

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIERO,
ON MONDAY THE
25TH DAY OF APRIL, 2022.

BETWEEN:

SUIT NO. B/99^{OS}/2021

CHIEF FERDINARD O. ORBIH, SAN-----CLAIMANT

(Carrying on legal practice as Ferd O. Orbih

(SAN) & CO)

AND

- 1. EDO STATE GEOGRAPHIC INFORMATION SERVICE**
- 2. EDO STATE GOVERNMENT**
- 3. ATTORNEY GENERAL OF EDO STATE**

DEFENDANTS

JUDGMENT

The Claimant instituted this suit by way of Originating Summons dated 11th of May, 2021 against the Defendants jointly and severally for the determination of the following questions:

- 1) *Whether in the light of the provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution the Land Use Charge Law, 2012 of Edo State is not unconstitutional, invalid, null and void and of no effect whatsoever;*
- 2) *Whether in the light of the clear and unequivocal provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution, the Defendants are not bereft of power to impose Land Use Charge on Claimant's privately owned property at Christiana Orbih Drive, By 84, Boundary Road, Behind G.R.A., Benin City.*

In the event that the Honourable Court resolves the above questions in the affirmative, the Claimant is seeking the following reliefs:

1. *A DECLARATION that the Land Use Charge Law, 2012 of Edo State is inconsistent with section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution and consequently same is unconstitutional, invalid, null and void and of no effect whatsoever;*
2. *A DECLARATION that the Land Use Charge Demand Notice served on the Claimant on the 19th day of March, 2021 directing the Claimant to pay Land Use Charge of N3, 373, 719.95 (Three Million, Three Hundred and Seventy Three Thousand, Seven Hundred and Nineteen Naira, Ninety Five Kobo) for 2016 – 2021 is unconstitutional, invalid, null and void and of no effect whatsoever;*
3. *AN ORDER setting aside the aforesaid Land Use Charge Demand Notice served on the Claimant on 19th March, 2021; and*
4. *AN ORDER of perpetual injunction restraining the Defendants, their servants, agents and privies from further imposing Land Use Charge on the Claimant in breach of the provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution.*

In support of the Originating Summons, the Claimant filed a 13 paragraph affidavit and a Written Address of his counsel.

The Claimant's case is that on the 19th of March, 2021 the Defendants served on the Claimant's Chambers at Christiana Orbih Drive, by 84, Boundary Road, Behind G.R.A., Benin City a Land Use Charge Demand Notice requesting the Claimant to pay the sum of N3, 373, 719.95 (Three Million, Three Hundred and Seventy Three Thousand, Seven Hundred and Nineteen Naira, Ninety Five Kobo)

to the Defendants as Land Use Charge for the period – 2016 – 2021 for a property at No. 66, Boundary Road, G.R.A., Benin City, which does not belong to the Claimant. The said Land Use Charge Demand Notice was attached to the affidavit in support of the originating summons and marked Exhibit A.

The Claimant alleged that his property is at Christiana Orbih Drive, by 84, Boundary Road, behind G.R.A, Benin City and not No. 66, Boundary Road, G.R.A., Benin City.

In this suit, the Claimant is disputing the constitutionality of the Land Use Charge Demand Notice which was served on his Chambers.

In his written address filed in support of the Originating Summons, the learned counsel for the Claimant, *K.O.Obamogie Esq.* formulated two issues for determination as follows:

- 1. Whether in the light of the provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution the Land Use Charge Law, 2012 of Edo State is not unconstitutional, invalid, null and void and of no effect whatsoever; and***
- 2. Whether in the light of the clear and unequivocal provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution, the Defendants are not bereft of power to impose Land Use Charge on Claimant's privately owned property at Christiana Orbih Drive, By 84, Boundary Road, Behind G.R.A., Benin City.***

Thereafter, the learned counsel argued the two issues together.

Opening his arguments, he submitted that the Constitution of the Federal Republic of Nigeria, 1999, (as amended) has elaborately set out the basic framework of government in the Federation of Nigeria and he referred to ***sections 4, 5 and 7(1) of the aforesaid 1999 Constitution***, wherein copious provisions were made for the existence of three tiers of government, namely, Federal, State and Local Governments.

He posited that the powers exercisable by the Federal, State and Local Governments have been clearly identified under the 1999 Constitution. He said that with the exception of items under the concurrent legislative list, each of the three tiers of government exercises exclusive power over the subject under its control. According to him, just as the Federal Government cannot interfere with areas under

the control of the State Government, so the latter cannot interfere with areas specifically reserved for the local government councils. On this point, he relied on the judgment of the Supreme Court of Nigeria in the case of ***Knight, Frank & Rutley v Attorney General of Kano State (1998) LPELR – 1694 (SC) at page 16, paras. E – G.***

He maintained that specifically, ***section 7(1) of the 1999 Constitution*** guarantees the system of local government by democratically elected local government councils in the following terms:-

“7(1)The system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every state shall subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.

He submitted that ***section 7(5) of the 1999 Constitution*** has clearly prescribed that the functions to be conferred by Law on local government councils shall include those set out in the law and that each state of the Federation is mandatorily required to enact a Law that confers on the local government councils the functions expressly itemized in the Fourth Schedule to the Constitution.

