A PAPER PRESENTED

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ON

LEGAL ISSUES IN REAL ESTATE: HOW PREPARED ARE THE ESTATE SURVEYORS AND VALUERS

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INTRODUCTION

I thank the Departmental Authority and this highly esteemed school management for finding me worthy to deliver this lecture.

Covenant University has distinguished herself in the Community of Tertiary Institutions in Nigeria and indeed Africa as a force to be reckoned with as per academic and practical excellence.

Academic excellence from your lecturers and the University; and practice from practitioners like me.

I shall be talking to you today both as an astute Estate Surveyor & Valuer of over 27 years experience in the art and science of Estate Surveying and Valuation, and as a lawyer who was called to the Nigerian Bar in 2008. My lecture shall dwell mainly on legal attributes, or implication or relevance to the practice of the profession of Estate surveying and valuation.

In practice, the profession has many faculties or arrears of operations or specialization which are: Valuation, Property/Facility Management, Project Management, Feasibility/Viability Appraisal, Compulsory Acquisition and Compensation Estate Agency e.t.c For want of space and time, I shall be concentrating a just a few.

1. *Valuation: -*

Land, Land and building, Chattels, Plant, equipment and machineries.

These are many types of valuation :-

Asset Valuation for financial statements of companies, Mortgage Valuation for obtaining credit facilities, Insurance Valuation for reinstatement or replacement of claims, Probate Valuation for Administration of Estate, Plant, Equipment and Machinery Valuation for going concern, Sales and Purchases e.t.c

You have course known the various Methods of Valuation, the investment, direct comparison market evidence, the Depreciated Replacement, the Profit, Residual and DCF which is an aspect of investment approach.

In practice all these types and methods of valuation exist because valuation is required for different purposes.

The Financial Reporting Standards require that Companies Assets must be valued annually and incorporated into Financial Statements (formerly Audited Account) and Public Sector Accounting Standards requires that Government Assets and infrastructures including Roads, Bridges e.t.c should be valued annually.

The Legal Implication of Valuation:

What are you valuing? Is it the brick and mortar or the interest subsisting in the property?

Senario I: What value would you ascribe to a 10 storey building affording a total space of 2500square metres at a rent of ₦60,000/m^2 and situate on Idowu Taylor Street in Victoria Island with a Certificate of Occupancy for 99years granted 10 years ago.

Senario II: Would your answer be the same assuming the Certificate of Occupancy has 5 years unexpire?

Senario III: Mr. A purchased a 99 year lease from Mr. B over 2 Arces of Land at Oba Akran in Ikeja Lagos. Mr. B developed one Arce and sold the remaining one Arce to Mr. C. 20 years latter and Mr. C developed a Shopping complex affording 2000square metres @ a rent of ₦18000/m^2.

Mr. D who is an international investor wants to acquire the entire property and has asked you to advise them. Value all the interests.

Comment:

From the 3 scenarios, I have tried to show that the interest you are to value is key in all valuation exercises, therefore, the law relating to property acquisition, ownership, devolution of title must or ought to be taken very seriously by you, without which, you will ascribe values indiscriminately and your professional integrity shall be called to question.

Is a freehold interest the same as leasehold? Does freehold interest still exist in Nigeria? What does section 34(2) and (4) of the Land Use Act says? How would these affect your valuation result?

Legal issues:

Professional Negligence: where a client relies on a valuer's opinion of value and realized that the opinion was wrong and has caused the client collateral damages. The client can sue.

Presently, the profession has instituted professional indemnity by ensuring that practicing firms take insurance cover.

2. ESTATE AGENCY:

This aspect is the most notorious aspect of our profession. By the simple reason that advertisement Boards are placed on many properties by Estate Surveyors & Valuers, we have come to be identified mostly as Estate Agents. Yet this aspect constitutes just about only 5% of the total gamut of what an Estate Surveyor & Valuer ought to do.

So what does Estate Agency involve in practice.

Receiving instruction to let, sale or buy a property either developed, uncompleted or undeveloped

Identification of the property –Type, Location, attributes

Examination of the property

Obtaining necessary market information of the property- Rent passing in the neighbourhood, characteristics of the neighbourhood e.t.c

Making offers,accepting offers or counter offers

Determining considerations- Rent, Sales Prices

Premiums e.t.c

Legal Issues:

There are so many legal issues associated with this aspect of the Profession

Definition of Estate Agent: There is no law in Nigeria or abroad that has been able to define who an Estate Agent is. Rather the English law attempted to assign roles to them. The legal duties of an Agent are:

a. Duty to Perform

b. Duty of Loyalty or Obedience

c. Duty of Care and Skill

d. Duty of Personal Performance

e. Duty to Act in Good Faith

From the foregoing, everybody can be an Agent, but everybody cannot be an Estate Agent because of item(c)

Contract: Perhaps, the most important aspect on this is the law of contract. The 4-element of contract ought to be known, respected and treated.

