

Home Sharing and Serviced Apartment Short-Term Rentals: Legal Implications of New Forms of Residential Occupancy in Nigeria

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Abstract

Following the advent of vehicle sharing online platforms such as Uber and Bolt, there has been, in recent years in Nigeria, the emergence of home sharing online platforms including Airbnb, Shortlet rentals, and Quickteller Homes which offer home sharing and serviced apartments on short-term rental basis. As a contractual arrangement with economic benefits for both the hosts and the guests, short-term rentals are new forms of residential occupancy that is gaining the preference of a rapidly growing number of patrons in commercial cities across Nigeria. This article examines the legal relationship between parties involved in short-term residential occupancy. In comparison with how the relationship is recognised under common law tenancy in other jurisdictions, this article determines the nature of the relationship under tenancy statutes in Nigeria.

Keywords: Home sharing, Short-term rentals, Occupancy licence, Tenancy, Residential occupancy

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1. Introduction

Technology has enabled the creation and growth of a “sharing economy” whereby people connect with one another through online platforms to “share” their assets on mutually beneficial terms. “Sharing economy” is a term that refers to “any marketplace that uses the Internet to bring together distributed networks of individuals to share or exchange otherwise under-utilized assets”¹. In the sharing economy, ownership of assets is not transferred. Instead, people create income from “sharing” their excess or under-utilised assets². The sharing economy has changed the way consumers access goods and services by both redefining the production-to-consumer model in terms of peer-to-peer exchanges, and providing numerous platforms for doing so³.

Foremost of these are vehicle sharing online platforms such as Uber and Bolt where consumers looking for rides are matched with independent providers of ride services⁴. Following the advent of these online vehicle sharing services in Nigeria, there has been, in recent years, the emergence of other internet platforms such as Airbnb, Shortlet rentals, and Quickteller Homes which offer home sharing and serviced apartments on short-term rental basis⁵. These online platforms advertise different types of accommodation listed by their owners or agents and interested guests are able to identify their preferred choices and then conclude the rental transactions remotely, easily and conveniently.

For the purpose of the rental agreement, the home owners or agents who list their accommodation for short-term rentals on online platforms are referred to as the ‘hosts’ while customers or persons interested in the accommodation are referred to as ‘guests’⁶. These nomenclatures for parties involved in short-term rental arrangement imply that a tenancy agreement or landlord and tenant relationship is not intended because the apartments that are hosted on the online platforms are only for short periods, ranging from one night to a few days at a time.

Hence, a home owner with unused space can afford to let it out and share it with a person in need of it. In addition, real estate developers list fully serviced apartments on these platforms instead of letting to tenants. Also, tenants who are not occupying their apartments or have unused spaces take advantage of this short-term rental arrangement for the purpose of generating part of their annual rent. Tenants are able to home-share their

¹ Christopher Koopman, Matthew Mitchell and Adam Thierer, (2015). The ‘Sharing Economy’: Issues Facing Platforms, Participants, and Regulators. The Mercatus Center, George Mason University, Submission to Federal Trade Commission. Available at: <https://www.mercatus.org/system/files/KoopmanSharing-Economy-FTC-filing.pdf>

² Ritchie, C., & Grigg, B. (2019). No longer unregulated, but still controversial: Home sharing and the sharing economy. *University of New South Wales Law Journal*, 42(3), 981–1017

³ Michelle Maese, (2014). Rethinking “Host” and “Guest” Relations in the Advent of Airbnb and the Sharing Economy, 2 *Tex. A&M J. Real Prop. L.* 481. Available at: <https://doi.org/10.37419/JPL.V2.I3.5>

⁴ See <https://www.uber.com/ng/en/about/>; and <https://bolt.eu/en/about-bolt/>

⁵ See [Airbnb.com](https://www.airbnb.com/); [Shortletrentals.com](https://www.shortletrentals.com/); [Homes.quickteller.com](https://www.homes.quickteller.com/). While Airbnb and Quickteller Homes have international coverage, Shortlet Rentals is a local online platform in Nigeria

⁶ Michelle Maese, (2014). Rethinking “Host” and “Guest” Relations in the Advent of Airbnb and the Sharing Economy, op.cit

apartments because what is granted to a guest is considered as a mere licence to occupy and not a sub-tenancy¹. Thus, short-term rentals are not limited to home owners alone or based on ownership right in the property. What is required is active possession of the property by the host.

The attraction in home sharing is that the host is able to receive supplemental income from unused spaces, and in the case of serviced apartments, short-term rental has higher turn-over of guests and lower stress on the property and its facilities than tenancy². Unlike hotels and lodgings, short-term rentals have been found to be of cheaper rates and therefore more economical because guests spend less on accommodation³. Also, guests are able to stay longer in the accommodation for business or pleasure and can enjoy the ambience of a home away from home, due to the privacy it offers.