Furthermore, he submitted that having regard to the clear and unequivocal provisions of section 7(1) & (5) of the Constitution, no State Government in the Federation can lawfully take over the functions of local government councils expressly itemized in the Fourth Schedule to the Constitution. He specifically referred to paragraph 1(j) of the said Fourth Schedule which provides as follows:-

“1. The main functions of a local government council are as follows:-

(j) assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State; and”

He posited that the Supreme Court pronounced on the legal implications of the above constitutional provisions whilst construing the provisions of the 1979 Constitution of the Federal Republic of Nigeria that are in pari materia with the aforesaid 1999 Constitution in the case of ***Knight Frank & Rutley (Nigeria) & Anor***

v Attorney General of Kano State (1998) LPELR – 1694 (SC) at pages 14 – 16, paragraphs G – C where the apex Court per Uwais, JSC (as he then was) held:

“Now, by Section 7 subsection (5) of the Constitution of the Federal Republic of Nigeria, 1979 (Cap. 62) the functions which can be conferred by Law on Local Government Councils are intended by the Constitution to include the functions set out in the Fourth Schedule to the Constitution. The Schedule provides in Paragraph I(b) and (j) thereof as follows- “1. The main functions of a local government council are as follows:- (b) collection of rates, radio and television licences; (j) assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State, and ...;” It is clear from the foregoing that the collection of rates on rateable hereditaments and the assessment of rates on privately owned houses are subjects within the responsibilities of local government councils. From the terms of the contract entered into by the appellants and the respondent, clause 1 states that the Government of Kano State was “desirous of having prepared a Valuation List of all rateable hereditaments” in the Municipal area of Kano. Clause 2 indicates that the Government was desirous of appointing a consultant “to prepare a valuation list for the purpose of property rates.” It can be seen that the main purpose for which the contract was entered into by the parties corresponds with the functions allocated to local government councils by the 1979 Constitution. Pursuant to the provisions of Section 7 subsection (5) of the 1979 Constitution, the Military Government of Kano State promulgated in 1977, Kano State Local Government Edict, No. 5 of 1977. The Edict provides in Section 76 thereof as follows:- “76. Every Local Government shall for the purposes of this part be the rating authority for its area,” These provisions give effect to the constitutional provisions in Fourth Schedule to the 1979 Constitution and put it beyond any doubt that it was the Local Governments in Kano State that possessed the power to assess, impose and collect rates on privately owned property.”

Again he referred to pages 32 – 33 of the report where *His Lordship, Ogwuegbu, JSC* stated thus:

“The House of Assembly of a State may by law prescribe the type of rates to be levied on such privately owned houses or tenements. The assessment and collection of such rates are exclusively the function of the local government council as guaranteed by the Constitution and not by the State Legislature. Paragraph 1m of the Fourth Schedule to the Constitution is clear and unambiguous. The State Legislature or the Military Administrator during the present dispensation has no business in the assessment and collection of rates in respect of the premises stated in the said schedule. It will amount to a usurpation of the power of the Local Government Council for the State Government to carry out such exercise or engage any person or authority to do so on its behalf.”

In the light of the foregoing, learned counsel submitted that the Land Use Charge Law, 2012 of Edo State was enacted in flagrant breach of the constitutional arrangement set out in section 7 subsections 1 and 5 and paragraph 1(j) of the Fourth Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended). He said that by the said Law, the Defendants seek to take over the functions of local government councils in Edo State expressly reserved for the local government councils by paragraph 1(j) of the Fourth Schedule to the Constitution. He referred to section 3 of the Law, which provides as follows:-

“3. Imposition of Land Use Charge

- (1) Subject to the provisions of this Law, there is hereby imposed a Land Use Charge which shall be payable on all real property situate in Edo State and assessed for the purpose under this law.***
- (2) For the purpose of this Law/each Local Government Area in the State may delegate to the State, by written agreement, its functions with respect to the collection of rates and the assessment of privately owned houses or tenement for the purposes of levying such rate as may be prescribed under this Law.”***

Counsel submitted that the said Law ought to be struck down as being inconsistent with the aforesaid constitutional provisions by virtue of ***section 1(3) of the said Constitution***, which provides as follows:-

“(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.”

He referred the Court to the judgment of the Court of Appeal in *Eze v Governor of Abia State & Others* [2010] 15 N.W.L.R. (Part 1216) 324 at 348 – 349 where the Court of Appeal per *Owoade, JCA* held as follows:-

“.....The basic law of Nigeria is the Constitution of the Federal Republic of Nigeria 1999 and its provision makes it supreme so that failure to follow its provisions renders whatever was done contrary to it unconstitutional. See *Adediran v Interland Transport Ltd.* (1991) 9 NWLR (Part 214) 155 at 179, *Erekanure v The State* (1993) 5 NWLR (Part 294), 385 at 393. Also, the provision of the Constitution are superior to every provision made in any Act or Law and are binding on and must be respected by all persons and authorities in Nigeria. *Adisa v Oyinwola* (2000) 10 NWLR (Part 674) 116. A.-G., *Abia State v A.-G., Federation* (2002) 6 NWLR (Part 763) 264 at 479, *Musa v I.N.E.C.* (2002) 11 NWLR (Part 778) 223 at 292. Furthermore, in a democratic system of government with a supreme Constitution, all laws flow from the Constitution and any law inconsistent with the Constitution is void to the extent of such inconsistency. *Obaba v Military Governor, Kwara State* (1994) 4 NWLR (Part 336) 26, A.-G., *Lagos State v A.-G., Federation* (2003) 12 NWLR (Part 833) 1 at 119.”

He further relied on *Knight, Frank & Rutley v Attorney General of Kano State, supra, at page 18, paragraph C.*

Premised on the above position of the law as espoused by the Supreme Court of Nigeria in *Knight, Frank & Rutley v Attorney General of Kano State, supra*, and the Court of Appeal in *Eze v Governor of Abia State & Others, supra*, he submitted that the Defendants are totally bereft of power to issue and serve on the Claimant the Land Use Charge Demand Notice attached to the originating summons as Exhibit A, which is targeted at a privately owned property.

He urged the Court not to countenance the attempt by the Defendants to stray outside the area of competence donated to them by the constitution.

