WHEN LONG POSSESSION CAN RIPEN INTO OWNERSHIP

By Justice Alexander Osei Tutu

Introduction

Not too long ago, there was an information on social media, particularly on Whatsapp platforms to the effect that, if you put a caretaker on your land, he takes ownership of the land after being in possession for ten (10) years. The panic it caused to many Ghanaians was so telling and manifest.

Since the circulation of the information on social media, strenuous efforts have been made through the same social media by some members of the 'I put it to you Profession' as well as those of the fourth estate to refute the allegation. At the centre of their explanation were the principles of adverse possession and long possession. It was indicated that without the exercise of adverse possession by a non-owner of land, it would be impossible for the true owner to lose his land to the non-owner, no matter how long the person remains in possession. In one of the videos that sought to explain the issue to the mind of the lay person, it was indicated that adverse possession can only be exercised over a bare and undeveloped land and not otherwise.

This is quite debatable and I believe it is about time the principles of adverse possession and long possession are explained thoroughly and put in their right perspective. With the passage of the new land Act, **Land Act, 2020 (Act 1036),** it is now possible for a person who stays longer on a land to acquire title in the land in the absence of adverse possession. On the contrary, occupants of public lands in long possession can no longer exercise adverse possession over such lands.

This article is in two parts. The first part deals with an explanation of the principles relating to long possession and adverse possession established many decades ago by our courts. In the second part, the writer proceeds to discuss how the principle

of long possession has been given prominence by Act 1036 thereby changing the underlining principles pertaining to long possession.

The author will raise some pertinent issues for Ghanaians in general and the legal fraternity in particular to digest. It is hoped that this paper would go a long way to allay the fears of many a Ghanaian who might have been fed with the wrong information. Serious attempts will be made to bring the members of the legal community up to speed with regard to the changes introduced into Act 1036 which now permits a person in long possession on land to acquire ownership in appropriate instances, while at the same time prohibiting the exercise of any form of adverse possession on public lands.

Importance of Possession in Land Law

Possession plays a vital role in land law. It is deemed to be nine-tenth of the law.[1] The relevance of the principle at customary law cannot be overemphasized. Ollenu J. (as he then was) in espousing the principle in the case of **Seraphim v. Amua Sekyi**[2] held: "*A person in possession can maintain an action against the whole world, except the true owner*".[3] Also, where a court is confronted with two conflicting traditional evidence, acts of possession remain crucial in the determination of the matter. In the case of **Hilodjie v. George,** Wood JSC (as she then was) held: "Where *a court is bent on choosing one of two conflicting traditional evidence, it must opt for the version of the party who additionally leads evidence of undisputed acts of possession or ownership over the subject matter ...*"[4]

The might behind possession of property in a claim of ownership of land is backed by statute in Ghana. Under **Section 48 (2) of the Evidence Act, 1975 (Act 323),** a person in possession of property is presumed to be the owner of it. A rebuttable

[1] See Osei (substituted by Gilard) v. Korang (2013-2014) 1 SCGLR 221 at p. 234.
[2] Seraphim v. Amua Sekyi (1961) 1 GLR 238 at holding 1.
[3] See also the cases of Buckman v. Essien [1963] 1 G.L.R. 426 per Crabbe JSC; Richard Kofi Dwamena v. Richard Nortey Otoo & The Regional Lands Officer [2017] 113 G.M.J. 46 at p. 116 & Mensah v. Ahodjo (1961) G.L.R. 292.
[4] Hilodjie v. George (2005-2006) SCGLR 974. See also the cases of Pitiko-Kwahu Stool v. Abetifi Kwahu Stool, Civil Appeal No. J4/38/2011, dated 29th November, 2017, S.C. (Unreported) and Mensah v. Komfo [2015] 91 G.M.J. 39 at p. 75.

presumption is therefore established in favour of the person. The principle is no different under the common law.[5]