Short-term rentals therefore provide economic benefits to all parties involved because of its capacity to generate income for hosts and save accommodation cost for guests. Instructively, short-term rentals now afford people with access to property, both owners and tenants, to use it in a manner and to an extent that has not previously been possible⁴, or envisaged under extant tenancy laws. This is because home sharing and serviced apartment short-term rentals involve the letting of residential spaces or apartments to guests in the form and nature of a periodic tenancy.

Except the duration of occupancy and the rental agreement which is considered as a licence, short-term residential occupancy has the essential ingredient of a tenancy; payment of a fee for the use or occupancy of a residential accommodation according to specified terms and conditions agreed between the host and the guest. As an emergent form of residential occupancy in Nigeria, there is yet to be any legislative response towards its regulation⁵. For example, there is no existing tenancy statute in Nigeria that makes provisions for home sharing and serviced apartments let out on short-term rental basis.

However, with the increasing popularity and patronage of this new form of residential occupancy in major commercial cities such as Lagos, Abuja and Port Harcourt, sooner than later disputes are bound to arise for adjudication. In view of potential legal disputes, therefore, it is important for parties to short-term rentals to understand their rights and obligations. The objective of this article is to examine the legal relationship between parties involved in short-term residential occupancy in Nigeria. In comparison with how the relationship is recognised under common law tenancy in other jurisdictions⁶, this article determines the nature of the relationship under tenancy statutes in Nigeria.

2. Short-Term Rentals

In the Western world, short-term rentals are not a new phenomenon as they date back to about the Middle Ages when roadside inns were established in order to provide night-time accommodations to weary travellers⁷. What is new, however, is the role of technology which has made it possible for online management of searching, identifying, booking, making payment and concluding short-term rental transactions. Advances in technology have therefore effectively replaced the older person-to-person relationship with a new form of relationship that is brokered between a host and a guest through the intermediary of online platforms⁸.

In Nigeria, it was the arrival of online service delivery platforms that introduced short-term rentals into the country. Online platforms such as Airbnb and Quickteller Homes serve as the intermediary that manage the processes through which short-term rentals are advertised by accommodation providers and patronized by customers. Consequently, short-term rentals now mainly involve the provision of accommodation by means of online platforms as part of the sharing economy. Through the online platforms, a host lists a vacant space or serviced apartment and a guest in need of such accommodation can book for its occupancy only for a short

¹ See Bill Swannie, (2016). Trouble in Paradise: Are Home Sharing Arrangements "subletting" Under Residential Tenancies Legislation? 25 Australian Property Law Journal 183

² Iis P Tussyadiah and Juho Pesonen, (2018). 'Drivers and Barriers of Peer-to-Peer Accommodation Stay: An Exploratory Study with American and Finnish Travellers', 21(6) Current Issues in Tourism 703

³ Michelle Maese, (2014). Rethinking "Host" and "Guest" Relations in the Advent of Airbnb and the Sharing Economy, op.cit

⁴ Laura Schatz and Rebecca Leshinsky, (2018). 'Up in the Air(bnb): Can Short-Term Rentals Be Tamed?', 7(2) Property Law Review 105, 105

⁵ Unlike in other jurisdictions such as the United Kingdom, United States, Spain, Germany and Australia where efforts have been and are being made to regulate this form of internet-enabled short-term rental arrangement. For an analysis of the regulatory efforts in these countries, see Espinosa, T.P. (2016), "The cost of sharing and the common law: how to address the negative externalities of home-sharing", Chapman Law Review, Vol. 19 No. 2, pp. 597-628; Sinclair, M. (2016). Fair and efficient regulation of the sharing economy. Economic Affairs, 26, 2, 204-211; Edelman, B.G. and Geradin, D. (2016), "Efficiencies and regulatory shortcuts: how should we regulate companies like Airbnb and Uber?", Stanford Technology Law Review, Vol. 19 No. 2, pp. 93-328; Zoe McKenzie, (2020). Life in a Sharing Economy: What AirBNB, Turo, and Other Accommodation-Sharing Services Mean for Cities, 8 PENN. ST. J.L. & INT'L AFF. 350; David Parker, (2018). 'Home-Sharing, Airbnb and the Role of the Law in a New Market Paradigm', 3 UniSA Student Law Review 72, 73

⁶ Particularly in Australia where the Supreme Court of Victoria had the opportunity to determine the nature of the relationship in the case of *Swan v Uecker* [2016] VCAT 483

⁷ Michelle Maese, Rethinking "Host" and "Guest" Relations in the Advent of Airbnb and the Sharing Economy, op.cit, at p. 498

⁸ Alex Lazar, (2018). Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests and Neighbours, 3 University of South Australia Student Law Review 49

period.