Offer, Counter Offer and negotiations

Acceptance

Consideration, and

Intention to enter into a legal relationship

Contracts are of various forms:

Formal and simple contracts (when under seal it is formal)

Expressed and implied contracts

Bilateral and Unilateral contracts

In the case of Ozua V. Suleiman and Another (2009) WRN (PT. 162). The court of Appeal as per Adekeye, JCA on the stages of a contract for sale of Land must pass through stated *"In a contract for sale of Land there are two stages the contract must pass through:*

The contract stage with the formation of a binding contract of sale; and

The conveyance stage culminating in the legal title to be vested in the purchaser by means of the appropriate instrument under seal"

On whether an agent is liable for contracts entered on behalf of a disclosed principal, MUKHTAR JCA held in the case of Fenton Keynes Fin.Ltd V. Transply (Nig) Ltd (2010) 13 WRN (Pt. 145). *"When an agent contracts on behalf of a disclosed principal, only the latter will be sued but not the former. The learned trial judged therefore was in error by holding both appellants jointly and severally liable for transactions to which only the 1st appellant was singularly responsible."*

Rhodes –Vivour, JCA in the same case held *"It is well settled that he who acts through another acts for himself. This is expressed in the Latin Maxim, quid facit per aluim facit perse. When an agent (the 2nd appellant) acts on behalf of a disclosed principal (the 1st appellant), it is only the latter that is liable. See UBN Ltd V. Edet (1993) 4NWLR (pt. 287) 288,.*

On when a contract is ex facie illegal, whether it is the duty of court to refuse to refuse to enforce such transaction if pleaded or not. *"When a contract is ex facie illegal, whether the alleged illegality has been pleaded or not, the court would not close its eyes against illegality, as it is the duty of every court to refuse to enforce such a transaction. In other words, once illegality has been brought to the attention of the court, it must be considered and resolved as per Mohammed, JSC in fasel Serv. Ltd v NPA (2009) 40 WRN (pt.70) with additional Authority in Gedge V. Royal Exchange Assurance Corporation (1900) 2 Q.B 214 @ 220, Okagbue & Ors V. Romaine (1982) 13 NSCC 137; 1982 ALL NLR III. Sodipo v. Lemminkainen O.Y(No2) 1986) INWLR (Pt.15) 220.*

3. Sales of Land and Acquisition of properties/interest in land:

Sales of land and buildings are also the function/duties of the professional Estate Surveyor & Valuer. Therefore, what land is he or she selling. Who owns the land? How do you know a genuine Land? What is the place of Certificate of Occupancy in the title transfer and transaction. When is Right of Occupancy considered revoked. How is Land Use Act construed by acquiring authority. How is notice of revocation ought to be served? What do you look for when buying a virgin land. How does the law look for when one is claiming a title. When relying on traditional evidence on ownership of Land, how does the law treat that? What are the ways of proving title to Land. How can traditional history to Land be proved? What are the ways of establishing identity of Land.

There are many judicial pronouncement which forms the basis of the law in practice and shall be ***espoused*** as we more along.

Case I: **Olagunju V. Adesoye** (2009) 33 W.R.N on what a party claiming declaration of title should prove.

Facts and History: The 1st respondent in this appeal applied for a grant of Certificate of Occupancy from the Kwara State Government for the construction of a Secondary School. The State Government replied the letter with terms and conditions, upon the respondent's compliance with the conditions of the letter, he started work on the land. At this point the appellant appeared and claimed the ownership of the land.

The 1st respondent instituted an action before the Kwara State High Court, in suit No.***KWS/OF/19/94.*** On the other hand, the appellant's instituted another action against the 1st respondent in suit No.***KWS/OF/19/94.*** Both suits were later consolidated and heard together.

All parties filed and exchanged pleading and called witnesses in proof of their case. PW1 was called to produce documents i.e. file No. LAN/ARO/COMM/10.117, certified true copy of plan No. ILRC. 49 of 12/5/56 and plan No. URS/OF/IC designation of urban area 1978 and T.P.O plan 119 Offa which were all admitted as exhibits 1,2,3,4,5 and 6 respectively.

After both parties have closed their respective case, written addresses were filed and exchanged. The learned trial judge, thereafter delivered his considered judgment in which he dismissed the appellant's claim and gave judgment for the 1st respondent.

CASE II: *Boye Ind. Ltd v. Sowemimo* (2009) 48 WRN (P.115)

Fact and History:

The plaintiff/respondents sued the defendants/appellant at the lower court for a declaration that the purported sale of the land in dispute to the defendants and the purported certificate of occupancy issue to the 1st defendant on the kind is null and void; that the 1st plaintiff is entitled to the statutory right of occupancy over the kind in dispute covering 1.452 hectres shown on survey plan No. KESH/L/775A dated 7th January, 1980, opposite the International Trade Fair Complex along Badary Express Road, Onikere, Lagos and perpetual injunction restraining the defendants.

The defendants on their part filed a counter –claim, pleadings were filed, exchanged and settled at the amended statement of claim as well as amended statement of defence and counter-claim. The matter went for trial. On the issues joined, the respondent called two witnesses including the first plaintiff himself. The defence called three witnesses including second defendant. At the end of adducing evidence, learned counsel for both parties addressed the court. Learned trial judge in a reserved and considered judgment accepted the respondents' case and dismissed that of the appellants.

The appellants not being happy and dissatisfied with the judgment appealed to the Court of Appeal.

On whether issuance of a Certificate of Occupancy can confer title where no such title existed or available to be transferred.