Furthermore, counsel posited that as clearly deposed to in paragraphs 5 and 6 of the affidavit in support of the originating summons, the Claimant's property is at Christiana Orbih Drive, by 84, Boundary Road, Behind G.R.A., Benin City and not 66, Boundary Road, G.R.A., Benin City stated in Exhibit A (the Land Use Charge Demand Notice) served on Claimant's Chambers. He said that assuming but without conceding that the Defendants are invested with power to assess and levy rates on privately owned houses, Exhibit A clearly shows that it was not the Claimant's house that was assessed. Consequently, he maintained that the said assessment does not relate to Claimant's property and a fortiori, Claimant has no obligation to pay the bill.

Counsel submitted that the local government councils in Edo State are totally bereft of power to delegate their constitutional functions to the Defendants. He said that to allow such absurdity of donation or delegation of constitutional functions by local government councils to the State Government would definitely undermine the constitutional guarantee of the system of local government by democratically elected local government councils.

He posited that both the Supreme Court of Nigeria and the Court of Appeal have consistently stressed the need to avoid undermining the system of local government by democratically elected local government councils and he cited the following authorities:-

- 1. *Olubunma & Others v Governor of Ekiti State & Others (2013) LPELR – 20405 (CA) at pages 52 – 53, paragraphs B – D.***
- 2. *Onuegbu & Others v AG Imo State & Others (2012) LPELR – 19691 (CA) at pages 52 – 53.***
- 3. *Attorney General of Benue State & Others v Umar & Others [2008] 1 N.W.L.R. (Part 1068) 311***

Furthermore, he submitted that it is settled law that parties cannot contract out of the constitution and he referred to the judgment of the Court of Appeal in *Attorney General of Plateau State v Goyol [2007] 16 NWLR (Part 1059) 57 at 96* where the Court per Akaahs, JCA (as he then was) reiterated the above principle that parties cannot contract out of constitutional provisions. He said that the Defendants

are, therefore, bound by the provisions of the constitution on the functions of local government councils and cannot usurp those functions.

In conclusion, he urged the Court to resolve the two legal questions posed in this Originating Summons in favour of the Claimant.

In opposition to this Originating Summons, the learned counsel for the Defendants filed a Counter-Affidavit of 17 paragraphs and a Written Address,

In their Counter-Affidavit, the Defendants denied some parts of the Claimant's Affidavit and stated their own position.

According to the Defendants, contrary to the averments in paragraphs 5, 6 and 7, of the Claimant's affidavit, they alleged that No 66, Boundary Road, G. R. A., Benin City and No. 84, Boundary Road, behind G. R. A., Benin City refer to one and the same property owned and occupied by the Claimant in this case. They explained that the property in question was formerly known as No. 66, Boundary Road, GRA, Benin City but was recently re-numbered as No. 84, Boundary Road, by the Oredo Local Government Council.

Furthermore, they stated that the Land Use Charge (LUC) Bill served on the Claimant on 19/3/2021 is not excessive but is an accumulation of unpaid LUC Bills of 5 years from 2016 to 2021, together with the yearly penalties for refusal to pay up the promptly.

They maintain that the Land Use Charge Law 2012 is an existing law which was validly passed by the Edo State House of Assembly and assented to by the Edo State Governor.

According to them, sometime in 2012 all the 18 Local Government Areas in Edo State agreed to collaborate with the Edo Local Government to harmonize all land-based taxes in Edo State to avoid multiple taxation, hence the enactment of the Land Use Charge, 2012 as amended.

They posited that the LUC, Law does not affect only tenement rate assessment and collection but it is a consolidation of all land-based taxes and charges payable in Edo State which comprises of Property Tax, Tenement Rate and Ground Rent.

According to them, the Land Use Charge office collects all the three land-based taxes and remit to the different accounts, with tenement rate going to designated account for the local government areas. They said that the LUC, Law has been in force since 2012 with the Local Government Areas receiving tenement rates due to them under the arrangement.

That since the implementation of the Edo State LUC, Law in 2012 none of the 18 Local Government Areas in the State has ever complained of their powers under Section 7(5) and the Fourth Schedule of the 1999 Constitution of the Federal Republic of Nigeria having been usurped by the State Government. They emphasized that the state government has not taken over the constitutional duties of the Local Government Areas but that the two tiers of government are working in collaboration with one another pursuant to the Land Use Charge, Law 2012 (as amended).

In her Written Address, the learned counsel for the Defendants, *Mrs V.U.Adeleye (Director)* formulated three issues for determination as follows:

- 1) Whether in the light of the provisions of Section 7(1)(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and paragraph I(j) of the Fourth Schedule to the aforesaid 1999 Constitution, the Land Use Charge Law, 2012 of Edo State is not unconstitutional, invalid, null and void and of no effect whatsoever;*
- 2) Whether in the light of the clear and unequivocal of the provisions of Section 7(1)(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and paragraph I(j) of the Fourth Schedule to the aforesaid 1999 Constitution, the Defendants are not bereft of power to impose Land Use Charge on the Claimant's private property at Christiana Orbih Drive, by 84, Boundary Road, Behind GRA, Benin City; and*
- 3) Whether the Claimant is entitled to the Declarations and the Orders sought.*

Thereafter, the learned counsel argued Issue 1 and 2 together while Issue 3 was argued separately.