Upon a successful conclusion of the transaction the guest can move into the apartment for whatever purpose, such as a short stay for vacation, business or official trips, party and social meeting, including “anonymous criminal hideaways”¹. A short-term rental appears similar to hotel or lodging accommodation in that it may involve not merely the provision of accommodation for a short stay, but also the provision of significant services to guests. For examples, cleaning of the apartment, provision of sheets, fresh towels, and even some food items, including “House Rules” regulating smoking, number of guests, acceptable noise levels, and “Check In” and “Check Out” times².

However, short-term rentals are not the same as hotel accommodations because the property and apartments are not so designated or registered, and are therefore not regulated as part of the hospitality sector of the economy. But the similar features with hotel accommodation means that in short-term rentals the guest is not granted exclusive possession of the apartment, and this also makes it to be incompatible with residential tenancy where exclusive possession is almost always granted to the tenant³. Also, the forms of short-term rental arrangement involve both home-sharing and serviced apartments scenarios where property may be listed on online platforms not only by the owner but also by tenants.

2.1 Forms of Short-term Rentals

Notably, Lazar classifies the forms of short-term rentals into three scenarios, which are; ‘present host’, ‘temporarily absent host’ and ‘permanently absent host’⁴. The ‘present host’ is the scenario where the host or home owner is present and living in the property, while sharing the unused spaces with guests for extra income⁵. This is the original idea of home-sharing which has been in existence in Western countries for centuries prior to technological development and the emergence of the internet. For instance, Parker notes that this form of home sharing has been seen in Australia since about 1788 and ranged from the renting of rooms to itinerant workers in the early days of the colonies, to the renting of rooms to students in this present time⁶.

Unlike in the old times, the availability of internet platforms and the effect of the sharing economy have now made it possible even for tenants to share the unused or under-utilized part of their property through short-term rentals. In Nigeria this is common with tenants who occupy entire premises containing a duplex with detached quarters originally designed for visitors and domestic staff. The presence of the host within the property makes this form of short-term rental a home-sharing. Depending on the agreed terms and conditions, the host may be obliged to provide the guest with extra services to ensure a comfortable stay. For instance, the guests may be entitled to use the kitchen, request errands, enjoy free laundry and cleaning services.

The ‘temporarily absent host’ is where home owners or occupiers let out their apartments during the period of their temporary absence and make the entire property available to the guests⁷. During vacations or other types of trips for work, business or pleasure which necessitate temporary absence, people may let out their apartments for short-term rentals. This is also a form of home sharing because the guests enjoy all the fixtures and facilities available in the property during the short period of occupancy.

The absent host does not provide the guest with additional service beyond what is already available in the property, unless expressly agreed otherwise. In any case, the guest is entitled to make full and unrestricted use of the property because the occupancy covers the entire property. Throughout the period of occupancy, the guest is the master of the property and can use it without any interference. In the ‘permanently absent host’ scenarios, the host does not reside within the property at all but makes the entire property available to a series of short-term guests on a continuing basis⁸.

In Nigeria this form of short-term rental is on the rise as wealthy individuals and corporate entities build fully serviced apartments that are let out only as ‘short-stay accommodation’. It is becoming some sort of real property investment model which involves the construction of blocks of flats and *studio* apartments that are fully equipped with all fixtures and facilities available in high standard homes. Rather than let out to tenants, these apartments are listed on internet platforms only for short-term rentals. The owners or corporate developers do not live within the property instead, ‘Facility Managers’ are hired to superintend the short-term rental business.

These three forms of short-term rentals have significant effect in determining the legal relationship between a host and a guest. Generally, the terms of occupancy under short-term rental agreement stipulate that the guests

¹ Laura Schatz and Rebecca Leshinsky, (2018). ‘Up in the Air(bnb): Can Short-Term Rentals Be Tamed?’, 7(2) Property Law Review 105, 105

² Bill Swannie, (2016). Is House Sharing Grounds for Eviction? A Victorian Perspective, 41(4) Alternative Law Journal 267

³ As discussed below, at common law exclusive possession is necessary to a tenancy, and under the tenancy statute exclusive possession is one of the rights of a tenant.

⁴ Alex Lazar, (2018). Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests and Neighbours, op.cit

⁵ *ibid*

⁶ David Parker, (2018). Home-Sharing, Airbnb and the Role of the Law in a New Market Paradigm 3 UniSA Student Law Review 72

⁷ Alex Lazar, (2018). Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests and Neighbours, op.cit

⁸ *ibid*

are granted only a licence to occupy the apartment¹. At common law, a licence is a permission granted to a person to use or occupy property which would otherwise be unlawful². The implication is that the licence can be withdrawn and the guests summarily evicted where there is a breach of any of the terms of occupancy³. However, in view of the second and third forms of short-term rental (temporary absent and permanently absent hosts), it may be problematic under common law to consider the guests as occupying under a licence, as against a tenancy.

