

Supreme Court decision restricts foreign ownership of land in Nigeria



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In **Huebner v. A.I.E. & P.M. Co. Ltd**,¹ the Supreme Court held that the Land Use Act 1978 did not repeal any pre-existing laws that restrict or prohibit foreigners from holding an interest in land in Nigeria. This position was reached by the Court after finding that the Land Use Act was made for the benefit of Nigerians and not for the benefit of foreigners. As a result of this decision, foreigners are restricted from applying for or receiving a grant of a statutory or customary right of occupancy in respect of any land in Nigeria.

Background

Prior to the enactment of the Land Use Act on 29 March 1978, there were regional laws that restricted the acquisition of native lands by foreigners. Amongst such laws were the Land Tenure Law of Northern Nigeria², Acquisition of Lands by Alien Law 1971 of Lagos State, and the Acquisition of Lands by Alien Laws of various other states of Nigeria. These laws were designed to limit the interest a foreigner could acquire in land in the relevant States of Nigeria.

With the enactment of the Land Use Act, the construction of the Act with respect to foreign acquisition of land had been in issue. This is in light of **section 1 of the Land Use Act** which vests all land within each State in the Federation in the Governor of that State to be held in trust and administered for the use and common benefit of all Nigerians.

Facts of the Case

The Appellant was a German national in occupation of a piece of land on a hilltop in Kajuru village, Kaduna State since 1975, on the permission of the Emir of Zaria. He later negotiated the purchase of the land measuring approximately 70 hectares surrounding

the Kanjuru Hill. During the final stage of such negotiations in 1986, he was appointed the Managing Director of the Respondent.

Being a foreigner, the Appellant was advised to acquire the land in the name of the Respondent as the applicable laws in Kaduna State made it unlawful for him to hold any legal interest in land in that State. The Appellant heeded the advice and acquired the land using his own funds but in the name of the Respondent. Subsequently, the Kaduna State Government issued a statutory Certificate of Occupancy under the Land Use Act in the name of the Respondent.

When the Appellant left his position as the Managing Director of the Respondent, he instructed the Respondent to transfer the legal title to the land to Kanjuru Nigeria Limited; a company that the Appellant had subsequently incorporated. The Appellant commenced this action at the High Court when the Respondent refused to comply with his instruction. Amongst other things, the Appellant claimed that:

- I. the Respondent held the legal estate in the land at Kajuru bought by the Appellant in the Respondent's name upon a

resulting trust to the Appellant's benefit;

- II. the issue of the Certificate of Occupancy in favour of the Respondent neither affected the position of the Respondent as trustee nor that of the Appellant as beneficiary of the legal estate; and
- III. the Respondent was, on account of the trust, obliged to comply with the Appellant's instructions to transfer the legal title in the land to Kanjuru Nigeria Limited.

The Appellant was unsuccessful at both the High Court and Court of Appeal. Consequently, the Appellant appealed to the Supreme Court.

The issues before the Supreme Court

- I. Whether the Land Use Act 1978 had repealed the provisions of the Land Tenure Law of Northern States which restricted foreigners from acquiring legal estate in land in Northern Nigeria.
- II. Whether the Appellant was qualified and had the capacity to hold legal estate in land in Nigeria.
- III. Whether, there was a resulting / implied trust between the parties in favour of the Appellant with respect to the Respondent's holding of the land.

Argument canvassed before the Supreme Court

The Appellant argued that the provisions of the Land Tenure Law which forbade aliens from acquiring legal estate in Northern Nigeria had been repealed by the Land Use Act. The Appellant's counsel relied on sections 5(1) and 6(1) of the Land Use Act and submitted that the use of the words "any person" in those sections and in section 36 of the Land Use Act included foreigners. As such the

Appellant could acquire a right of occupancy over land in Northern Nigeria.

The Appellant further argued that there was an implied trust between the parties for the Appellant's benefit because the land in dispute was bought with the Appellant's personal funds. The Appellant argued that the implied trust automatically made the Respondent a trustee and as such, there was no need to prove a grant of the land under a trust or the acceptance of that grant.

The Respondent argued that the Appellant, being a foreigner, was not entitled to acquire title to land by virtue of the relevant Nigerian Laws relating to landed property. Because of this, the Appellant was barred from holding title to land under the Land Use Act. This meant that the Appellant could not hold any legal interest over the disputed land which could be entrusted to the Respondent under a trust.