ISSUES 1 AND 2

Arguing these two issues together, learned counsel submitted that the Edo State Land Use Charge, Law 2012 (as amended) is not in contravention of *Section 7(5) and the Fourth Schedule to the Constitution of the Federal Republic of Nigeria, 1999*. She submitted that the LUC Law of Edo State is not just a law for the collection of tenement rate but a consolidation of all land-based rates and charges on landed or real properties in Edo State. That it consists of Property Tax, Tenement Rate and Ground Rent. She referred to the preamble of the law which states thus:

“A law to make provision for the consolidations of all land rates and charges payable in Edo State into a single Charge to be called Land Use Charge, to make provision for the levying and collection of the Charge and for purposes connected therewith”

She submitted that from the preamble, it is clear that this law encompasses other land taxation in Edo State. She referred the Court to the decision of the Supreme Court in the case of *CHAIRMAN, LAGOS EXECUTIVE DEVELOPMENT BOARD v. JAMIL SAID & ORS (1967) LPELR-25335(SC)* where the apex Court explained the function of a preamble in an enactment thus:

“... A preamble may of course be included in an Act so as to make clear the object of the legislature and if there is a preamble, that can be looked at as a guide to the intention of the Legislature if the wording of a provision of the Act itself creates doubt as to what is its meaning, but there is no legal requirement to incorporate a preamble in an Act, be it altering the Constitution or otherwise.”

Counsel submitted that from the Preamble it is clear that the Land Use Charge derives its legality from the Edo State Land Use Charge Law which is a consolidation of all land-based rates and charges payable in Edo State.

She referred to section 24 of the Land Use Charge Law which provides thus:

“On and from the date when Land Use Charge is levied on a property in accordance with this law, the provisions of Tenement Rates Law and any amendments made pursuant thereto, shall cease to apply to that property”.

She contended that the multiplicity of taxes on land has been stopped in Edo State by reason of the LUC, Law because this land use charge is in collaboration with the 18 Local Government Areas in the state.

She submitted that although under the Fourth Schedule to the 1999 Constitution, tenement rates is listed as one of the taxes to be collected by the Local Government, the inclusion of tenement rate in the LUC Law 2012 is not in violation of the Constitution as the Collecting authority remits the tenement rate meant for the Local Government into a designated account of the relevant Local Government on monthly basis. She posited that Section 18 of the LUC Law, 2012 as amended provides that the Commissioner for Finance shall establish and maintain a LUC collection Fund for payment deposited in all designated Banks. That by Section 18(3), the Commissioner is to pay to each Local Government Council it's agreed share of the LUC collection fund not later than 10 days after the beginning of each month. That the implication is that the tenement rate which is being collected under the State Law by the State Government is not for the benefit of the State Government but for the benefit of the respective Local Government Councils.

Learned counsel submitted that LUC can only be challenged by the LG Council whose powers under Section 7 of the Constitution are allegedly encroached upon by the State Government. She maintained that the LGAs have not complained because they are receiving what is due to them. She referred to the case of *AIRTEL NETWORKS LTD V. AG OF KWARA STATE & ANOR (2014) LPELR-23790(CA)*, where the Kwara State Land Charge Law (similar to that of Edo State) was challenged as being inconsistent with the provisions of the 1999 Constitution and the Tax and Levies Act, the Court of Appeal dismissed an appeal against the trial Court's judgement in favour of the State law on the ground that the Law is not inconsistent with the Federal Laws.

Counsel submitted that while it is conceded that *Section 7(5) and the Fourth Schedule of the 1999 Constitution (as amended)* expressly conferred the responsibility of assessment and collection of tenement rates on the Local Government Councils, the Land Use Charge, Law of Edo State has not taken the power away from the Local Government Council. She said that what the law has done is to give legal backing to the collaboration between the State Government and the 18 Local Government Councils towards an effective implementation of the

revenue drive of the two tiers of government to meet up with their respective obligations to the citizens.

She further submitted that should the Court hold that the inclusion of tenement rates in the consolidated land use charge under the State Law is inconsistent with Section 7 of the 1999 Constitution that cannot be a ground for striking down the entire law because under the Land Use Act, 1978 all lands in the State are vested on the Governor who has power to collect ground rent. She submitted that the State law will still stand as good law, since the State government collects the tenement rate for the Local Government Councils.

In concluding her arguments under Issue one and two she submitted that the State Law is not inconsistent with the Constitution of the Federal Republic of Nigeria. Consequently, she urged the Court to resolve these two issues in favour of the Defendants.

ISSUE 3

Whether the Claimant is entitled to the reliefs sought before this honourable Court?

Learned counsel submitted that putting all their arguments on issues 1 and 2 together with the facts deposed to in their Counter Affidavit in opposition to this suit, the Claimant is not entitled to the Declarations and the Orders sought. She pointed out that it is in evidence that the Claimant is owing the arrears of five years tenement rate. That this is the basis for Exhibit A attached to the Claimant's Affidavit in support of the Originating Summons. That in view of the above, she urged the Court to dismiss this suit as totally lacking in merit. She also urged the Court to hold that the Land Use Charge, 2012 of Edo State as amended is not inconsistent with the Constitution.

Upon receipt of the Defendants' Counter-Affidavit and Written Address, the Claimant filed a Further Affidavit and a Reply on Points of Law.

Essentially in the Further Affidavit, the Claimant denied some parts of the Defendants Counter-Affidavit and maintained that the Claimant's property has

never been known as No.66 Boundary Road, but No.66A Boundary Road. He said that the former No.66 Boundary Road belongs to someone else other than the Claimant.

In his Reply on Points of Law, the learned counsel for the Claimant, re-emphasized that the Local Government Councils cannot surrender their powers under section 7 of the Constitution to the State Government, that such an action would be unconstitutional, null and void. He also tried to distinguish the case of ***AIRTEL NETWORKS LTD V. AG OF KWARA STATE & ANOR (2014) LPELR-23790 (CA)*** from the instant case.