The law as restated in modern times is that possession is one of the means of establishing a good title, especially in the absence of documents. In the case of **Nsowaa & 2 Others v. Bamba & Another,** the Court of Appeal held thus: "*In law title to land may take the* ***form of possession*** *or it may take the form of documents or series of documents. It is however stipulated in section 23 (5) of the Land Title Registration Law, 1986 (PNDCL 152) that a good title is always documentary.*"[6] **(My emphasis).**

Long Possession not a way of acquiring ownership

Despite the role possession plays in land suits, the law close to a century has been that long possession alone does not ripen into ownership. The principle that was established in colonial times valiantly survived colonialism. In order to demonstrate the consistency in its application, I have discussed it under colonial, post-independent Ghana and post Conveyancing/Evidence Decrees regimes.

a. *The Principle in Precolonial years*

   In the 1938 case of **Nchiraahene Kojo Addo v. Wusu (1938) 4 WACA 96**, it was held in unambiguous terms as follows: "*That long possession alone was not enough to establish title at customary law because there was no prescriptive rights at customary law".* Prior to the determination of the above case, Sir Lancelot Sanderson had in the 1936 case of **Kuma v. Kuma**[7] set down the principle which was again applied in the 1947 case of **Panyi II v. Anquandoh.**[8]

[5] See the case of Mireku v. Yeboah (1992) 1 G.L.R. 242.

[6] Nsowaa & 2 Others v. Bamba & Another (2015) 86 G.M. J. 21 at p. 24, C.A. See also the cases of F.K.A. Ltd. V. Adjei Boadi (2012) 43 G.M.J. 47, per Abban J.A. (as she then was) & Deliman Co. Ltd. V. HFC Bank Ghana Ltd (2016) 92 G.M.J. 1 at p. 25.

[7] Kuma v. Kuma (1936) 5 WACA 4 at p. 8.

[8] Panyi II v. Anquandoh (1947) 12 WACA 284 at p. 286.

b. *The principle in post independent Ghana*

After Independence, the principle marched on. This was understandable because, even though the Judges who delivered it were not Ghanaians, the principle was attributed to customary law. One of the earliest applications of the principle in post independent Ghana was by Ollenu J. in the case of **Lartey v. Hausa**[9], the learned Judge did not mince words when he held thus: "… *at customary law, possession, however long, does not ripen into ownership*"[10]. In 1960, the Supreme Court held in the case of **Ehuran v. Atta**[11] thus: **"…** *title to land cannot be established by proof of long possession"*[12] See also **Davies v. Randall and Another**[13] **and Nkyi XI v. Kuma (Bedu Substituted).**[14]

c. *The principle in post Conveyancing/Evidence Decree (Acts) regime:*

This period commences from the middle of the 1970's when Ghana took a bold step to pass its own Conveyancing and Evidence Decrees. Hitherto, the laws of England were applicable in Ghana by virtue of the Statutes of General Application as provided for by the Supreme Court Ordinance of 1876. In **Brown v. Quashigah,** the Supreme Court relied on the 1936 case of **Nchiraahene Kojo Addo v. Wusu** case supra and applied the principle thus: **"***That long possession alone was not enough to establish title at customary law because there was no prescriptive rights at customary law".*[15] See the cases of **Sagoe v. SSNIT**[16] **and F. K.A. Co. Ltd. & Anor. v. Akramah II.**[17]

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[9] Lartey v. Hausa (1961) G.L.R 773.
[10] See holding 2 of the headnotes.
[11] Ehuran v. Atta (1960) G.L.R. 224.
[12] See holding (1) of the headnotes
[13] Davies v. Randall & Anor. (1964) G.L.R. 671.
[14] Nkyi IX v. Kumah (Bedu substituted) (1959) G.L.R. 281.
[15] Brown v. Quashigah (2003-2004) SCGLR 92.
[16] Sagoe v. SSNIT (2011) 30 G.M.J. 13.
[17] F.K.A. Co Ltd. & Anor. V. Akramah II (2015) 90 G.M.J. 187, C.A. at p. 221.