The Supreme Court's decision

The Court found that the disputed property was acquired with the funds of the Appellant. As such, the question became whether the Appellant being a foreigner had the capacity to hold legal title in land in Nigeria.

The Supreme Court held that the Appellant could not hold an interest in land because he was a foreigner. The Court stated that the Land Use Act did not repeal any laws which limit the right of foreigners to own land and, the expression "any person" as used in sections 5, 6 and 36 of the Land Use Act were to be interpreted to refer only to Nigerians because the Land Use Act expressly stated that Nigerians were its beneficiaries. As a result, a foreigner could neither apply for nor receive a grant of a statutory or customary right of

occupancy which are creations of the Land Use Act.

The Supreme Court further held that there wasn't an implied or resulting trust between the parties in favour of the Appellant. The Court based its decision on the principle that equity does not operate in a vacuum but follows the law. The rationale being that, since the Appellant could not legally hold an interest in land himself, he could not by way of a trust assign / confer on the Respondent an interest which he was incapable of owning (applying the Latin maxim of "*nemo dat quod non habet*").

Unresolved issues

In addressing the issues before it, the Supreme Court held that the Land Use Act did not repeal any laws that restrict or limit the rights of non-Nigerians to own land in Nigeria. The import of this pronouncement is that laws like the Acquisition of Land by Aliens Law of Lagos State still have force. The extent to which the State laws remain in force was not specified. The applicability of the State laws is questionable, as Nigeria operates a federal structure where State laws are rendered inoperative if they conflict with Federal laws on issues within both governments' legislative competence.³

The Lagos State law for example does not prohibit foreign acquisition of land in totality. The law only limits the interest of foreigners in land to leaseholds subject to the written consent of the Governor. This conflicts with the totalitarian approach taken by the Supreme Court in concluding that foreigners cannot legally acquire an interest in land and at the same time upholding the validity of these other laws. Leaseholds, however short the duration confer a legal interest in land.

Further, the Supreme Court made no reference to the effect of section 46 of the Land Use Act which empowers the National Council of State⁴ to, among other things, make regulations for "**the transfer by assignment or otherwise howsoever of any rights of occupancy, whether statutory or customary, including the conditions applicable to the transfer of such rights to persons who are not Nigerians**". The effect of the above section means that though the Land Use Act was made for the benefit of Nigerians, the Act still contemplated the affairs of foreigners.

The takeaway

Foreigners cannot lay a claim to the benefits of the Land Use Act by applying for the grant of a statutory or customary right of occupancy. This will be the position until such time as the National Council of State makes regulations allowing foreigners to acquire a statutory or customary right of occupancy.

Foreigners may acquire short term interests in land in the form of leases of a term not more than 3 years or yearly tenancies. These short-term leases and tenancies would not require any form of government approval for validity.

Foreigners may however derive an indirect interest under the Land Use Act using the instrument of a company incorporated under the provisions of the Companies and Allied Matters Act 2004. The company would qualify as a Nigerian to apply for a grant of a right of occupancy. The company would ordinarily have the power to acquire or transfer an interest in land. However, this has to be expressly provided in the Memorandum of Association of that company.

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About Kayode Sofola & Associates

Kayode Sofola & Associates (KS LEGAL) is a full service firm that has provided commercially focused legal advice in Nigeria for over 60 years. We have six core practice areas of Banking & Finance, Corporate & Commercial, Dispute Resolution, Employment, Real Estate, and Tax by which we provide services to the banking, energy & infrastructure, funds & investment management, insurance, real estate, and telecommunications & technology sectors. Our client promise is consistency as we deliver accurate and practical advice.

1 **(2017) 14 NWLR (pt 1586) 397**

2 **Cap 59 Vol II Laws of Northern Nigeria 1963**

3 The doctrine of Covering the Field states that where there are conflicts between the law of a State and a law made by the federal legislature on a matter in which both governments have legislative competence (i.e. matters on the concurrent legislative list), the law passed by the Federal legislature prevails while that of the State legislature is rendered inoperative during the duration of the Federal law.

4. A body that advises the federal government on policy making. The Council consists of: The President of the Federal Republic of Nigeria; the Vice-President; all former Presidents of the Federation and all former Heads of the Government of the Federation; all former Chief Justices of Nigeria; the President of the Senate; the Speaker of the House of Representatives; the Governors of the States of the Federation; and the Attorney-General of the Federation.