During the adoption of their written addresses, both counsel made some further oral submissions. In her further oral submissions, the learned counsel for the Defendants, ***Mrs. V. U. Adeleye*** submitted that assuming without conceding that the Land use charge of Edo State 2012 as amended is inconsistent with Section 7(1) & (5) of the 1999 Constitution, that going by the intendment of the Law it is not a law that deals with the assessment and collection of tenement rates but a law that harmonizes all Land based taxes. She posited that it would not be in the interest of justice to strike out the entire law because the tenement rates is just one of the taxes that the law deals with. She cited the case of ***NIGERIA DEVELOPMENT COMPANY LTD V. ADEMAWA STATE WATER BOARD 2008 LPELR 1997*** to buttress her point. She posited that if the Court finds that the provisions on tenement rates are inconsistent with the constitution those provisions can be struck out and not the entire legislation.

In his further oral submission, the learned counsel for the Defendants, ***K. O. Obamogie Esq.*** submitted that the Defendants have no answer to the decision of the Supreme Court in the case of ***Knight Frank and Routley Supra.*** He urged the Court to reject the invitation to apply the Blue Pencil rule because the enactment of the Land use charge Law is a direct infringement of the powers of the Local Government under the constitution.

He submitted that the Claimant's case is meritorious as the Law is long settled that a delegate cannot delegate the powers delegated to him.

I have carefully considered the totality of the evidence in this case together with the submissions of the learned counsel in the matter.

In this suit, the Claimant is urging the Court to determination of the following questions:

- 1) Whether in the light of the provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution the Land Use Charge Law, 2012 of Edo State is not unconstitutional, invalid, null and void and of no effect whatsoever;**
- 2) Whether in the light of the clear and unequivocal provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution, the Defendants are not bereft of power to impose Land Use Charge on Claimant's privately owned property at Christiana Orbih Drive, By 84, Boundary Road, Behind G.R.A., Benin City.**

I will adopt the two questions formulated above as the issues for determination in this suit.

Before I resolve the two issues for determination in this suit, I would first determine a preliminary point raised by the Claimant in respect of the correct address of his house. The Claimant alleged that his property is at Christiana Orbih Drive, by 84, Boundary Road, behind G.R.A, Benin City and not No. 66, Boundary Road, G.R.A., Benin City as stated on the Demand Notice.

The Defendants tried to counter this assertion by explaining that No 66, Boundary Road, G. R. A., Benin City and No. 84, Boundary Road, behind G. R. A., Benin City refer to one and the same property owned and occupied by the Claimant in this case. They explained that the property in question was formerly known as No. 66, Boundary Road, GRA, Benin City but was recently re-numbered as No. 84, Boundary Road, by the Oredo Local Government Council.

However, in his Further Affidavit, the Claimant still insisted that the Claimant's property has never been known as No.66 Boundary Road, but No.66A Boundary Road. He maintained that the former No.66 Boundary Road belongs to someone else other than the Claimant.

I am of the view that the issue of the correct number of the Claimant's house is immaterial in so far as it is clear that the Claimant was served with the Demand Notice in respect of his house in that vicinity. I agree with the Defendants that the Demand Notice served on the Claimant refer to one and the same property

owned and occupied by the Claimant in this case. The issues at stake in this suit are beyond the dispute over the actual number of the Claimant's house.

I will now proceed to resolve the two issues seriatim.

ISSUE ONE:

Whether in the light of the provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution the Land Use Charge Law, 2012 of Edo State is not unconstitutional, invalid, null and void and of no effect whatsoever?

For the avoidance of doubt, the provisions of the relevant parts of ***Section 7 of the 1999 Constitution*** provides thus:

“Sections 7(1) The system of Local Government by democratically elected Local Government Councils is under this Constitution guaranteed, and accordingly, the Government of every State shall subject to Section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.”

“Section 7(5) The functions to be conferred by law upon local government council shall include those set out in the Fourth Schedule to this Constitution.”

Furthermore ***Paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution*** provides as follows:

“1. The main functions of a local government council are as follows --

(j) Assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State.”

The Edo State House of Assembly sometime in 2012 passed into Law the Land Use Charge Law 2012. From the preamble of the Law, the law purports ***to make provision for the consolidation of all land based rates and charges payable in Edo State into a single charge to be called Land Use Charge; to make provision for the levying and collection of the charge and for purposes connected therewith.***

The validity or otherwise of this statute is a question of law based on a proper appreciation of the provisions of the 1999 Constitution (as amended).

The Edo State Land Use Charge Law, 2012 has 27 sections and a schedule. By *section 3 (1)* the law imposes Land Use charge on all real properties situate in the State. *Section 12 of the Law* empowers the Edo State Internal Revenue Service to be the sole collecting authority of the Land Use Charge due to the Edo State Government.

Section 3 (2) of the Law provides thus:

“For purpose of this law, each Local Government Area in the State may delegate to the State, by written agreement, its functions with respect to the collection of rates and the assessment of privately owned houses or tenement for the purpose of levying such rate as may be prescribed under this law.”

By the use of the words ‘*may delegate*’ it suggests that the local governments have been given an option to contract out their constitutional duties to the State Government by a written agreement.

In defence to this suit, the Defendants are seriously contending that sometime in 2012 all the 18 Local Government Areas in Edo State agreed to collaborate with the Edo Local Government to harmonize all land-based taxes in Edo State to avoid multiple taxation, hence the enactment of the Land Use Charge, 2012 as amended. Furthermore, while conceding that *Section 7(5) and the Fourth Schedule of the 1999 Constitution (as amended)* expressly conferred the responsibility of assessment and collection of tenement rates on the Local Government Councils, they contend that the Land Use Charge Law of Edo State has not taken the power away from the Local Government Council but has given legal backing to the collaboration between the State Government and the 18 Local Government Councils towards an effective implementation of the revenue drive of the two tiers of government to meet up with their respective obligations to the citizens.