"It is trite that the mere issuance or acquisition of a Certificate of Occupancy does not and cannot confer title in respect of a parcel of land it purports to cover where no such title either existed or was available to be transferred. It is clear from the provisions of section 34 of the Land Use, Act that any person without title to a parcel of land in respect of which a Certificate of Occupancy is issued acquired no right or interest which he did not have before the certificate.*Kyari v.Alkali (2001) 31 WRN 88; (2000) 11 NWLR (Pt.724) 412; (2001)S.C (Pt. 11) 192, Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745. This is the weakness a certificate of occupancy issued in such circumstances as it is never associated with title. A certificate of occupancy does not stop the court from enquiring into the validity or existence of title of the person asserting possession before the issue of the certificate."*

Per Salami, JCA (P.124) lines. 25 – 40

On provision of section 28 of the Land Use Act, Cap. L.5 of the Laws of the Federation of Nigeria, 2004.

"Section 28 of the Act read as follows:

The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Governor and the notice thereof shall be given to the holder.

The title of the holder of a right of occupancy shall be extinguished on receipt by him of a notice given under sub-section (6) or on such later date as may be stated in the notice."'

Per Salami, JCA (P.125) lines. 35 – 45

On whether notice must be given to holder of right of occupancy before its right can be extinguished.

"The right or interest of a person in a piece of land is extinguished once a notice signified by a public officer authorized by the Governor in that behalf is served on the holder of a right of occupancy. In other words, notice must be given to the holder of right of occupancy before the revocation of his right of occupancy and the notice must be served in accordance with the provisions of section 44 of the same Act. See N.E.W v. Denap Ltd (1999) 10 NWLR (Pt. 525) 481, 1062, 1085 and Laguro v. Toku (1986) 4 NWLR (Pt.33) 90."

Per Salami, JCA (P.126) lines. 5-10

On need for Land Use Act to be construed strictly against acquiring authority.

"The Land Use Act is an expropriatory statute which encroaches on an individual proprietary right and must be construed *fortissimo contra preferentes* in other words must be construed strictly against the acquiring authority by leaning symphathetically towards the citizen whose right is being invaded. *Ononuju v. A-G., Anambra State (1998) 11 NWLR (Pt. 573) 304, 330, Garba Abioye & Ors. v. Sa'radu Yakubu & Ors. (1991) 5 NWLR (Pt. 190) 130, 251, Din v.A.G., Federation (1988) 4 NWLR (Pt. 87) 149, 187."*

Per Salami, JCA (P.126) lines. 25 – 30

On mode of service of notice of revocation on holders' right of occupancy.

"Section 44 of the Land Use Act, Cap. L. 5 provides as follows:

"44. Any notice required by this Act to be served on any person shall be effectively served on him:

By delivering it to the person on whom it is to be served;

By leaving it at the usual or last known place of abode of that person; or

In the case of an incorporated company or body by delivering it to the Secretary or Clerk of the company or body at its registered or principal office or sending it in a prepaid registered letter addressed to the Secretary or Clerk of the Company or body at that office; or

If it is not practicable, after reasonable inquiry to ascertain the name or address of a holder or occupier of land on whom it should be served, by addressing it to him by the prescription of 'holder" or occupier' of the premises (naming them) to which it relates, and by delivering it to some person on the premises or , if there is no person on the premises to whom it can be delivered by affixing it, or a copy of it, to some conspicuous part of the premises."'

Per Salami, JCA (P.126-127) lines. 35 – 15

CASE III: Pharmatex Ind. Proj. Ltd v. Trade Bank (Nig) Plc (2009) 41 W.R.N (P.65)

Facts and History:

The first and fourth defendants/respondents granted loan and overdraft facilities to the plaintiff/appellant. While the plaintiff/appellant executed deeds of loan and mortgage agreement and debenture respectively, in favour of the fourth respondent, it executed a mortgage debenture in favour of the fourth respondent. In other words, it charged all its fixed and floating assets as collateral security to the said respondents. Although it utilized the facilities, the appellant defaulted in repayment. The two creditors beseeched it to settle its indebtedness but the appellant could not.

The first respondent recalled its investment and, in exercise of its powers, appointed the second respondent a receiver for the appellant.

The second respondent gave notice of his appointment to the appellant and called for the submission of its statement of affairs. He also notified the general public, particularly the secured creditors of the appellant. It failed to react to the said notice. It equally failed to

avail the receiver of any statement of its affairs. The second respondent, therefore, notified the appellant of his decision to take physical possession of its fixed and floating assets charged to the first respondent.

While the plaintiff/appellant, in the first suit, challenged the appointment of the second defendant as receiver based on the deed of appointment by Trade Bank (Nigeria) Plc, in the second suit, it challenged the deed of appointment granted to the second defendant by Nigerian Industrial Development Bank.

After some chequered movements from the lower court to the Kaduna Division of this court and back again to the lower court, the two suits were consolidated. As shown above, the lower court coram dismissed the consolidated suit.

The plaintiff being dissatisfied with the judgment of the lower court, filed an appeal at the Court of Appeal

On who should seek and obtain Governor's consent in order to alienate, transfer or mortgage a property.

"The holder of a right of occupancy, evidenced by a certificate of occupancy, is the one to seek consent of the Governor to alienate, transfer, mortage e.t.c.