The Principle of Adverse Possession

Having stated the principle that long possession of a land alone does not ripen into ownership, it is important to consider the principle of adverse possession in order to know their interrelation. The law is that an owner of land may be ousted of his title by a person in adverse possession of the land after the expiration of twelve (12) years. This is a creature of statute and actions taken to recover land have been stated under **Section 10 the Limitation Act, 1972 (N.R.C.D. 54).**

Section 10 of N.R.C.D. 54 provides:

"*10.* ***Recovery of land***

> *(1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to a person through whom the first mentioned claims to that person.*
>
> *(2) A right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run.*
>
> *(3) Where a right of action to recover land has accrued, and before the right of action is barred, the land ceases to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession.*
>
> *(4) For the purposes of this Act, a person is in possession of a land by reason only of having made a formal entry in the land.*
>
> *(5) For the purposes of this Act, a continual or any other claim on or near a land does not preserve a right of action to recover the land.*
>
> *(6) On the expiration of the period fixed by this Act for a person to bring an action to recover land, the title of that person to the land is extinguished.*
>
> *(7) For the purpose of this section "adverse possession" means possession of a person in whose favour the period of limitation can run*".

It is pertinent at this stage to state that although the above provision deals with recovery of land, **Section 34 of N.R.C.D. 54** makes it clear that action to recover land includes actions for a declaration of title to land. Per **Subsection 2 of Section 10 of the Limitation Act**, the right of a land owner to recover a land does not accrue unless, the person seeking to rely on the defence of limitation is in possession of the land. **Subsection 4 of the above Section** goes on to say that a person is deemed to be in possession, if he made a formal entry in the land. And **Subsection 7 of Section 10** infra describes the exercise of adverse possession to mean possession by a person seeking to take advantage of his possession for the period within which time would be running.

It may appear that **Section 10 of N.R.C.D. 54** could lend itself to several interpretations. What amounts to '*a formal entry in a land'*? Is it when the person is put on the land by the true owner or it is when the person physically entered on the land? It may appear that from **Subsection 4 of Section 10 of the Limitation Act**, a person who did not make a *formal entry* to a land, but has been exercising acts of possession for a period of twelve years may not be able to successfully raise the defense of adverse possession.

In practice, the principle seems to have been applied irrespective of whether the person entered the land lawfully or unlawfully before he started exercising acts of adverse possession. For persons lawfully put in possession of the land, the principle is that they suffer themselves to be evicted if they later deny the title of their landlord or licensor as decided in cases like **Torgbui Dzokui II of Zuta v. Atise Adzamli & Others,[18], Okpata v. Mataheko and Tetevi & Anor. V. Borkor & 3 Ors. [19].**

[18] Torgbui Dzokui II of Zuta v. Atise Adzamli & Others, Civil Appeal No. J4/36/2015, dated 9th December 2015, S.C. (Unreported) & Okpata v. Mataheko (2012) 44 G.M.J. 148 at p. 151.
[19] Tetevi & Anor. V. Borkor & 3 Ors. (2016) 100 G.M.J. 177 at p. 192.

On the contrary, in the case of squatters relying on adverse possession, the Courts appear not to have been consistent in their decisions. The Supreme Court held per Brobbey JSC (as he then was) in the case of **Awulae Attibrukusu III v. Oppong Kofi & Ors.** as follows: *The fact that the defendants and their fellow trespassers had developed the trespassed lands or stayed on the lands for several years were no grounds for decreeing valid title in their favour. If long possession were enough to found title in their favour, it would mean that whenever anyone took possession of another person's property and held on to it for a very long time, he becomes the owner of that property. That kind of acquisition of ownership by long possession would lead to chaos. The principle is that long possession is valid and is evidence of title but not against the true owner. Whenever the true owner surfaces, the one in possession should give way to that true owner*."[20]

The above decision may be contrasted with the decision in the case of **Adjetey Adjei & Ors. v. Nmai Boi & Ors.**[21] The Supreme Court, this time recognized adverse possession exercised by squatters when they held**:** *"If a squatter took possession of land belonging to another and remained in possession for twelve years to the exclusion of the owner, that would represent adverse possession and, accordingly, at the end of twelve years, the title of the owner would be extinguished."* See also **Klu v. Konadu**[22] **and Odonkor & Ors. v. Botchway**[23]**.**

