomes complete and effective in law after Governor's consent is obtained.
- ▶ This decision however overlooks the definition of mortgage in Section 50(1) of the Act where 'mortgage' includes a second and subsequent mortgage and *equitable mortgage and so directly prohibits the type of mortgage which the supreme court affirmed.*

# Access to Land

- ▶ On paper the land allocation process looks good: Government acquires land from the land owning communities by paying compensation; it creates large residential, commercial and industrial layouts with basic infrastructure; plots are then allocated to citizens.
- ▶ This enables Government to guide town planning and secure land need for large public purpose projects.
- ▶ In reality the process is grossly abused by the civil servants who operate it. Yes, common Nigerians do get allotted land, but too many plots acquired and developed with public funds are made available at less than its intrinsic value to Government functionaries' cohorts, political party stalwarts who speculate with it.

# Direct allocation of Land from Government

- ▶ How secure is the allocation of right of occupancy over land which was originally acquired by Government from the ordinary natives.
- ▶ the sect 28 and 29 LUA empowers the Governor to revoke a right of occupancy for overriding public interest. Overriding public interest is defined in section 28(2) and 29(3) read in conjunction with section 51 (1) (h).
- ▶ If the Government fails to follow the provision strictly (which the sometimes do) the acquisition is liable to be set aside in court. If it set aside you also get nothing.  
**Eletu Edigbo v Ojomu**
- ▶ “Public purpose” is defined to include for obtaining control over land required for or in connection with economic, industrial or agricultural development.

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- ▶ So, it is lawful for a Government acquire land of a citizen lay it into large Agric land Estate and then sell or allocate to farmers? Is that overriding public interest under the LUA?
  - ▶ The short answer is yes, Oviawe v I.R.P (Nig) Ltd is a case that decides this but is was decided under the Public Land Acquisition Act and not the LUA.
  - ▶ The words revocation of the LUA are slightly different from that of Public Land Acquisition Act and a few lawyers have contended that since expropriatory statutes are to be construed to favour the innocent citizen and against the Government.

# Compensation to Original Owners of Acquired Land

- ▶ in the event of revocation of a right of occupancy sec 29 of the LUA requires the Government to pay compensation for the unexhausted improvement on the land to the communities whose land has been acquired.
- ▶ Most time communal strife and agitation is due to the failure of government to pay compensation.
- ▶ In practice it is too often the case that, even if you do get good title from the Government you are unlikely to get peaceful possession unless you negotiate a financial settlement with the original owners of the land.
- ▶ In modern times, some Government has included the cost of this financial settlement as part of the allocation fee, but there remains the high risk that this payment will not be passed on to the intended recipient.
- ▶ The letter of allocation also does not identify the titles holders which is arguable the biggest risk in such allocation.

# Foreign Ownership of Land

- ▶ The law as stated in **Ogunola v Eiyekole** is that the Governor holds land under Section 1 for the benefit of Nigerians' only and as such there can be no direct ownership of land by foreigners.
- ▶ This position of the law was recently affirmed in the case of **Gerhard Huebner v Aeronautical Industrial Eng**, where a foreigner had **provided** funds for the purchaser of land which was conveyed to the defendant company ostensibly to avoid the limitation of the law.
- ▶ The Supreme Court rejected the contention that a trust was created and said that the foreigner had no legal capacity to hold an interest in land, it follows *abi initio* he had no legal title which he could vest in the Company to create a trust. Furthermore he had not come to the court with clean hands and equity could not avail him.

- ▶ This issue on first impression appears theoretical only, because in practice by incorporating a wholly owned Nigerian company, a foreigner through the company can gain easy access to land.
- ▶ But the Supreme Court gave no opinion as to the applicability of the **Acquisition of Lands by Aliens Law (ALAL)**, a law which is enacted in most state of Nigeria.
- ▶ It appears this is an extant law in so far as it has not been expressly repealed by the Land Use Act and does not obviously conflict with any provisions of the Land Use Act.
- ▶ **The ALAL prohibits a foreigner from acquiring any interest or right over land from a Nigerian (save with the prior approval of the Governor) and goes on to define a foreigner to include any company in which majority of the shares are held by foreigners.**

# Conclusion

- ▶ Remove the Land Use Act from the constitution so that it can be easily amended
- ▶ We need legislation imposing a country wide formal registration of title
- ▶ Amend the Act to provide more certainty of title and certainty of the nature of legal right granted
- ▶ Ensure parity between deemed granted land and holder of Certificates of Occupancy
- ▶ Impose more stringent revocation regime and a fair and just compensation policy
- ▶ Ensure hitch free transfer of ownership and creation charges over land