It was the duty of the plaintiff, as mortgagor, to seek the consent of the Governor for him to mortgage his property to the defendant. That is what the law says. It would be unconscionable of him to turn around and maintain that such consent obtained was flawed having received valuable consideration in the form of a loan from the mortgagee."

Per Nweze, JCA (Pp.96 -97) lines. 20 -45

"In Savannah Bank v. Ajilo's case, it was held unmistakably and steadfastly that by virtue of sections 21, 22 and 26 of the Land Use Act, Cap. 202, Laws of the Federation, 1990, a holder of a statutory right of occupancy who wishes to mortgage the property by assignment must first of all obtain the consent of the Governor of the State before carrying out the mortgage transaction."

Per Sankey, JCA (Pp. 127 – 128) lines. 45 – 5

On whether a defaulting mortgagor could impeach a mortgage deed on the ground of absence of consent.

It was unconscionable for a defaulting mortgagor to impeach a mortgage transaction on the ground of the absence of consent. Executing the mortgage deed (and when as a result of his own default the mortgagee, that is, the defendant, sought to exercise its rights under the mortgage deed) to assert that the mortgage deed was null and void for lack of the Governor's consent, is, to say the least, rather fraudulent and unconscionable.

Per Nweke, JCA (P.96) lines. 10-20.

On whether a transaction will be declared void for failure to obtain approval by a party whose responsibility is to seek and obtain same.

"A transaction would not be declared void for failure to obtain approval at the instance of the party whose responsibility it was to seek and obtain the approval. Akpata, JCA (as he then was) took the view that it was 'morally despicable for a person who has benefitted from an agreement to turn around and say that the agreement (was) null and void.

Per Nweze, JCA (P.97) lines. 20-25

"Where attempts were made to dispose of the property covered in mortgage transactions without the consent of the Governor, from a conspectus of the authorities, the inflexible position is this: non-compliance with the prohibitive prescription in section 22 (*supra)* attracts the absolute consequences ordained in section 26 of the Act. Section 26 provides:

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.

The authorities on this point are many: see, for example, Iguh JSC in *Awojugbagbe Light Industries Ltd. v. Chinukwe (1995)* 4 NWLR (Pt. 379) 436 line B to the effect that section 22(1) prohibits transactions or instruments whereby the holder of statutory right of occupancy purports to alienate his right of occupancy by inter alia mortgage without the requisite consent of the Governor first had and obtained.

Section 22(1) of the Land Use Act does not intend to become immediately effective until necessary approval by the Governor is obtained, it strikes at transactions which effectively purport to enable an assignee, mortgage or sub-lessee of the right of occupancy to exercise his rights thereunder without the prior consect of the Governor."

Per Nweze, JCA (P.106) lines. 5 – 35

On provision of section 22 of the Land Use Act Cap. L5, Laws of the Federation, 2004.

"Section 22 of the Land Use Act, Cap L5, Laws of the Federation, 2004 provides:

'22 Prohibition of alienation of statutory right of occupancy without consent of Governor

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 ……mortgage …..or otherwise howsoever without the consent of the Governor first had and obtained."'

Per Nweze, JCA (P.101) lines. 5 - 10

On definition of the term "mortgage" and how an equitable mortgage is created against legal mortgage.

"A mortgage is a conveyance of a legal or equitable interest in property as a security for the payment of debt or the discharge of some other obligations for which it is given. It is subject to the condition that the title shall be re-conveyed if the mortgage debt is liquidated, see, Lord Lindley M.R. in Santley v. Wilde (1899) 4 Ch. 474 approved in Noakes & Co. Ltd. v. Rice (1902) A.C. 24, 28, London County & Westminster Bank Ltd. v. Tompkins (1918) 1 K.B 515, R. Megarry and H.W.R. Wade, The Law of Real Property, (supra) 885; also, Intercity Bank Plc. v. Feed and Food Farms Nigeria Ltd. and Ors. (2001) 17 NWLR (Pt. 742) 347, 364, Ahaneku v. Iheaturu (1995) 2 NWLR (Pt. 380) 758, 770, I.O. Smith, Nigerian Law of Secured Credit, (*Supra) 35.*

The borrower who conveys the property is called the mortgagor. The lender who obtains interest in the property is called the mortgagee, R.Megarry and H.W. R. Wade, the Law of Real Property, (supra) 885. The debt for which the security is created is called the mortgage debt. The substance of a mortgage of land is a right of property vested in the mortgagee. By virtue of this title, the latter, namely, the mortgagee, is entitled to have the rents and profits applied to satisfy his debt, and upon default by the mortgagor to liquidate the loan, to enforce the security by sale or foreclosure, see, I. O. Smith, Nigerian Law of Secured Credit, (supra) 35, citing Waldock, Law of Mortgages, (second edition) page 6. One final point may be noted here. As Chukwuma – Eneh, JSC observed in Yaro v. Arewa Construction Ltd. (2008) All FWLR (Pt. 400) 603, 634: it is settled that the deposit of title deeds with a bank as security for a loan, creates an equitable mortgage as against (a) legal mortage which is created by deed transferring the legal estate to the mortgage".

Per Nweze, JCA (Pp. 101-102) lines. 40 – 25

On when a mortgage deed due for Governor's consent.