The latter decision appears to accord with the English position. In the case of **Perry v. Clissold,** Lord Macnaghten explained: *"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownerships has a perfectly good title against all the world, but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the statute of limitations applicable to the case, his right is forever extinguished and*

[20] Awulai Attribrukusu III v. Oppong Kofi & Ors., Civil Appeal No. J4/27/2009, dated 29th April 2010, S.C. (Unreported)
[21] Adjetey Adjei & Ors. V. Nmai Boi & Ors. [2013-2014] 2 S.C.G.L.R. 1473 at holding 2.
[22] Klu v. Konadu (2009) S.C.G.L.R. 741
[23] Odonkor v. Botchway (1991) 2 G.L.R. 1.

the ***possessory owner acquires an absolute title***."[24] **(My emphasis).** See also **Klu v. Konadu[25] and Odonkor & Ors. v. Botchway[26].**

It would appear that the Courts have been placing much emphasis on the need for the adverse possession to be open, visible and unchallenged (and not necessarily on the formal entry to the land). In the **Adjetey Adjei & Ors. v. Nmai Boi & Ors. Case supra[27],** Sophia Akuffo JSC (as she then was) speaking for the Court noted: *"Adverse possession must be open, visible and unchallenged so as to give notice to the legal/paper owner that someone was asserting a claim adverse to his .... Under the present law, the person claiming to be in possession must show either (i) discontinuance by the paper owner followed by possession; or (ii) dispossession or as it is sometimes called 'owner' of the paper owner."*

Similarly, in the case of **Nana Kofi Antwi v. Kobina Abbey and Others[28]**, the Apex Court held: *"It is trite law that the claim of an adverse possession cannot be based on clandestine payments of tribute alone, as it must be open, visible and apparent, so that it gives notice to the legal owner that someone may assert claim".[29]*

The status of a stranger who succeeds in putting up the defense of adverse possession was initially vague. It was not clear whether the person acquired any title in the land. In **Ohimen v Agyei,** it was held *"The correct position is that the true owner loses his right to assert his title to and to recover possession of the land;*

[24] Perry v. Clifford (1907) A.C. 73 at p. 79.
[25] Klu v. Konadu (2009) S.C.G.L.R. 741
[26] Odonkor v. Botchway (1991) 2 G.L.R. 1.
[27] Adjetey Adjei & Ors. V. Nmai Boi & Ors. [2013-2014] 2 S.C.G.L.R. 1473 at holding 2.
[28] Nana Kofi Antwi v. Kobina Abbey & Ors. [2010] SCGLR 17.
[29] See also GIHOC Refrigeration & Household Products Ltd. (No. 1) v. Hanna Assi (No. 1) [2007-2008] SCGLR ; Boateng v. Ntim & Orss. [1961] 1 G.L.R. 671 & Tei Angnor & Co v. Yiadom III & Anor. (1959) 1 G.L.R. 157.

***not that the stranger acquires title to it**, though in actual fact he does thereby acquire title to it"*[30] *(My emphasis).*

It needs reiterating the point that many years after the decision in **Ohimen v. Agyei** supra, the **Limitation Decree now Act (N.R.C.D. 54)** was enacted. Under **Subsection 6 of Section 10 of the said Act**, the title of the original owner becomes extinguished.

The courts have thereby gone ahead to recognize the title of the adverse possessor. In time past, the defense of limitation enabled the adverse possessor to rely on it as a defense in a legal suit but not as a cause of action. Now, adverse possession operates to confer possessory title on the person who successfully put up the defense and can take advantage of his possession to commence an action to seek the protection. The Supreme Court in the case of **GIHOC v. Hannah Assi** decided**:** "*A person who had been in adverse possession of land for more than 12 years in terms of section 10 (1) and (6) of the Limitation Decree, 1972 (NRCD 54) would be entitled to a declaration of **possessory title**... **such adverse possessory title could be used both as a sword** and shield.*"[31] **(Emphasis is mine).**

It is worthy to note that the English courts had for a long time recognized the rights of the adverse possessor to take legal action in court to secure the interest he acquired in the land. In the case of **Learch v. Jay** [32]**,** it was held: **"**... that a *squatter may acquire an actionable interest in the land on which he or she squats*"

[30] Ohimen v. Agyei (1957) 2 W.A.L.R. 275.
[31] GIHOC v. Hanna Asi (2005-2006) S.C.G.L.R. 458 at p. 460.
[32] Leach v. Jay (1878) 9 Ch. D 42.

