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CASE NOTE

Can a Foreigner Own Land in Nigeria? The Supreme Court Decision in *Gerhard Huebner v Aeronautical Industrial Engineering and Project Management Company Limited*

Chukwunweike A Ogbuabor*
University of Nigeria
chukwunweike.ogbuabor@unn.edu.ng

Damian Uche Ajah**
University of Nigeria
damian.ajah@unn.edu.ng

Abstract

In a landmark decision on 17 April 2017, the Supreme Court of Nigeria held that foreigners cannot legally and validly own land in Nigeria. This decision is of significant interest for the international investing community. The decision is a curious one and deserves close scrutiny. It was based on the court's interpretation that the Land Use Act provides that all lands in Nigeria are to be held in trust by the governor of each state for the use and benefit of all Nigerians. This note posits that the Supreme Court decision was completely erroneous and that, contrary to that decision, the correct position of the law is that foreigners can lawfully and validly own land in Nigeria provided that they are not enemy aliens.

Keywords

Land ownership, foreign ownership, alien acquisition, foreign land ownership, Nigeria

INTRODUCTION

All over the world, land is considered one of man's greatest possessions. It is also one of the most valuable resources bequeathed to mankind by nature. Thus, it is not surprising that it is a veritable source of disputes, not only between individuals but also between communities, nations and countries. Therefore, the existence of laws regarding the use and disposition of land is acknowledged across the world. In Nigeria, the various issues associated with land use and disposition gave rise to the enactment of the Land Use

* LLB, LLM, PhD (Nig), BL. Senior lecturer and former acting head, Department of International Law & Jurisprudence, Faculty of Law, University of Nigeria Enugu Campus.
** LLB, LLM (Nig), BL. Lecturer, Department of Public Law, Faculty of Law, University of Nigeria Enugu Campus.

Act (LUA) in 1978 by the then military government.[1] Since the enactment of the LUA, it has attracted a host of controversies.[2] Recently, the Supreme Court resurrected yet another controversy when it held in *Gerhard Huebner v Aeronautical Industrial Engineering and Project Management Company Limited* (*Huebner*)[3] (appellant and respondent respectively) that foreigners cannot legally and validly own land in Nigeria. The decision in *Huebner* was in turn largely based on the 1990 majority decision of the Supreme Court in *Ogunola v Eiyekole*,[4] Agbaje JSC dissenting. This note argues that the whole basis of the majority decision in *Ogunola v Eiyekole* was wrong in so far as it purported to hold that a non-Nigerian cannot legally own land in Nigeria and that the subsequent decision in *Huebner* was similarly wrong. This note takes a critical look at the decision in *Huebner* with a view to showing that it was erroneous, *per incuriam* [without reference to an earlier decision or statutory provision that would have been relevant] and manifestly unsupportable.

The note is in six parts. An overview of the facts of the case follows this introduction. The note then recaps the parties' arguments and the judgment of the Supreme Court, before critically dissecting the apex court's decision together with its supporting authorities, with a view to showing that the decision was not only wrong but also perpetuates an incorrect position. This note concludes with a call on Nigeria's apex court to review, at the earliest opportunity, the decision in *Huebner* with a view to overruling it and establishing a regime that allows foreigners to own land in Nigeria in line with the Nigerian law on the subject and in accordance with international best practice.

FACTS OF THE CASE

Sometime in 1975, the district head of Kajuru District in the Kachia local government area of Kaduna State, acting on the instruction of the Emir of Zaria, granted the appellant permission to build a temporary weekend hospitality resort on a hilltop in Kajuru village. The appellant built a structure, which he named The Kajuru Castle. As a result of a desire to expand the business, the appellant commenced negotiations in 1981 through the agency of the district head to purchase 70 hectares of land surrounding the hill. He was in the final stages of the negotiations when, in 1986, he was appointed managing

1 Enacted as Decree No 6 of 1978, now cap L5, Laws of the Federation of Nigeria (LFN), 2004.

2 See generally JA Omotola *Essays on The Land Use Act, 1978* (1984, Lagos University Press); G Ezejiofor and I Okafor "Jurisdiction to entertain judicial proceedings under the Land Use Act" (1994–97) 6 *Nigerian Juridical Review* 21; *Nkwocha v Governor of Anambra State* (1984) 6 SC 1. In *Savannah Bank of Nigeria Ltd v Ajilo* [1989] 1 NWLR (pt 97) 305, Obaseki JSC observed (at 324) that "this case has once more highlighted the unnecessary difficulties created by lack of precision and inelegant drafting of statutes. The Land Use Act … leaves a lot to be desired in its drafting".

3 [2017] LPELR 42078 (SC).

4 [1990] 4 NWLR (pt 146) 632.