3. Legal Relationship between Host and Guest

The forms of short-term rentals show either a home sharing with a guest – where the host resides in the property, or an exclusive occupancy by a guest – where the host does not reside in the property. The type of agreement under which a property owner grants occupancy to a person in need of accommodation defines the legal relationship between the parties; whether the occupancy is a licence or a tenancy.

At common law, the difference between a licence and a tenancy is whether exclusive possession is granted to the occupier; if exclusive possession is granted, the occupier is a tenant but if not, the occupier is a licensee⁴. Exclusive possession is the occupier's right to exclude every other person from the property, including the grantor of the occupancy⁵. In determining the legal relationship that is created between a host and a guest under a short-term rental agreement, the only relevant consideration is the effect of the occupancy agreement.

In the case of *Street v Mountford*⁶, which is the extant authority on the distinction between a licence and a tenancy under common law, the House of Lords held that though parties are at liberty to contract on mutually agreed terms, the intention of the parties is only to be understood from the effect of their agreement. According to Lord Templeman, if the effect of the agreement confers exclusive possession for a period and upon payment of a sum of money, it is a tenancy and not a licence.

3.1 Short-term Rentals; Licence or Tenancy?

It is of legal significance whether a short-term rental is a licence or a tenancy because different rights and obligations accrue to parties under the two types of occupancy. If the short-term rental agreement takes the form of a licence the rights and obligations of the parties will be limited to those stated in the online contract and under common law rules of contractual licences⁷. This implies that the guest is permitted to be in the property by mere invitation and can be evicted summarily if the contract is breached.

However, more is required of both the host and the guest when their relationship is that of a landlord and tenant: the rights and obligations imposed by both common law and statute must be observed by the parties⁸, such as the obligation to issue notices prior to termination of the tenancy and an application to court for an order to recover possession. As already noted, the terms of the online agreement for short-term rentals describe the occupancy as “a limited license to enter and use the accommodation”⁹.

By necessary implication, this means that the intention of parties is not to create a tenancy or landlord and tenant relationship. However, from the authority of *Street v Mountford*, it is the actual form of occupancy which a guest enjoys in the property pursuant to the short-term rental agreement that has to be considered. Accordingly, in home sharing it has to be determined whether a guest has exclusive possession of the apartment within the property where the host also resides.

For instance, whether the apartment is physically separated from the main house where the host resides; or whether the apartment is within the main house such that the host and the guest necessarily share certain facilities within the house, such as the kitchen, living area and lobby. If the host does not reside within the premises, it is *prima facie* that the guest is granted exclusive possession. In any case, evidence that a guest is in exclusive possession of the apartment or property would be indicative of a tenancy, notwithstanding that a licence was intended by parties, and that the rental agreement was labelled as a licence.

In a long line of cases¹⁰, mostly influenced by Denning LJ between 1950 and 1980, the English Court of Appeal had established that the intention of parties was more important in determining whether an occupancy

¹ For example, see Airbnb, (2022). Terms of Service, clause 8.2, Available at <www.airbnb.com.au/terms>

² This common law definition of a licence was originally given in the seventeenth century case of *Thomas v Sorrell* (1673) Vaugh 330 at p. 351, per Vaughan C.J, thus: “A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful”

³ *ibid*

⁴ The extant authority is the judgment of Lord Templeman in the case of *Street v Mountford* [1985] A.C. 809

⁵ If the occupancy is a tenancy the landlord retains the right of access only for the purpose of carrying out necessary repairs in the interest of habitability of the property.

⁶ [1985] A.C. 809

⁷ Alex Lazar, (2018). Home-Sharing in South Australia: Protecting the Rights of Hosts, Guests and Neighbours, op.cit

⁸ *ibid*

⁹ See Airbnb, (2022). Terms of Service, clause 8.2, Available at <www.airbnb.com.au/terms>

¹⁰ See the cases of *Foster v Robinson* (1951) 1 K.B 149; *Marcroft Wagons Ltd v Smith* [1951] 2 K.B. 496; *Cobb v Lane* [1952] 1 All ER 1199; *Facchini v Bryson* [1952] 1 TLR 1386; *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 WLR 374; *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 WLR 612; *Marchant v Charters* [1977] 1 W.L.R. 1181

was a licence or a tenancy¹; whether the parties intended a contractual licence giving rise to a mere personal privilege, or a contractual tenancy giving rise to a proprietary interest in the property². For example, in the case of *Errington v Errington*³, Denning LJ held that the “test of exclusive possession is by no means decisive” in determining a tenancy, and that while “a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy”.

It was held in the case that the type of agreement or contract of occupancy needs to be determined based on the intention of the parties, and that a contractual licence may confer on a licensee an exclusive possession, and an occupier in exclusive possession may be a licensee⁴. However, in *Street v Mountford* the House of Lords overruled the “intention test” and upheld exclusive possession as the distinctive feature of a tenancy, stating that: “No other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable”.