In one of the videos in circulation on social media trying to explain the issue raised in the introductory part of this paper, it was indicated that adverse possession cannot be exercised by a caretaker of a house or building except in respect of bare or undeveloped land. I find this restatement of the principle quite problematic, because the Limitation Act does not say so. Secondly, land as understood in the legal sense includes buildings and houses. The meaning of land in Ghana can be gleaned from **Section 281 of the Land Act, 2020**. The said Section provides '*land*' *includes the solid surface of the earth, trees, plants, crops and other vegetations, a part of the earth surface covered by water,* ***any house, building or structure*** *whatsoever, and any interest or right in, to or over immovable property*" (My emphasis).

It stands to reason that if a caretaker of land exercises adverse possession for twelve years, he can successfully put up the defense of limitation. It is immaterial that the land was developed or bare prior to the occupation of the adverse possessor.

Drawing the curtains down on this point, it should be noted that whereas a landowner's title may extinguish if a person successfully demonstrates visible, open and unchallenged acts of adverse possession for a period of twelve years, the same cannot be said to be the law if the person in possession does not demonstrate any overt act of adverse possession, no matter the length of time he remains on the land.

Adverse possession in relation to Public Lands

a. **The Law before Act 1036**: Since the **Adjetey Adjei v. Nmai Boi & Others** supra decided that squatters could benefit from their adverse possession, there is the need to examine the scope of the principle in the light of public lands. Until the passage of the Act 1036, the applicable statute was the **Public Lands (Protection) Act, 1974 (N.R.C.D. 240)**. The law made it illegal for anybody to trespass or encroach on public lands. However, there was no express provision in the law making it impossible for a squatter to establish adverse possession on public lands.

b. ***The Law after the passage of Act 1036***: Upon the passage of the new Land Act, it has been made illegal under **Section 236 of Act 1036** for anybody to encroach or trespass on a public land. Other offences have further been created in relation to public land and the punishment for a person found guilty under **Section 236** is very punitive.[33] **Subsections (1) and (2) of Section 236 of Act 1036** made it clear that a trespasser or encroacher cannot take advantage of the Limitation Act or adverse possession.

The subsections read:

> *"(1) Despite the provisions of the Limitation Act, 1972 (N.R.C.D. 54) and any other law, a person who unlawfully occupies public land does not acquire an interest in or right over that land by reason of the occupation.*
>
> *(2) A person shall not acquire by prescription or adverse possession an estate or interest in public land*".

Legal recognition given to people in long occupation of land

Act 1036 was assented to by the President on 23rd December 2020 and has since taken effect. The Act has brought substantial changes to many of the principles known to the Ghanaian land law. One of the provisions of the Act that is likely to have a major social impact is **Section 5 (1) (b)** which deals with usufructuary interest in land for non-indigene settlers.

Section 5 (1) (b) of Act 1036 now recognizes long settlement on land as a means of acquiring usufructuary interest in land by non-indigenes. Non-indigenes who were permitted to occupy land and on account of their long occupation of the land can no longer be displaced or dispossessed. They acquire an interest in that land by law, unless there was an agreement to the contrary. The duration for such

[33] For instance, a person who unlawfully sells a public land is liable to a fine ranging between five thousand penalty units to Ten Thousand Penalty Units or to an imprisonment term of seven to fifteen years or both. (See section 236 93)

settlement should however not be less than fifty (50) years. Perhaps, the policy reasoning behind this provision could be that the settlers might have been assimilated into the community. Typical examples of such occupants include some of the settlers at Madina, Nima and Sukura in Accra, while in Kumasi one can mention the settlers at Moshie Zongo, Aboabo, Fanti New Town and Anloga. The interest acquired by such settlers is usufructuary which appeared to have been traditionally enjoyed by the subjects of the allodial authority, that is the stool, skin or family.