"It is after the mortgage has been executed that obtaining of the Governor's consent falls due. It is normally after the parties have agreed that the deed……is prepared and sent for the Governor's consent *Yaro v. Arewa Construction Ltd. (2008) All FWLR (Pt. 400) 603".*

Per Nweze, JCA (P.106) line. 40

On when mortgage transaction could be said to be valid.

"For a mortgage transaction of this nature to be valid, the parties to it must first enter into a binding agreement to alienate subject to the consent of the Governor. It is that consent that vests a valid title on the purchaser'. In the same case (C.C.C.T. & C.S. Ltd. v. Ekpo (2008) All FWLR (Pt. 418) 243, Tobi, JSC at 222 made this further clarification:

Though there is no time limit to the obtaining of the said consent…., it is very clear that before the alienation can be valid or be said to confer the desired right on the party intended to benefit therefrom, the consent, of the Governor… must be first had and obtained".

Per Nweze, JCA (Pp. 106 – 107) lines 45 – 10

On whether there is provision in Land Use Act,1978 which prevents someone other than the Governor or his delegate from conveying consent.

"There is nothing in the said Land Use Act which prevents someone other than the Governor himself or his delegate from conveying the consent so granted by the Governor or his delegate."

Per Nweze, JCA (P.109) lines. 30 – 35

On whether secured creditors should be cautious to examine consent letters purporting to convey approval of their mortgage transactions.

"Secured creditors must henceforth painstakingly examine such consent letters purporting to convey approval of their mortgage transactions with the finery of a toothcomb. Hence, the new maxim in all secured credit transactions should be: creditors beware!

The appellant's bank ought to know that those consents were not from the respective appropriate authorities as directed by the Land Use Act. The appellants should have checked before executing the deeds and parting with their money."

On distinction between the office of a receiver and a manager in the affairs of a company.

"A receiver's duty is only to realize the debenture holder's security. Thus, it is not his duty to manage the affairs of the company for its benefit, citing Re B. Johnson & Co (*Builders) Ltd. (1955)Ch. 634. Where, on the other hand, it is necessary for the receiver to carry on the business of the company, the court usually appoints the receiver as both receiver and manager. Above all, a manager is not generally appointed except to carry on the business for the purpose of selling it as a going concern, citing Marshall v. South Staffordshire Tramways Co. (1895) 2 Ch.36."*

Per Nweze, JCA (Pp. 122 – 123) lines. 45 – 5

On effect of issuance of consent to a mortgage transaction by an undesignated officer other than the Governor or Commissioner of Lands.

"The signing of the letter granting consent to the mortgage by the Acting Chief Lands Officer could not be in substantial conformity with the signature of the Governor or his delegate, the Commissioner for Lands and Housing. So too in the instant case, the signing of the letter by one J.O. Dada, Chief Lands Officer for the Director-General conveying approval for the assignment does not suffice for the purpose of the mortgage deed and has, without question, negatively affected the validity of the mortgage."

Per Sankey, JCA (P.128) lines. 15-25

On need for mortgagees to be both eagle-eyed and wise in dealings with mortgage transactions.

"The mortgagor, upon whom the duty lies to ensure that the proper consent is acquired before conveying his property to another, is allowed to benefit from his wrong. Invariably therefore, the hapless mortgagee finds himself a laser on multiple fronts. This however only underscores the need for mortgagees to be both eagles – eyed and wise as serpents in such transactions in order not to be caught cat-napping by devious clients who may deliberately engage in practices which are less than honest, to reap where they have not sown."

Per Sankey, JCA (Pp.128 – 129) lines. 45 – 5

On whether Land Use Act can be used to exploit and perpetrate fraud by other smart alec.

"Equity has not remained silent on the reserve bench while the Land Use Act is actively at play but equity now lies prostrate and has bitten the dust while the harshness of the Land Use Act is being exploited and shall continue to be on the rampage as a vehicle for the perpetration of fraud by persons of the appellant's ilk and other smart alec UBN v. Ayodare (2007)4 KLR (Pt. 235) 2022."

Per Agube, JCA (P.131) lines. 5 -15

On provision of section 26 of the Land Use Act. ***"Section 26 of the Land Use Act provides:***

'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." Per Sankey, JCA (P.128) lines. 30 – 35

On whether having a building on the land is the same as claiming ownership of Land?

Akaahs,JCA in Ekpenyong v.Effanga (2010) 7WRN (P.81) Line 40. Held that:

"Having a building on land is not the same as claiming ownership of the Land". Does this contradict the maxim "Whatever is attached to the Land belongs to the Land?

On whether the grant of Certificate of Occupancy is conclusive prove of title?

Orji – Abadua, JCA held in Edohoeket v. Inyang (2009) 51WRN (Pp. 73 -74) lines 45 – 20

" A certificate of occupancy is never associated with title. A certificate of statutory or customary right of occupancy issued under the Land Use Act, 1978, cannot be said to be conclusive evidence of any right, interest or valid title to land in favour of the grantee. It is at best only a *prima facie* evidence of such right, interest or title without more and may in appropriate cases be effectively challenged and rendered invalid and null and void.