The salient question to be raised at this stage is whether this purported contractual arrangement between the eighteen Local Governments and the State is constitutional. It is pertinent to observe that Section 3 (2) of the Land Use Charge Law which seeks to validate the arrangement provides that: ***“For purpose of this***

law, each Local Government Area in the State may delegate to the State, by written agreement, its functions with respect to the collection of rates and the assessment of privately owned houses or tenement for the purpose of levying such rate as may be prescribed under this law.”(Underlining mine). In this proceeding, the Defendants have not produced any written agreement of delegation by the eighteen local government councils in line with the provision of the statute.

Laying aside my pertinent observations about the absence of any written agreement of delegation, I would proceed to examine the constitutionality of the purported arrangement between the Local Government Councils and the State Government as encapsulated in the Land Use Charge Law, 2012 particularly as it relates to the collection of tenement rates.

It is elementary that the constitution of every nation is the basic document that regulates the affairs of the nation by setting out the functions and powers of the different components of government namely the Executive, the Legislature and the Judiciary. It also regulates the relationship between the various tiers of Government. Furthermore, the various arms and tiers of government are bound by the constitution and have a duty to ensure its enforcement.

Thus, the 1999 Constitution (as amended) has encapsulated lucidly, the various powers and functions of the arms and levels of government. Legislative powers were by the constitution divided between the National Assembly and the Houses of Assembly of various states. The constitution by the same token clothed each of the legislative organs with jurisdiction to legislate on certain matters listed in Parts I & II of the second schedule. By *section 1 (3) of the 1999 Constitution*, any law which is inconsistent with the provisions of the constitution is to the extent of the inconsistency null and void.

The Edo State Land Use Charge Law, 2012 was enacted pursuant to *section 4 (7) and Item 9 of the Second Schedule to the 1999 Constitution*. By virtue of *item 9 of the Second Schedule to the 1999 Constitution*, as amended, a House of Assembly may, subject to such conditions as it may prescribe, make provisions for the collection of any tax, fee or rate or for the administration of the Law providing for such collection by a local government council.

Also worthy of mention at this stage is the provisions of the Fourth Schedule on the functions of a Local Government. As it relates to the subject matter under consideration, *Paragraph 1 (j) of the Fourth Schedule* provides as follows:

“1.The main functions of a local government council are as follows:

(j) Assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State.”

The combined effect of *section 4 (7), Item 9 of the Second Schedule and paragraph 1 (j) of the Fourth Schedule to the 1999 Constitution* is that the legislative power to make laws on matters affecting the collection of any tax, fee or rate or for the administration of the Law providing for such collection by a local government council is reposed in the House of Assembly of the State.

However, the power to collect such tax and fees above mentioned is within the purview of the Local Government. In clear terms the power to assess, levy and collect tenement rates in a state is vested on the Local Government as provided under Paragraph 1 (j) cited above. Thus it would be an ouster of the powers and functions of the Local Government and a breach of constitutional provisions for a State Government to seek to perform the functions which are vested on the Local Government Councils under the Constitution.

Thus, in providing under *section 12 of the Edo State Land Use Charge Law, 2012* that the Internal Revenue Service shall be the sole collecting agent, the Law seeks to oust or curtail the powers and functions of the Local Government Council, if not to completely undermine it.

The Court of Appeal had occasion to consider a point akin to this in the case of *Knight, Frank & Rutley v. A.G Kano (1990) 4 NWLR (Pt.143) 210*. In that case, the Kano State Government entered into a contract with the appellants to prepare a list of rateable hereditaments within Kano municipality with the aim of enabling the state government charge and collect tenement rate. When the Court of Appeal Kaduna Division was seised of the matter, the court held such contract to be illegal, null and void. In arriving at their decision the court stated thus:

“Since the Kano State Government has no power over the assessment of tenement rates, it has no competence or power to enter into an agreement with anybody or person for the valuation of rateable hereditaments.”

On appeal to the Supreme Court, the apex Court upheld the decision of the Court of Appeal. At the Supreme Court, *Uwais JSC* whilst delivering the leading judgment stated thus:

“it is clear from the provisions of paragraph 1(b) and (j) of the Fourth Schedule read together with the provisions of section 7 subsection (5) of the constitution that the intendment of the Constitution is that only Local Government Councils have the power to assess and impose rates on privately owned property.”

The next point is to determine the necessary implication of *Section 3 (2) of the Edo State Land Use Charge Law, 2012*. By the said subsection, each Local Government Area in the State may delegate to the State, by written agreement, its functions with respect to the collection of rates and the assessment of privately owned houses or tenement for purpose of levying such rate as may be prescribed under this law. Whether the Local Government can validly delegate such power as envisaged by that subsection is a question of law.

The 1999 Constitution, as amended creates a Local Government System as a third tier system of government.

The provisions of *section 7 of the 1999 Constitution* guarantees the system of local government by democratically elected local government council thus:

“The system of local government by democratically elected local government councils is under this constitution guaranteed; and accordingly, the Government of every State shall subject to section 8 of this constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.”

The constitutional nature and functions of the local government has been considered and clarified in the case of *KNIGHT, FRANK & RUTLEY (NIG.) LTD. V. ATTORNEY-GENERAL OF KANO STATE (1990) 4 NWLR (PT. 143) 210* where the court confirmed the metamorphosis of the local government as a third tier of government.

Sequel to the foregoing, the court will confirm the jurisdictional sphere of operation of the local government authorities from the incursion of the State or the Federal Government since they are in their own rights an independent third tier of government.