Prior to the enactment of Act 1036, the courts had taken the view that although a stranger grantee of the allodial owner may be able to grant conveyances in certain instances which is similar to the current law, it doubted the possibility of the stranger acquiring real interest in the land by virtue of his long possession of the land.

Appau JSC speaking for the Supreme Court recently explained the point in the case of **Togbe Lugu Awadali IV v. Togbe Gbadawu IV**[34] when he held: "*The law is certain that long possession by a stranger with the permission of the allodial owner, would not confer ownership of the land upon the stranger. The authorities are clear that laches of this nature do not extinguish the title of the true owner and do not vest the stranger-occupier with title to the land. All it does is that it prevents the true owner from recovering possession, and enables the stranger to retain the use of the land. Though such a stranger can deal with the land as he wishes including granting conveyances, these interests are limited to possessory and user rights and cannot mature to absolute ownership rights. This is grounded on the customary law principle that a stranger cannot by mere occupation of land of a stool or clan or family to which he does not belong, acquire any real interest in that land, no matter how long*".

[34] Togbe Lugu Awadali IV v. Togbe Gbadawu IV, Civil Appeal No. J4/50/2016, dated 24th January 2018, S.C. (Unreported)

Usufructuary interest is generally provided under Section 5 of Act 1036. I have mentioned **that Section 5 (1) (b) of Act 1036** is likely to have enormous social impact in its application.

The section provides as follows:

"*5. (1) Usufruct is an interest in land, which is*

(a) Acquired in the exercise of an inherent right by a subject or a member of a stool or skin, or family or clan which holds the allodial title through the development of an unappropriated portion of the land of the stool or skin, or family or clan or by virtue of an express grant; or

(b) Acquired through settlement for a period of not less than fifty years, with permission of the holder of an allodial title by a non-indigene or group of non-indigenes, except where the settlement is on agreed terms; and

(c) Inheritable and alienable.

(2) Where the alienation of the usufruct is to a person who

(a) is not a member of the stool or skin, or clan or family which holds the allodial title, or

(b) is not a non-indigene or from the group of non-indigenes who holds the usufructuary interest as provided in paragraph (b) of subsection (1) in the land in respect of which the usufruct is to be alienated,

the alienation is subject to the written consent of the stool or skin, or clan, or family or group and the performance of established customary obligations".

Since we are more interested in **Subsection 1 (b) of Section 5 of Act 1036**, it is important to point out that the interest acquired by the non-indigene settlers is usufructuary, so it is alienable and inheritable.[35] In other words, the interest acquired by the non-indigenes after their fifty (50) year stay on a parcel of land cannot only be transferred but also passed on to their descendants perpetually.

[35] See section 5 (1) (c) of Act 1036.

Under **Section 81 (1) of Act 1036**, the non-indigenes after the fifty (50) year settlement can register their interest in the land. Under **Sections 83 (1) of Act 1036,** the usufruct is recognized as a registrable title. It is also significant to state that among the factors that give rise to a good title is a title derived from an enactment as provided under **Section 64 (1) (a)** of the Act. Since the usufruct's interest is now created by an enactment, it undoubtedly constitutes a good title.

It is worth emphasizing the point that when such non-indigenes who acquired usufructuary interest decide to alienate their lands, the prior written consent of the allodial holder is required for such disposition.[36] One may be curious to interrogate what the effect of the law would be, if the allodial stool, skin, clan or family decides not to give its written consent to the alienation. Perhaps, we may refer to **Section 50 (20)**[37]. The Section provides that the consent of the allodial holder must not be unreasonably withheld in certain alienations by a usufructuary holder.