It is instructive that the facts of *Street v Mountford* reflect the form of a short-term rental where the host does not reside in the property, whether temporarily or permanently. In the case, the parties entered into an occupancy agreement expressly labelled as a licence, and the occupier signed an acknowledgment that the agreement was a licence to occupy, and not intended to come within the provisions of the Rent Act⁵. In pursuance to the agreement the occupier was granted exclusive possession of furnished rooms upon weekly payment of rent.

The case arose when the occupier applied for a “fair rent” under the provisions of the Rent Act, and the landlord argued that the agreement was a mere licence to occupy to which the rent statute was not applicable according to the intention of parties expressed in the agreement. On appeal to the House of Lords it was held that the agreement conferred exclusive possession on the occupier and that despite being labelled as a licence, the agreement created a tenancy, hence the occupier was entitled to the protection of the rent statute.

The House of Lord ruled that the only intention which was relevant was the intention demonstrated by the agreement to grant exclusive possession for a term and upon payment of rent, and that “the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement”. According to Lord Templeman; “If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence”⁶.

With reference to the “intention test”, Lord Templeman conceded that⁷: “Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy”. In the opinion of Lord Templeman, special circumstances may exist to prevent the grant of exclusive possession from creating a tenancy; such as occupancy under a contract for the sale of the property; occupancy pursuant to a contract of employment; occupancy referable to the holding of an office; and where the occupier is allowed to live in the property rent-free, for example, as an act of generosity or between family members. In those circumstances, occupiers in exclusive possession may be considered as licensees rather than as tenants.

Thus, at common law, exclusive possession remains the decisive factor for determining whether occupancy agreement creates a tenancy or a licence, except in the afore-mentioned special circumstances⁸. Consequently, in a short-term rental where the host does not reside in the property, or the guest is in exclusive possession in a home-sharing arrangement, the occupancy would be considered as a tenancy. In the leading authority of *Swan v Uecker*⁹ this common law position was upheld and applied in a case of short-term rental contracted on Airbnb platform¹⁰.

¹ The relevant question, according to Denning LJ in the case of *Marchant v Charters* [1977] 1 W.L.R. 1181, ought to be: “Was it intended that the occupier should have a stake in the room or did he have only a permission for himself to occupy the room, whether under a contract or not?”

² C.A. Rendell, (1988). Licences to occupy land, Durham theses, Durham University. Available at Durham E-Theses Online: <http://etheses.dur.ac.uk/6403/>

³ [1952] 1 All ER 149

⁴ See Taiwo Ajala, (2022). Tenancy and Occupancy Licence in Nigeria: Does Exclusive Possession Matter? *Forthcoming*

⁵ The acknowledgement at the foot of the written agreement stated thus; “I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts”.

⁶ According to the law Lord; “The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade”.

⁷ In agreement with the decision of Denning LJ in *Errington v Errington* [1952] 1 All ER 149

⁸ See Taiwo Ajala, (2022). Tenancy and Occupancy Licence in Nigeria: Does Exclusive Possession Matter? *Forthcoming*

⁹ [2016] VCAT 483

¹⁰ To the best knowledge of this writer, this decision of the Supreme Court of Victoria in Australia is the highest judicial authority on the common law legal relationship between a host and a guest in a short-term rental for residential occupancy contracted on Airbnb platform. Prior to this case the same court had decided similar cases but only with respect to whether home sharing by tenants via Airbnb was a breach of the tenant’s covenant not to sublet without the consent of the landlord. See the cases of *Janusauskas v Director of Housing* [2014] VSC 650; *Wong v Doney* [2016] NTCAT 57; *Alex Taxis Pty Ltd v Knight* [2016] VCAT 528; *Li v Yang* [2018] VCAT 293. In the UK, the cases have also been mainly whether hosting on Airbnb by tenants breached the tenant’s covenant to not use the premises “for any purpose

In the case the defendant, who was a tenant occupying two bedrooms apartment, listed the apartment for short-term rental on Airbnb while away and absent from the property, such that the guests used the entire property exclusively. The landlord, upon discovering that the apartment had been let out on Airbnb, brought an application to recover possession on the ground of breach of the tenant's covenant not to sublet without the landlord's consent.

In order to determine the nature of occupancy of the Airbnb guest the Court focused on the relationship between the tenant, as the host, and the Airbnb guest¹. The Court held that from the effect of the agreement, exclusive possession had been granted by the tenant to the Airbnb guest. Therefore, the occupancy agreement between the tenant and the Airbnb guest constituted a tenancy, irrespective of the terms of the agreement stipulating that the occupancy was "merely a licence" and that if guests stayed beyond the check-out time "they no longer have a license to stay" and would be made to leave².