Where a certificate of occupancy has been granted to one of two claimants who has not proved a better title, it must be deemed to be defective, of no validity and to have been granted or issued erroneously and against the spirit of the Land Use Act and the holder of such a certificate would have no legal basis for a valid claim over the land in issue. Therefore, where it is shown by evidence that another person other than the grantee of a certificate of occupancy had a better right to the grant, the court may have no option but to set aside the grant or otherwise discountenance it as invalid, defective and for being spurious as the case may be. *See Olohunde v. Adeyoju (2000) 14 WRN 160; (2000) FWLR (Pt. 42) 1355; (2000) 10 NWLR (Pt.676) 562, per Iguh, JSC at 598, B – D."*

Per Orji – Abadua, JCA (Pp. 73 -74) lines. 45 – 20.

On what a plaintiff must establish in a claim for declaration of title.

"To succeed in a claim for a declaration of title to land, the court must be satisfied as to:

The precise nature of the title claimed, that is to say, whether it is title by virtue of original ownership, customary grant, conveyance, sale under customary law, long possession or otherwise, and

Evidence establishing title of the nature of land claimed. See Adesanya v. Adeounmu (2000) 13 WRN 104; (2000) 9 NWLR (Pt. 672) 370."

Per Orji – Abadua, JCA (P.74) lines. 25 – 35.

On ways of proving ownership of land.

"It is well establish that ownership of land maybe proved by any of these five methods, namely.

- By traditional evidence.
- By production of document of title which are duly authenticated;
- By acts selling, leasing, renting out all or part of the land, or farming on it, or on a portion of it;
- By acts of long possession and enjoyment of the land; and
- By proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such land would, in addition, be the owner of the land in dispute."'

Per Orji – Abadua, JCA (Pp. 74 – 75) lines. 35 – 5.

On when the onus of proof place on plaintiff in a land matter will shift.

"The onus on the plaintiff is discharged if he established any one of the five methods. By section 137(2) of the Evidence Act, the onus of proof shifts to the adverse party once the party asserting his right has adduced sufficient evidence that ought to be reasonable to satisfy a Jury that the fact sought to be proved has been established. See Baba – Iya v. Sikeli (2006) 3 NWLR (Pt. 968) 508." *Per Orji – Abadua, JCA (P.75) lines. 5 – 15.*

On admissibility of an unregistered instrument.

"The admissibility or otherwise of an unregistered registrable instrument depends on the purpose for which it is being sought to be admitted. If it is being tendered for the purpose of proving or establishing title to land, it will not be admissible under the Land Instruments Registration Law of Akwa Ibom State. But if it is tendered only to show that there was a transaction between the grantor and the grantee, it will be admissible. See Abu v. Kuyabana (2002) FWLR (Pt.99) 1141. Also, where a document evidences sale of land and the said document is tendered in evidence not as evidence of title, but simply to establish a fact which one of the parties has pleaded, then such a document does not qualify as an instrument as defined in the Land Instruments Registration Law, and is therefore not admissible in evidence without being registered. See Olowolaramo v. Umechukwu (2003) 2 NWLR (Pt.805) 537."

Per Orji – Abadua, JCA (P.86) lines. 40 -10.

"*To acquire an interest in land under Customary Law by purchase, there must be a valid sale, payment of money in the presence of witness and delivery of possession of the land to the purchaser in the presence of witnesses*"

On the question, whether traditional evidence or history in respect of ownership of land is evidence. The honourable Sidi Dauda Bage JCA held in the same case that:

"Traditional evidence or history in respect of ownership of land is evidence albeit admissible hearsay as to the rights alleged to have existed beyond the time of living memory proved by members of the family or community who claimed the land, subject of dispute as their own, it can equally be described as ancient history, thus the principles of traditional history are:

- *Where the line of succession is not satisfactorily traced in an action for declaration of ownership of land mysterious or embarrassing linkages which are not explained or established, such line of succession would be rejected.*
- *Once a party pleads and traces the root of the title to a particular person or family, he must establish how that person came to have title vested in him. He cannot ignore proof of his overlord's title and rely on long possession.*
- *Where there are conflicts in the evidence given by witnesses called by the same party, the trial court is duly bound to find which of the two conflicting histories is more probable by testing it against the other evidence. It is* only when it can neither find any of the two histories probable or conclusive that it would declare both inconclusive and proceed to decide the case on the basis of numerous and positive acts of possession or actual user. See Mogaji v. Cadbury Nig. Ltd (2004) 23 W.R.N 54, (1985) 75 S.C. 59, Kojo II v. Bonsie (2003) 34 W.R.N 112.

The courts have also made Judicial pronouncement on what constitutes Trespass to Land and this is the Law.

In the case of Adua v. Essien (2010) 3 W.R.N (P.112 -122) Honourable Justice Theresa Ngolika Orji – Abadua, JCA, held

On meaning of trepass to land.

"Trespass to land in law constitutes the slightest disturbance to the possession of land by a person who cannot show a better right to possession. A trespass to land is an entry upon land or any direct and immediate interference with the possession of land. See fagunwa v. Adibi (2004) 39 WRN 1; (2004) FWLR (Pt. 226) 340; (2004) SCNJ 322; (2004) 17 NWLR (Pt. 903) 544, where Tobi, JSC referred to the case of Renner v. Dabor (1935) 2 WACA 258 in which it was held, inter alia, that the comprehensive way of describing trespass is to say that the defendant broke and entered the plaintiff's land, and did damage."