The Positive Side of Section 5 (1) (b) of Act 1036

1. The provision of **Section 5 (1) (b) of the Act 1036**, in my view, is timely, particularly because many of such settlers have become integral members of the community in which they live. Some of the settlers may have been born there, lived there, schooled there, married there and ultimately, become identified with the community in all respects. If the lawmaker had overlooked their special circumstances and not accorded them some relief, it is my view that it would have visited social injustice on them.

2. **Section 5 of Act 1036** tends to guarantee the title to the allodial owners. By stipulating that an alienation by a non-indigene who has acquired usufructuary title should obtain the written consent of the allodial owner. In this way, the non-indigene usufruct cannot rely on adverse possession to oust the allodial holder's title.

[36] See section 5 (2) (b) of Act 1036.
[37] Of Act 1036

Some Issues identified with Section 5 of Act 1036 and its related provisions.

While, **Section 5 (1) (b) of Act 1036** has to a greater extent, granted a respite to many, it still requires some discussions.

(1) The provision tends to alter the existing legal principle that long possession per se, does not ripen into ownership in the absence of open, visible and clear acts of adverse possession as explained above. Ordinarily, a settler in possession ousts the land owner's title if he successfully establishes proof of adverse possession. However, under **Section 5 (2) of Act 1036**, the settler acquires his interest in the land without denying the grantor's title, hence its written consent is required in an alienation by the settler. It remains to be seen in the coming days, how the courts are going to apply the principle.

(2) There is the possibility of the law generating conflicts in some parts of the country. Since the law fixes fifty (50) years as the minimum years of settlement by non-indigenes before they can acquire usufructuary interest in the land in the absence of an agreement to the contrary, there is the fear that settlers who have been on land for many years but not up to the fifty (50) years may be forced to vacate by the allodial owners who may not want to lose their land to the settlers. We need to be realistic and appreciate the fact that many of these settlers may have nowhere to go. They were born in these communities and might have lost touch with their roots. As a result, they are likely to fight back and this can lead to serious conflicts and national security issues. It is unknown why the law maker did not afford any protection to such non-indigene settlers of less than fifty (50) years. Nevertheless, it is suggested that in order to bring harmony between the allodial holders and the settlers, the proper approach should be for the allodial owners to grant the settlers a leasehold interest in the land.

(3) The difference in the treatment of the usufructuary title holders (i.e., the indigenes and the non-indigenes) smacks of discrimination. Despite the recognition granted non-indigenes by the Act, it may be argued that there

are some elements of discrimination against them. If the law has recognized the non-indigene settlers for their long period of occupation, why should an alienation by them alone require consent, while that of non-indigenes require no consent? Why should the subjects (indigenes) only have the right to take or enjoy vacant portion of the community's land, while the non-indigenes who have invariably become part of that community are denied such rights as **Section 9 (2) and (3) of Act 1036** seek to do? On a lighter note, we can say there are two categories of usufructs: the indigenes usufructs may be classified as Grade 'A' usufructs while the non-indigenes are Grade 'B' usufructs. It should be remembered that under **Section 11 of Act 1036**, a person is not to be discriminated against on ground of place of origin.[38]

(4) Although the interest held by the non-indigenes is alienable; apart from the written consent required from the allodial holder relative to the alienation by the usufruct, the law further demands of the payment of adequate compensation to the allodial owner where the alienation is made to a person who is not entitled to that interest under **Subsections (19) and (20) of Section 50 of Act 1036**. What amounts to adequate compensation? The law maker did not give any clue and the absence of any provision in the Act can trigger unnecessary tensions, conflicts and even court litigations.

(5) Though the consent of the allodial holder is not to be unreasonably withheld in an alienation by the usufruct under **Section 50 (19) and (20) of Act 1036,** nothing was said in the Act, if the consent is unreasonably withheld by the allodial holder.

(6) Finally, it appears that there is a drafting error and omission in **Section 5 (2) (b) of the Act**. It was observed that the wording of the subsection of the Land Bill, 2019 was not too clear.

[38] See section 11 (a) of Act 1036.