While the *Swan* case clearly adopted the common law position that exclusive possession confers a tenancy, it also emphasised that whether or not a tenancy is created depends on the correct characterisation of the relationship between the host and the guest³. But more significantly, it demonstrated that the nature of the relationship between a host and a guest in short-term rentals does not depend on whether the host is a tenant or the owner of the property. Thus, any person in lawful possession of residential accommodation may let out the property or part of it on short-term rental arrangement⁴.

However, whether a short-term rental is a tenancy or a licence under common law would ultimately depend on whether it is a home sharing arrangement where the host remains in the property, or whether it is a serviced apartment without the host in residence. In home sharing, there is the likelihood that exclusive possession is not granted, therefore the occupancy may be a mere licence. But in serviced apartments where the hosts do not reside in the property, the presumption is that guests are granted exclusive possession, which makes their occupancy a tenancy, notwithstanding the short duration of the occupancy⁵, or that parties expressly agreed and intended to create a licence.

4. Residential Occupancy under Tenancy Statute

In Nigeria, residential occupancy is generally governed by tenancy statutes as enacted by the various States⁶. However, the provisions of the various statutes are similar in every material particular, such as the creation of tenancy, rights and obligations under tenancy agreement, and the relationship between landlord and tenant, including the procedure for the termination of tenancy and recovery of premises. For example, under the Lagos State Tenancy Law 2011 a tenancy is created where a property owner grants a proprietary interest in such property in favour of a person pursuant to a tenancy agreement⁷. The statute defines a tenancy agreement as a written, oral, express or implied agreement between a landlord and a tenant regarding the possession of premises⁸.

Besides express agreement, a tenancy agreement is deemed to exist where occupancy of a property is granted by the landlord to a person for value whether or not it is express or implied, oral or written, or partly oral or partly written, or for a fixed period⁹. The implication of this provision is that in any circumstances where a landlord grants residential occupancy to a person for value, landlord and tenant relationship is thereby deemed to exist. The statute expressly sets out the rights and obligations that accrue to both landlord and tenant under a tenancy agreement which is deemed to exist where residential occupancy is granted for a valuable consideration. Amongst other rights¹⁰, a tenant under the statute has the right to exclusive possession of the property, subject to

whatsoever other than as a private residence". See *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303.

¹ The reason was that if the Airbnb was in exclusive possession, then it is a sub-tenancy in breach of the tenant's covenant and the landlord was entitled to evict the tenant. Otherwise, if it was a licence to occupy the apartment then there was no breach and the landlord's application would fail. The lower Court held that there was no grant of exclusive possession, and that the relationship between the tenant and the Airbnb guests was a mere licence to occupy the apartment, hence the landlord's application was refused.

² The Court relied heavily on the judgment of Windeyer J in the case of *Radaich v Smith* (1959) 101 CLR 209, which is Australia's *locus classicus* on exclusive possession as the distinguishing feature between a tenancy and a license. This case was also cited with approval by Lord Templeman in *Street v Mountford*.

³ Bill Swannie, (2018). Airbnb and Residential Tenancy Law: Do 'Home Sharing' Arrangements Constitute a Licence or A Lease? [2018] AdelLawRw 10; 39(2) Adelaide Law Review, 231

⁴ If the host is a tenant, it is a separate issue whether the short-term rental is in breach of the tenant's covenant.

⁵ In the *Swan* case, the Court opined that short-term tenancy is "not eschewed by the common law", and that a tenancy could be "for days or even hours".

⁶ A foremost tenancy statute which is replicated in other States of Nigeria is the Lagos State Tenancy Law 2011, and it is the statute of reference in this article because it is the standard and most widely studied tenancy statute in the country.

⁷ Section 47

⁸ *ibid*

⁹ Section 3

¹⁰ Which include the right to privacy; Freedom from unreasonable disturbance; the use of common areas for reasonable and lawful purpose; and the tenant's entitlement to quiet and peaceable enjoyment of the premises. See section 6(1)

the landlord's restricted right of inspection¹. Thus, exclusive possession constitutes one of the rights of a tenant under the Nigerian statute. Unlike the position at common law, exclusive possession is not the test for determining whether residential occupancy is a tenancy. Nigeria is therefore one of the jurisdictions where the question of whether residential occupancy constitutes a tenancy is separate from the question of whether the tenancy statute applies². The tenancy statute applies irrespective of whether or not the landlord confers exclusive possession in granting residential occupancy.

The rights of the tenant as provided in the statute, including the right to exclusive possession, attach to tenancy and the status of a tenant, and parties cannot contract out of the statutory provisions³. According to the statute, a person who comes into residential occupancy by mere permission without the creation of a landlord and tenant relationship and has no estate or legal interest in the property is a licensee⁴. Again, unlike the position at common law, under the statute a licence is not defined by the lack of exclusive possession. From the statutory provision, the three defining elements of occupancy licence are: permission to occupy property; absence of a tenancy agreement or landlord and tenant relationship; and absence of transfer of proprietary interest in property⁵.