Per Orji – Abadua, JCA (P.112) lines. 10-20

On what plaintiff must prove to institute an action in trespass.

'For a plaintiff to institute or commence an action in trespass he must show that he is in exclusive possession; exclusive in the sense that he does not share his right of possession with any other person. A plaintiff need not show ownership of the land; proof of actual possession can sustain an action on trespass. To resist the plaintiff's claim, a defendant must show either that he is the one in actual possession or that he has a right to possession. See also Fagunwa v.Adibi (2004) 39 WRN 1; (2004) FWLR (Pt. 226) 340; (2004) SCNJ 322; (2004) 17 NWLR (Pt. 903) 544. This is because, where two parties make conflicting claims to possession of the same land, the possession being disputed, the law ascribes possession to the person that can prove the better title to the land in dispute. See Provost, Lagos State College of Education v. Dr. Kolawole Odun (2004) 6 NWLR (Pt. 870) 476.

It is the party who claims a relief in relation to a land that has the burden to prove the boundary of the land to which his claim relates. Therefore, the appellant in this appeal had the burden to prove with definitive certainty the boundary of the land which he claimed the respondents had trespassed upon."

Per Orji – Abadua, JCA (P.112) lines. 20-40

"The onus was on the appellant who was the plaintiff at the trial court to prove that the respondents trespassed into his land. The identity of the land in dispute was made an issue before the trial court. The proper thing to do was for the appellant to file a plan showing the location, boundaries, features and the exact area where the trespass was committed by the respondents. See Gbadamosi v. Dairo (2007) 48 WRN 1; (2007) 3 NWLR (Pt. 1021) 282 and Ansa v. Ishie (2005) 15 NWLR (Pt. 948) 210; (1999) 7 NWLR (Pt.610) 277."

Per Omokri, JCA (P.122) lines. 40 – 45

On whether a survey plan reflecting the boundary features of land is necessary where a dispute in land ensues.

"Where a land in dispute is not identifiable by one of the parties and therefore, not identified or certain, a survey plan drawn to scale, accurate, reflecting the boundary features of the land and property orientated, is necessary to prove the identity of the land notwithstanding the fact that a declaration of title to the land is not sought by any of the parties. In Archibong v. Ita (2004) 13 WRN 1; (1954) 14 WACA 520; (2004) 2 NWLR (Pt. 858) 590 at 629, per Tobi, JSC, it was held that a survey plan is not only necessary in an action for declaration of title to land, it is also necessary in the situation and circumstances of this appeal where the identity of the land is in dispute. What is necessary is that the land, the subject of the award must be ascertained with definitive certainty. His Lordship also referred to the case of Omoregie v. Idugiemwanye (1985) 2 NWLR (Pt.5) 41; (1985) 16 NSCC (Vol.8) (Pt. 11) 838; (1989) 6 S.C 150, wherein the Supreme Court held that one of the ways of showing the specific area of land claimed is to file a plan of the area. Also, Pats-Acholonu, JSC stated at page 650 – 651 paragraph H thus:

'I find it odd as to how the respondents could have in all seriousness asked for injunctive order in respect of an area of land not defined and over which the court would not be certain of its proper limitations due to the latent short coming of the land not having been surveyed and a proper plan of the area exhibited before the court. In *Salawu v. Gbadoola (1997) 4 NWLR (Pt. 499) 277 at 285 it was held that:*

The burden on the plaintiff, in the circumstances, includes the requirement that it is for him to prove the identity of the land claimed by him if the parties are not ad idem on the identity of the land. See *Makanjuola v. Balogun (1989) 3 NWLR (Pt. 108) 192; (1989) 5 S.C 82; (1989) 5 SCNJ 42; (1989) 2 NSCC 294.* if a plaintiff fails to fulfill the requirement, that is, to prove or establish the identity of the land in dispute his claim for a declaration of statutory right of occupancy will be dismissed.

Although in this case the claim is not for a statutory right of occupancy but for an interest and right as co-beneficiaries which the respondents admit they had been sharing the benefits in the land with the appellants from time immemorial, it behoves the respondents to make a survey plan delineating the land in dispute for the purpose of ascertaining the true nature of the nature of the land over which some form of interests are being claimed and which will enable the court to determine the specific area of land it has to impose an order or restraints. It is my view that this is a case where the respondents should definitely have procured survey plan having regard to the geographical location to help to ascertain the truth of the matter in controversy. I do not share the very espoused by the Court of Appeal and supported by the respondents' counsel that the plan of the area is not necessary on the erroneous belief that the two parties know the land in dispute.'