Section 5 (2) of the Land Bill reads:

"2. *Where alienation of the usufruct is to a person who is not a member of ...*

(a) The stool, skin, clan, family or group which holds the allodial title, or
(b) ***A group of non-indigenes or from the group of a non-indigene who holds the usufructuary*** *interest as provided in paragraph (b) of subsection (1) in the land in respect of which the usufruct is to be alienated,*

the alienation is subject to the written consent of the stool, skin, clan, family or group and the performance of established customary obligations." (**Emphasis is mine).**

It seems that when the law maker decided to make itself clearer in the substantive Act, the situation somehow worsened. The said **Section 5 (2) of Act 1036** reads as follows:

"2. *Where alienation of the usufruct is to a person who*

(a) is not a member of the stool or skin, or clan, or family which holds the allodial title, or
(b) ***is not a non-indigene*** *or from the group of non-indigenes who hold the usufructuary interest as provided in paragraph (b) of subsection (1) in the land in respect of which the usufruct is to be alienated,*

the alienation is subject to the written consent of the stool, or skin, or clan, family or group and the performance of established customary obligations". **(My emphasis)**

Four things are observed here.

First and foremost, it is the writer's view that the **Subsection 2 (b) of Section 5 of Act 1036** beginning with '*is* ***not*** *a non-indigene'* should have been written "*is a non-indigene*". It may appear that the law maker intended to use the phrase '*is not an indigene or from the group of non-indigenes' or 'is a non-indigene or from the group of non-indigenes'*. **Section 5 subsection 2 (b) of Act 1036** seems to be talking about '*non-indigenes'* and not otherwise. In any event, if the provision is

in reference to '*indigenes*' why did it not state so plainly, but described them as '*not a non-indigene*" when it could simply have stated '*indigenes*'? The phrase '*is not a non-indigene'* is therefore unclear and likely to be a drafting error. One may want to refer to **Order 81 (1) of the High Court Rules, 2004 (C.I. 47)** when the Rules of Court Committee included the word *'not'* when they should not have done so.

Another careful observation is that there seems to be an omission in **Subsection 2 (a) of Section 5 of Act 1036** of the word '*group*' which was originally in the Bill. It does not appear that the law maker deliberately excluded it from **Section 5 (1) (b) of Act 1036**, because the word '*group*' is mentioned in the latter part of the section pertaining to the allodial holders whose written consent would be required for an alienation by a non-indigene usufruct. For those who insist that the law maker had a reason for drafting the law in its current state, the question then would be; who would the word *'group'* at the concluding part of the statement be referrable to in the light of **Section 5 (2) (a) of Act 1036?**

It can be observed that the provision of **Section 5 (2) (b) of Act 1036** does not match with its corresponding provision in the Land Bill. Whereas the Act makes reference to both an individual and a group, that is: "*is not a non-indigene or from the group of non-indigenes";* that of the Bill seems to be referring to two separate groups, that is "*A group of non-indigenes or from the group of a non-indigene".*

In addition, apart from the stool, skin, clan or family, what customary obligation may have to be performed to '*a group*' vested with an allodial title. Would that not be problematic? If some members of a secret society, for instance, own land as allodial owners and granted permission to non-indigene usufructs who may want to alienate it, what customary obligation would they be expected to perform?

Conclusion

It can be seen from the above discussion that Act 1036 has made tremendous inroads into our land law particularly with regard to the effect of long possession and adverse possession. The traditional principle requiring adverse possession before a land owner can lose his land to an occupier who has stayed on the land for some time appears to have been altered by Act 1036. A non-indigene occupant of land under Section 5 (1) (b) of Act 1036 does not need to establish adverse possession in order to acquire usufructuary title in the land after fifty (50) years. The right is derived from law. The Act is fairly new and the courts are yet to restate the principle regarding long possession. Nonetheless, one thing is clear that by virtue of Section 5 (1) (b) of the Act 1036, the principle that long possession of land does not ripen into ownership appears to have been neutralized and lost its universal application since the 23rd day of December 2020 when Act 1036 came into force, while at the same time those who have been enjoying public lands and taken advantage of the adverse possession can no longer do so.

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Watch out for the author's book about to hit the market in the coming months.