However, if these three elements are present but there is a valuable consideration accruing to the property owner, a tenancy agreement would be deemed to exist, with the implication that parties intend to create landlord and tenant relationship, and that there is transfer of proprietary interest in the property. The implication of the statutory provisions is that parties may expressly create a tenancy, or deemed to have created it. For instance, it a licence to occupy is coupled with a valuable consideration furnished by the occupier and received by the property owner.

Therefore, instead of exclusive possession under common law, it is the presence or absence of a valuable consideration that determines whether residential occupancy is a licence or a tenancy. Though tenancy may exist with or without a valuable consideration, under the statute a licence must be devoid of a valuable consideration, otherwise it would create a tenancy by statutory implication.

4.1 Short-term Rentals under Tenancy Statute

Generally, short-term rentals are regarded as a licence under the contract of occupancy which is executed by a host and a guest on the different online platforms. At common law, the form of short-term rentals is essential to determining whether residential occupancy is a licence. In home sharing where the host resides in the property the likelihood is that the guest is not in exclusive possession, as such the occupancy is a licence. But in the case of serviced apartments where only the guests occupy the entire property the presumption is that exclusive possession has been granted, hence the occupancy is a tenancy.

However, under the tenancy statute the form of short-term rentals does not have legal significance because exclusive possession is not necessary to determining whether residential occupancy is a licence. Rather, it is whether there is a valuable consideration accruing to the licensor or property owner who grants permission for occupancy licence. From the provisions of the statute, residential occupancy is only a licence if granted without the creation of landlord and tenant relationship due to the absence of a valuable consideration. By the statutory provisions, a tenancy agreement, which results in landlord and tenant relationship, is deemed to exist where property is granted by the landlord to a person for valuable consideration⁶.

In short-term rentals there is the payment of occupancy fee by guests, which is a strong motivating factor for people who grant this form of residential occupancy. The demand for occupancy fee by the host and the payment of such fee by the guest effectively transform short-term rentals from occupancy licence to a tenancy under the statute. In addition, the tenancy statute does not exempt short-term rentals from the ambit of its provisions. Instead, it expressly provides for the type of termination notice to be given to a tenant-at-will by stipulating a period of seven days as the length of notice⁷.

At common law, the occupancy of a tenant-at-will can be terminated at any time because there is no tenancy agreement between the landlord and tenant specifying the length of occupancy⁸. Common law tenant-at-will is the equivalence of a licensee under the statute because a licence is a permission to occupy property without a tenancy agreement. Though there is no tenancy agreement in short-term rentals, there is however the payment of occupancy fee. Therefore, under the statute the result would be the same whether a short-term residential

¹ Section 6(1)(c)

² See the various Territorial tenancy statutes in Australia, except the Residential Tenancies Act 1997 (Victorian Act); Bill Swannie, (2018). Airbnb and Residential Tenancy Law: Do 'Home Sharing' Arrangements Constitute a Licence or A Lease? Ibid

³ However, parties may agree to vary their respective obligations because the statutory obligations are subject to any contrary term in a tenancy agreement between parties. See section 7.

⁴ Section 47

⁵ See Taiwo Ajala, (2022). Tenancy and Occupancy Licence in Nigeria: Does Exclusive Possession Matter? Forthcoming

⁶ See section 3

⁷ Section 13(1)(a)

⁸ Christopher Wm. Sullivan, (2006). Forgotten Lessons from the Common Law, the Uniform Residential Landlord and Tenant Act, and the Holdover Tenant, 84 WASH. U. L. REV. 1287, at p. 1297

occupant is considered as a tenant-at-will or a licensee due to the absence of a tenancy agreement.

In both cases, the statute provides for the service of seven-day notice to terminate the occupancy. According to the statute, if a licence expires or is withdrawn but the licensee refuses to vacate the property the licensor must give seven-day notice to the licensee before applying to the court for an order to recover possession from the licensee¹. Consequently, under the tenancy statute short-term rentals create a tenancy which can only be terminated by the service of seven-day notice. Service of such notice is a requirement even if a short-term rental is considered as a licence the way it is currently on Airbnb, Quickteller Homes, and others.

The implication of the statutory provisions on short-term rentals in Nigeria is that a “guest” who is granted a mere “licence” to occupy is in effect a tenant. Therefore, if the “guest” fails or refuses to vacate the property after the agreed check-out date the “host” is under legal obligation to serve seven-day written notice to give up possession². If the guest does not comply with the notice the host can only recover possession through an order of the Court based on a claim filed by way of summons³.

This statutory procedure for recovering possession from a guest who is in breach of the agreed date of vacating the property may appear far-fetched, but it has already played out in jurisdictions with similar tenancy statute. For example, in San Francisco, California, a lady rented a condominium which she was listing on Airbnb for short-term rental as additional source of income⁴. It had been a successful investment for about a year until a particular guest refused to vacate the property after the check-out date, which was more than a month from the check-in date.