Then Onu, JSC at pages 634, 635 and 636 said inter alia:

> This issue in this case is not whether the same land or an agreed or identified land is being referred to in different names. Exhibit 9 the 1915 suit relied upon by the respondents' shows that the identity of the land in dispute in that case was uncertain.
>
> From the foregoing, the need to file a survey plan, in my view becomes more compelling since the respondents' claim was that the land in dispute extends from Ikot to the Ifiang Village.
>
> In the light of the above, even if the respondents' evidence on the description of the land in dispute was unchallenged (which is not the case here) there was no means or machinery for ascertaining the land as claimed by the appellants without a survey plan bearing in mind that the respondents admitted the existence of some autonomous villages between Ikot-Iwang and the Ifiang Village and appurtenances are exclusive of the land as claimed by the appellant.
>
> I am therefore of the firm view that in view of the uncertainty of the land even as claimed by the appellants, added to the fact that land was disputed by the respondents, with the further facts that the judgment in exhibits 2 and 9 relied upon did not contain any survey plans. It was wrong to have granted a declaration on any imprecise piece of parcel of land. Relying on the decision of this court in *Opara v. Echue suit No. SC. 396/64(*reported), to the effect that a previous judgment in respect of a piece of land, which is not tied to a plan, cannot operate as an *estoppels*. See also the (Pt. 405) 54 at 65, where Edozie, JCA as he then was, reading the judgment of the court said:

'Indeed, it has been decided that a previous judgment in favour of any party in respect of a piece of land which is not tied to any plan cannot amount to an act of possession and I should add relied upon to raise plea of *res judicata.* See *Opara v. Echue (*unreported SC. 396/64) decided on 9/12/66. As this vital ingredient necessary to sustain a plea of *res judicata* is lacking, it is futile to inquire if other conditions, that is, sameness of parties and issues exist."

Per Orji –Abadua, JCA (P.112 – 115) lines. 40 – 20

"it is trite that in an action for trespass, the plaintiff must also prove the exact area of the land in his possession trespassed upon. See *Ansa v. Ishie (2005) 40 WRN 54; (2005) 15 NWLR (Pt. 948) 201.*

The identity of land in a land dispute will only be in issue if, and only if, the defendant in his statement of defense makes it one as was done by the respondents, in the instant appeal. If he disputes specifically either the area or the location or the feature shown in the plaintiff's plan then the identity of the land becomes an issue. See *Gbadamosi v. Dairo (2007) 48 WRN 1; (2007) 3 NWLR (Pt. 1021) 282."*

Per Orji – Abadua, JCA (Pp. 120 -121) lines. 45 – 10

"In an action where land is in dispute, the identity, area, boundary and other factors must be accurately defined and ascertained with mathematical precision or accuracy. This can be achieved by filling survey plan which usually filed with the pleadings. See *CGC (Nig.) Ltd. v. Baba (2004) 10 NWLR (Pt. 882) 658."*

Per Omokri, JCA (P.123)lines. 5-10

On where a party alleges trespass to land, whether injunction is a ready tool to prevent further trespass.

Hon. Justice Sidi Dauda Bage, JCA in Oladapo v. Wilson (2010) 21 WRN (P.96) said

"The remedy for trespass to land where a party alleges trespass to land, the remedy of injunction is a ready tool to prevent further trespass. See Anibire v. Womiloju (1993) 5 NWLR (Pt. 295) 623" Hon. Justice Chidi Nwaoma Uwa JCA also held in the aforementioned case, answering the question on whether alienation by a member or sections of the family without the consent of the head and prinicipal members of such family is void ab initio"

"The law is settled that a sale or alienation by a member or sections of the family without the consent of the head of the entire large family and the principal members of such family is void ab initio. See Ekpendu v. Erika (1959) 4 FSC 79, (1959 JSCNLR 186, Oyebanji v. Okunola (1968) NMLR 221

I have dwelled extensively on the cases and the judicial pronouncement which are the operating laws on Real Estate.

Now to answer the questions on how prepared are the Estate Surveyors and Valuers? Examining the case, it is not clear that Estate Surveyors and Valuers were involved in those transactions. Currently in Nigeria, the profession of Estate Surveying and Valuation is not in control of upto 10% of the Real Estate Development or transactions in the Country.

However, the profession through The Nigerian Institution of Estate Surveyors & Valuers and Estate Surveyors & Valuers Registration Board of Nigeria are fighting for recognization and patronage from all tiers of government and the organized private sectors.

As you may have been taught, there are many faculties of the profession which have legal issues, but have not come to the fore in our courts because of the development stage of our country.

Property/Facility Management:

A[illegible]om flats out of 10 No luxury flats at Ikoyi at a rent of ₦6million per annum per flat and paid for the initial 2years. They also paid a service charge deposit of N2million per flat per annum.

After 3 years of occupation, they reduced the number of flats to 4No, later 2 and were finding it difficult to pay both the rent and service charge. They approached the landlord for a reduction in rent and the rent was reduced from N6million to ₦5million per annum. Latter reduced to N4million.

Despite several demands, they negated to pay outstanding rent and service charge arrears and attempted to packed their things out. The landlord's Agent prevented them and they went to the police. They wrote an undertaking through their lawyers and never honoured it.

The landlord took them to court and the court referred the matter to ADR (Alternative Dispute Resolution) since 2013. The ADR has met several times and there is no resolution or award yet.

Cases like this abound.

Conclusion:

Real Estate is a complicated legal entity. From the definition of land, to the practice of the different facets of the Real Estate, legal issues arise either in contract, negligence, tort or crime. In all, the Estate Surveyor & Valuer either in practice or aspersing must be vast in the laws that govern the different aspects of the profession if the professional intends to succeed. I hope my time with you has been useful, as I now expect to answer your questions.