In the case of ***BAMIDELE & ORS V. COMMISSIONER FOR LOCAL GOVERNMENT AND COMMUNITY DEVELOPMENT LAGOS STATE & ANOR. (1994) 2 NWLR (PT. 328) 568 C.A.***, the claim was for a declaration that it was incompetent of the Defendants, contrary to the Constitution of the Federal Republic of Nigeria, to establish, maintain and regulate markets, particularly to interfere with the day to day running of the Alayabiagba market situate and lying within the Lagos Island Local Government.

Justice Uwaifo JCA (as he then was) delivering the lead judgment held inter alia:-

“By the Local Government Edict No. 16 of 1976 of Lagos State, Section 63(a) thereof Local Governments were given exclusive responsibility and power to make bye-laws, for markets and motor vehicle parks. Incidentally, section 7(5) of the 1979 Constitution provides for the functions of Local Government in the 4th Schedule of the Constitution, among which as stated in paragraph 1 (e) thereof, is the : establishment, maintenance and regulation of markets, motor parks and public toilets. It will be unconstitutional for any other person or authority to purport to exercise that function on the state of the Law. The function has been given to the Local Government. That such usurpation of function was done by an elected State Government to an elected Local Government tells a lot about our respect for democratic principles”

Thus it can be deduced from these judicial authorities that the local government is by nature, a constitutional third tier of government, endowed with its own constitutional functions. By the fourth Schedule to the Constitution the express powers and functions of the local government council are safeguarded.

On the question of whether the Local Government can surrender or delegate their constitutional functions, the case of ***Bamidele v. Commissioner for Local Government (1994) 2 NWLR pt. 328, 568*** is instructive. There the court pointed out that: ***“If a public body, such as the local government in this case, is***

entrusted with certain powers by statute, it is has the duty to perform it. It cannot be deprived from it nor can it surrender it.”

Similarly in the case of *AG PLATEAU STATE & ORS V. GOYOL & ORS (2007) LPELR-12875(CA)* the Court of Appeal exposted as follows: *“Even if the respondents consented to the dissolution of the councils which paved way for the enactment of the law giving the Governor power to appoint Caretaker Committees, it will still not alter the position because the parties have no power to contract out of the Constitution. It is the same as parties agreeing to vest jurisdiction on a Court where such jurisdiction has been explicitly ousted.”*

In the old case of *A.G. BENDEL STATE V A.G. FEDERATION (1981) NSCC 314 AT 318* the Supreme Court emphatically validated this position when they stated thus: *“Neither a State nor an individual can contract out of the provisions of the Constitution. The reason for this is that a contract to do a thing which cannot be done without a violation of the law is void.”*

In her vehement effort to validate the provisions of the Edo State Land Use Charge Law, the learned counsel for the Defendants relied heavily on the case of *AIRTEL NETWORKS LTD V. AG OF KWARA STATE & ANOR (2014) LPELR-23790(CA)*, where the Kwara State Land Charge Law which she alleged was similar to that of Edo State, was challenged as being inconsistent with the provisions of the 1999 Constitution and the Taxes and Levies Act.

As the very learned counsel for the Claimant ably submitted in his Reply on Points of Law, the aforesaid case of *AIRTEL NETWORKS LTD V. AG OF KWARA STATE & ANOR (supra)* is quite distinguishable from the present one on the following grounds:

- I. The aforesaid case dealt with Items 46, 66 and 68 of the Exclusive List of the 1999 Constitution and whether the Kwara State Land Use Charge Law was interfering with matters of telecommunications which is on the Exclusive List;*
- II. The case was not about the State Government collecting Tenement Rates for the Local Government Councils;*

III. *The Kwara State Land Charge Law specifically stated that “Land Charge” is defined as including all property and Land based rates and charges other than the tenement rates” (Underlining supplied for emphasis)*

Clearly, the case of *AIRTEL NETWORKS LTD V. AG OF KWARA STATE & ANOR (2014) Supra* does not support the Defendant’s case in any way.

From the foregoing analysis it is evident that Local government Councils in Edo State are by the Constitution empowered to levy, assess and collect tenement rates on residential premises within their area of jurisdiction pursuant to the law made by the House of Assembly. Such constitutional power or duty cannot be derogated from by agreement or by any other statutory provision.

Thus the Edo State Land Use Charge Law, 2012 which seeks to contract out or delegate the constitutional functions of the Local Government Councils in the area of the collection of tenement rates is clearly inconsistent with the provisions of the 1999 Constitution and is null and void to the extent of its inconsistencies.

Having declared the law as inconsistent with the provisions of the 1999 Constitution, the pertinent question to answer at this stage is whether I should declare the entire statute null and void or I should merely strike down the offending provisions of the statute which are inconsistent with the 1999 Constitution.

Putting it in proper context, the question is whether the entire provisions of the Edo State Land Use Charge Law 2012 are inconsistent with the provisions of Sections 7(1) and (5) of the Constitution of Nigeria 1999 (as amended) and Item 1(J) of the 4th Schedule and by virtue of Sections 1(1) and (3) and 4(5) of the Constitution of Nigeria 1999 (as amended) amounted to an usurpation of the functions of the Local Government Councils in Edo State and therefore null, void and of no effect?

If the answer to the above question is in the negative, that is to say it is not the entire provisions of the Law that is inconsistent with the provisions of the Constitution, then we may consider striking down only the unconstitutional provisions. This is based on the *application of the blue pencil rule*.

In their judgment in the recent case of *EDO STATE HOUSE OF ASSEMBLY & ORS v. MR. JOHNSON OBASOGIE IGBINEDION & ORS (2021) LPELR-55990(CA)* the Court of Appeal, Benin Division observed thus: “*the*

constitutionality or otherwise of a Statute is a fundamental issue and invariably involves the determination of the legal strength of the Statute in relation to the Constitution of the law - the grund norm from which all other laws must derive their validity. Thus, before a Statute is pronounced as being unconstitutional by a Court of law there must be a clear contravention or violation of the Constitution and must never be treated lightly but solemnly and must be the result of a mature consideration and well - reasoned decision.”

