

LITIGATION UPDATE

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ADVOCAT
LAW PRACTICE

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NIGERIA.

THE RIGHTS OF AN ALIEN TO ACQUIRE LAND UNDER THE LAND USE ACT CAP L5 LAWS OF THE FEDERAL REPUBLIC OF NIGERIA 2004: GERHARD HUEBNER V. AERONAUTICAL INDUSTRIAL ENGINEERING AND PROJECT MANAGEMENT CO. LTD (AIEP/DANA) - (2017) LPELR-42078(SC)

Background

The provisions of the extant land laws in Nigeria with respect to an alien's capacity to acquire and own land is well settled. However, the degree or extent of rights exercisable by an alien who is in occupation of a land and/or who wishes to occupy a parcel of land under the laws is often the subject of debate. Ownership of land in Nigeria is regulated by the 1999 Constitution of the Federal Republic of Nigeria (As amended) ("CFRN"), the Land Use Act Cap L5 Laws of the Federation 2004 ("LUA") and the Acquisition of Lands by Aliens Laws (ALAL) of the various States of the Federation with particular reference to the ALAL of Lagos State Cap A1 Laws of Lagos State 2015 as well as the Acquisition of Lands by Aliens Act being an Act of the National Assembly applicable to the Federal Capital for Abuja.

Section 1 of the LUA provides that "Subject to the provision of this Decree, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be **held in trust and administered for the use and common benefit of all Nigerians** in accordance with the

provision of this Act." A Nigerian in this instance is anybody who by virtue of the provision of the CFRN is of natural born of Nigeria either an individual, company or association; by naturalization or registration. By virtue of the provisions of ALAL an alien can own land in Nigeria subject to certain restrictions. Chief amongst the restrictions is the requirement for State Governor's written approval before instrument of transfer can be lawfully executed. This answers the above which then means the notion that foreigners cannot own land in Nigeria is a false one.

This position of the law as provided in the Supreme Court's decision of **Ogunola & Ors v Eiyekole** was again upheld in the case under review **Gerhard Huebner v. Aeronautical Industrial Engineering and Project Management Co. Ltd (AIEP/DANA)** -, where the apex court held that the Appellant being an alien had no legal capacity to hold interest in land in Kajuru Local Government Area of Kaduna State, Nigeria.

Facts

The facts of this case are that the District Head of Kajuru in Kachia Local Government Area of Kaduna State, acting on the instruction of the Emir of Zaria, granted permission to the Appellant (a German national) in 1975 to build a temporary weekend hospitality resort on a hilltop of the village. In a bid to expand the business, the Appellant commenced negotiations through the agency of the District Head, for purchase of the land surrounding the hill. He was at the final stage of the negotiation when he was appointed the Managing Director of the Respondent in 1986. Being a German, the Appellant was

advised to purchase the land in the name of the Respondent considering that he was a foreigner. The Appellant purchased the property and a receipt of purchase was issued in his name and that of the Respondent. However, a certificate of occupancy and a subsequent statutory certificate of occupancy were issued in respect of the land in the name of the Respondent.

When a dispute arose as to the ownership of the property, the Appellant (as Plaintiff) commenced an action by Writ of Summons at the High Court of Kaduna State. The Appellant sought against the Respondent amongst other reliefs a declaration that the Respondent holds the legal estate in the land at Kajuru bought by the Appellant in its name (name of the Respondent) upon a resultant trust to the benefit of the Appellant. The Appellant further sought a declaration that the issuance of the Certificate of Occupancy in favour of the Respondent in respect of the land does not affect the position of the Respondent as trustee nor that of the Appellant as the beneficiary of the legal estate. The trial court in its decision, held that the Appellant cannot rely on the doctrine of implied trust to prove his claim as beneficiary to the trust (disputed property), as an alien ordinarily has no capacity to hold legal interest/estate in land in Nigeria. The Court in its decision relied on **Sections 1, 5, 6 and 36** of the **LUA** to hold that Nigerians are the sole beneficiaries of the provisions of the LUA. The Court further opined that in interpreting **Section 36(1)** of the Land Use Act the phrase 'ANY PERSON' does not include foreigners by virtue of **Section 1** of the **LUA** which specifically limits the LUA's benefits to Nigerians.

Being dissatisfied with the decision of the trial Court the Appellant appealed to the Kaduna Division of the Court of Appeal where the decision of the trial court was affirmed. On a further appeal to the Supreme Court, the issue was finally resolved by a unanimous decision of the Justices of the Supreme Court who found the appeal to be lacking in merit and accordingly dismissed same.

The Apex court in its decision considered a sole issue for determination to wit: Whether the Court of Appeal was right when it dismissed the Appellant's appeal for failure to adduce sufficient evidence in proof of his claim that the Respondent is holding the legal estate upon an implied trust in respect of the disputed property for his benefit by implication of law. In a well-considered decision of the Justices of the Supreme Court, it was held Per **Galinje**, JSC at pages 13 – 16, paras. A-B that:

“The law under which the case of Ogunola & Ors v. Eiyekole (supra) was decided, that is the Land Use Act 1978, has not been repealed or altered. It is still the extant law that regulates land administration in this country. The call therefore on this Court to depart from the said decision is without merit. I entirely associate myself with the decision of my learned brothers in Ogunola & Ors v. Eiyekole (Supra) and hold that the Appellant being an alien had no legal capacity to hold interest in land in Kajuru Local Government Area of Kaduna State. This being so and by virtue of the Latin Legal Maxim, Nemo dat quod non habet, the Appellant cannot benefit from property which he was incapable of owning”.

Commentary

The decision of the Supreme Court has no doubt re-emphasized the long standing principle guiding the acquisition of land by foreigners in Nigeria. However a closer look at the LUA may not totally foreclose a foreigner from acquiring land in Nigeria by virtue of a Probate Will. **Section 51 LUA** defines a holder of right of occupancy as a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-underlessee. The focal point here is the mode upon which the land is passed to a foreigner upon the death of a testator. Thus, this determines the validity of passing the land to a foreigner on death i.e. the elements of a valid Will must be established and probate must have been obtained.

More so, the question whether a foreigner can acquire land in Nigeria may be answered in the affirmative where the restrictions/conditions identified under ALAL have been satisfied. That is, the granting of the Governor's written approval shall be of paramount importance; but where the alien's acquisition of interest or right in land is less than 3 years the Governor's written approval is not required. It is also noteworthy that upon procurement of the Governor's written approval, the acquired interest on land by such foreigner shall not be greater than Twenty Five (25) years with an option to renew.

Ultimately, our attitude towards attracting foreign investment must be seen to be accommodating. Access and title to land is a major factor in every developing economy and the drafting and passage of our laws must be economically driven. The fact that the LUA provides that land must be administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act does not totally proscribe the Governors from granting rights of occupancy to foreigners who are interested in acquiring land, the use of which would enhance the economy for the benefit of Nigerians. This case reinforces the call to have the LUA either repealed or replaced to reflect the demands of the time woo foreign investors.

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