The guest even stopped making further payment for the excess days, complaining that the property had not been comfortable and convenient for purpose, as a result of which he claimed to have suffered personal and financial losses. When the host threatened to shut off utilities to the property the guest responded that he would sue for damages for breach of his rights as a tenant. Eventually, the host consulted a lawyer and was surprised to learn that the guest was correct; under California tenancy statute a residential occupancy for more than a month is considered as a tenancy.

The implication was that getting the guest to vacate “required a full-blown eviction proceeding, which typically take between three to six months and can cost anywhere from \$3,000 to \$5,000 in legal fees”⁵. From the provisions of Nigerian tenancy statute, it would also require such lengthy and costly process of recovering possession from a guest who refused to vacate after the check-out date as agreed under a short-term rental arrangement for residential occupancy.

5. Conclusion

As a contractual arrangement with economic benefits for both the hosts and the guests, short-term rentals are gaining the preference of a rapidly growing number of patrons in commercial cities across Nigeria. Besides the economic benefits, however, short-term rentals may be attractive to accommodation providers due to the erroneous belief that the arrangement is a mere licence to occupy. The implication of a licence is that the guest can easily be ejected if there is breach of terms of occupancy such as failure to pay for extra day spent in the apartment or refusal to check out at the agreed time and date.

It has always been the desire of landlords to have total control of the process of termination of occupancy and eviction of the occupier without legal constraints. Tenancy statutes protect tenants’ interests in several ways, including a lengthy process of recovering possession from tenants who remain in possession after their tenancies have been duly terminated. For centuries, landlords had used occupancy licence as a means of avoiding the protection provided for tenants under tenancy statutes, such that a licence had become a device for contracting out of the statutes⁶.

¹ Section 14

² Though short-term rental creates a tenancy under the tenancy statute, it is better to use the terms “host” and “guest” in reference to the parties instead of landlord and tenant. This is in view of the fact that short-term rental requires possession and not ownership of the property. Identifying the parties as “landlord” and “tenant” may be confusing where the accommodation provider is a tenant in the property and not the landlord.

³ See section 24

⁴ See Michelle Maese, (2014). Rethinking "Host" and "Guest" Relations in the Advent of Airbnb and the Sharing Economy, *ibid*, at p. 482; Also narrated by Julie Bort, (2014). Airbnb Host: A Guest is Squatting in My Condo and I Can't Get Him to Leave, SF GATE. Available at: <http://www.sfgate.com/technology/businessinsider/article/Airbnb-Host-A-Guest-Is-Squatting-In-My-Condo-And-5638090.php>; and Carolyn Said, (2014). Squatters Don't Sit Well with Airbnb Hosts, SF GATE. Available at: <http://www.sfgate.com/realestate/article/Squatters-don-t-sit-well-with-Airbnb-hosts-5631952.php>. See also Chad Marzen, Darren A Prum and Robert J Aalberts, (2017). ‘The New Sharing Economy: The Role of Property, Tort and Contract Law for Managing the Airbnb Model’, 13(2) *New York University Journal of Law and Business* 295, 300

⁵ See Carolyn Said, (2014). Squatters Don't Sit Well with Airbnb Hosts, *op.cit*

⁶ Mark Hayward, (2017). Exclusive possession or the intention of the parties? The relation of landlord and tenant in Northern Ireland, *Northern Ireland Legal Quarterly* 68(2), 203-223; Indeed, statutory interventions in common law contractual tenancy led to a number of judicial decisions on the distinction between tenancy and occupancy licence during the first half of the nineteenth century. See the cases of *Booker v Palmer* [1942] 2 All E.R 674, 677; *Foster v Robinson* [1950] 1 KB 149 at p. 153; *Marcroft Wagons Ltd v Smith* [1951] 2 K.B 496; *Facchini v Bryson* [1952] 1 TLR 1386; *Errington v Errington* [1952] 1 K.B 290; *Cobb v Lane* [1952] 1 All ER 1199; *Addiscombe Garden*

For instance, in *Street v Mountford* Lord Templeman cautioned the courts to “be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts”. For the purpose of avoiding the tenancy statute, it may be convenient for people listing accommodation online for short-term rentals to describe the arrangement as a mere licence to occupy. However, from the provisions of the tenancy statute, a short-term rental in Nigeria constitutes a tenancy and the terms “host” and “guest” ought properly to be “landlord” and “tenant”. Instructively, even if a short-term rental is taken as occupancy licence, under the tenancy statute the licensee or “guest” is entitled to be treated as a tenant for the purpose of recovering possession. This is the nature of the legal relationship between parties involved in short-term residential occupancy in Nigeria.