In law, the Blue Pencil Rule or Test is a judicial standard for deciding whether to invalidate the whole of a document or contract or an enactment or only the offending words therein. Thus, in the application of this rule only the offending words or provisions are generally liable to be invalidated where it is possible to delete them simply by running a blue pencil through them as opposed to changing, adding, or rearranging them. See *Idika V. Uzoukwu (2008) 9 NWLR (Pt.1091) 34 @ P. 64.*

In the case of *Attorney General of Ondo State V. Attorney General of the Federation & Ors (2002) LPELR - 623 (SC)*, the Supreme Court per Uwais JSC (as he then was but later CJN) applied the blue pencil rule to validate some Sections of the ICPC Act whilst invalidating only the offending Sections of the Act.

However in the case of *AG ABIA STATE & ORS V. AG FEDERATION (2002) LPELR-611(SC) (PP. 130-131 PARAS. A)*, the apex Court expounded further as follows:

"The "blue pencil" rule is applied to sever a part of a legislation that is good in the sense that it is valid, from the part that is bad, in that it is invalid. That is, the blue pencil is run over the part that is bad. If what remains of the impugned legislation, that is the part that is good, can stand, then it is applied. But if what remains cannot stand on its own, the impugned legislation is declared invalid.”

The rationale for applying the blue pencil rule in the present suit is predicated on the allegation that the Land Use Charge Law of Edo State is not just a law for the collection of tenement rate but a consolidation of other land-based rates and charges on landed or real properties in Edo State such as Property Tax and Ground Rent payable under the Land Use Act to the State Government.

At this stage, I will attempt to run the blue pencil over the entire provisions of the Edo State Land Use Charge Law 2012 to sever the part of the legislation that are unconstitutional and to find out whether the remaining valid provisions can stand on their own.

The Edo State Land Use Charge Law, 2012 has 27 sections and a schedule. Having used the Blue Pencil to go through the entire provisions of the Law, I find the following Sections as the offending Sections that must be struck down for the reasons stated by them, namely: ***Sections 3(2)- Delegation of functions by each Local Government Council - (It amounts to usurpation and thus completely null and void); Section 5 – Property Assessment after Delegation (It amounts to usurpation and thus completely null and void); Section 18 – Land Use Collection Fund (It amounts to usurpation and thus completely null and void); Section 24 – Application of other Laws (It amounts to usurpation and thus completely null and void); Section 27- Interpretation: The following two items- “Collecting Authority” & “Net Land Use Charge” (The are in furtherance of the delegation and usurpation).***

The consequence of striking out the unconstitutional provisions is that all the provisions which were inserted in the law to give effect to the illegal delegation of the functions of the Local Governments to the State Government on the collection of tenement rates have been expunged. Furthermore, since the provision of the Law which repealed the former Tenements Rates Law has also been struck down, the Local Governments can invoke the provisions of the revived Tenements Rates Law to collect Tenement Rates as envisaged by the Constitution.

Sequel to the foregoing, I hold that in the light of the provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution the provisions of sections 3(2), 5, 18, 24 and the identified parts of section 27 the Land Use Charge Law, 2012 of Edo State are unconstitutional, invalid, null and void and of no effect whatsoever. I therefore resolve Issue 1 partially in favour of the Claimant.

ISSUE TWO:

Whether in the light of the clear and unequivocal provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution, the Defendants are not bereft of power to impose Land Use Charge on Claimant's privately owned property at Christiana Orbih Drive, By 84, Boundary Road, Behind G.R.A., Benin City.

Since I have made a finding under Issue 1 that the salient provisions of the Edo State Land Use Charge which vested power on the State Government to impose Tenement Rates on behalf of the State Government are unconstitutional, it is clear that the Defendants are bereft of power to impose the Land Use Charge on the Claimant's privately owned property at Christiana Orbih Drive by 84 Boundary Road, G.R.A Benin City. Issue 2 is therefore resolved in favour of the Claimant.

Having resolved the two issues for determination in favour of the Claimant, I hold that the Claimant's Claims against the Defendants succeed and the Claimant's reliefs are granted as follows:

- 1. A DECLARATION that the provisions of sections 3(2), 5, 18, 24 and the parts of section 27 of the Land Use Charge Law, 2012 of Edo State (on "Collecting Authority" and "Net Land Use Charge") are inconsistent with section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution and consequently same are unconstitutional, invalid, null and void and of no effect whatsoever;***
- 2. A DECLARATION that the Land Use Charge Demand Notice served on the Claimant on the 19th day of March, 2021 directing the Claimant to pay Land Use Charge of N3, 373, 719.95 (Three Million, Three Hundred and Seventy Three Thousand, Seven Hundred and Nineteen Naira, Ninety Five Kobo) for 2016 – 2021 is unconstitutional, invalid, null and void and of no effect whatsoever;***
- 3. AN ORDER setting aside the aforesaid Land Use Charge Demand Notice served on the Claimant on 19th March, 2021; and***
- 4. AN ORDER of perpetual injunction restraining the Defendants, their servants, agents and privies from further imposing Land Use Charge on the Claimant in breach of the provisions of section 7, subsections 1 and 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 1(j) of the Fourth Schedule to the aforesaid 1999 Constitution.***

I award the sum of N200, 000.00 (two hundred thousand naira) as costs in favour of the Claimant.

Hon. Justice P.A. Akhiero
JUDGE
25/04/2022

COUNSEL:

- 1. K.O.Obamogie Esq.....Claimant*
- 2. Mrs V.U. Adeleye (Director).....Defendants*