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director of the respondent company. Being German, the appellant was advised to buy the land in the respondent's name as it was unlawful for him to hold legal estate in Kaduna State. The appellant heeded the advice. The receipt evidencing the purchase of the land was issued in his name and the name of the respondent. Subsequently, a certificate of customary right of occupancy dated 1 January 1997 and another certificate dated 6 March 1999 for a statutory right of occupancy were issued in the name of the respondent by the Kachia local government and Kaduna state government respectively. Sometime after the grant of the right of occupancy, the appellant instructed the respondent to transfer the property to Kajuru Nigeria Ltd (a company that the appellant had subsequently incorporated); the respondent refused, whereupon a dispute arose between the parties. The appellant, as plaintiff, sued the respondent asking for: a declaration that the defendant / respondent held the legal title in the land in question on a resultant trust for the benefit of the plaintiff; a declaration that the respondent was bound to comply with the plaintiff's instructions to transfer the land to Kajuru Nigeria Ltd; an injunction compelling the respondent to comply with the plaintiff's instructions to transfer the land to Kajuru Nigeria Ltd; and a perpetual injunction restraining the respondent from interfering with the plaintiff's interest in and possession of the land.

The respondent denied the claims, arguing that they were frivolous, vexatious and an abuse of court process and should be dismissed. Issues having been joined, the matter proceeded to trial. The two certificates of occupancy were admitted in evidence as exhibits A1 and A3 respectively. At the end of the trial, which spanned slightly over six years, in a judgment delivered on 5 November 2002 the appellant's claims were dismissed in their entirety for lack of merit. The appellant's appeal was also dismissed on 11 May 2006, whereupon the appellant appealed to the Supreme Court. In its determination of the appeal, the Supreme Court was of the opinion that the only issue calling for determination was 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 was holding the legal estate upon an implied trust in respect of the disputed property for his benefit by implication of law.

THE ARGUMENTS

In his argument, counsel for the appellant submitted that: the evidence before the trial court clearly established that the disputed property was purchased and developed with the appellant's private resources; exhibits A1 and A3 were admitted in evidence to establish the respondent's capacity as an implied trustee for the benefit of the appellant; and the lower court was wrong when it relied on section 132(1)(a) of the Evidence Act to hold that the testimonies of PW1–PW14 could not vary exhibits A1 and A3, which were issued in the name of the respondent. Counsel contended that the provision under the Land Tenure Law that forbade aliens from acquiring legal title in land in northern

Nigeria had been abrogated by the LUA. He cited sections 5(10) and 6(1) of the LUA and submitted that the words "any person" used in those sections included aliens. According to the appellant's counsel, an implied trust is an equitable conversion of the holder of the property into a trustee by operation of law. As such, the question of leading evidence to prove a grant and acceptance does not arise. In aid, counsel cited *Ezeanah v Attah*.[5] Finally, the appellant's counsel urged the court to allow the appeal and set aside the lower court decision by adopting the dissenting views of Agbaje JSC in *Ogunola v Eiyekole*, who held that "[i]n my judgment, a non-Nigerian who is a holder of land is entitled to the benefits of section 36(1) of the Act provided the non-Nigerian in the words of the definition section of the Act is a person entitled to a right of occupancy or a person to whom a right of occupancy has been validly assigned".[6] He urged the court to depart from the majority decision in *Ogunola v Eiyekole*.[7]

In his own argument, respondent's counsel submitted that the appellant's oral testimony could not vary the contents of exhibits A1 and A3, which were clearly issued in the name of the respondent, and that, on the authority of *Ughutevbe v Shonowo and Another*,[8] the appellant failed to establish before the lower court the existence of any legal relationship between him and the respondent. He cited in aid of his submissions *Anayelugo v Ogunbiyi*[9] and *Abraham Oyeniran v Egbetola*.[10] He also submitted that the appellant knew and had consistently maintained that he, as an alien, could not hold title to land by virtue of the relevant statutory provisions of Nigerian law relating to landed property, including the LUA. He further submitted that the appellant could, therefore, not hold a legal interest in the disputed property, which was capable of being entrusted to the respondent on the basis of *Ogunola v Eiyekole*.

THE SUPREME COURT DECISION

In dismissing the appeal and affirming the Court of Appeal decision, the Supreme Court held that the appellant established neither a resulting nor constructive trust in his favour. The Supreme Court came to the conclusion that the appellant had indeed acquired the disputed property. Having reached that conclusion, the court was, however, concerned whether the appellant was qualified to hold legal estate in Nigeria. The Supreme Court held that the appellant, being an alien, had no legal capacity to hold an interest in land in the Kajuru local government area of Kaduna State. According to Galinje JSC, who delivered the lead judgment:

5 [2004] 7 NWLR (pt 468).
6 *Ogunola v Eiyekole*, above at note 4 at 656.
7 *Huebner*, above at note 3 at 15.
8 [2004] All FWLR (pt 220) 1185 at 1211–12, paras E–A.
9 (1998) 6 SCNJ 102.
10 (1997) 5 SCNJ 94.

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> "I wish to state clearly that the views expressed by my lord Agbaje JSC was [sic] raised in a dissenting judgment. A dissenting judgment, however powerful, learned and articulate is not the judgment of the court and therefore not binding. The judgment of the court is the majority judgment which is binding. See *Orugbo v Una* (2002) 16 NWLR (pt 792) 175 at 208 paragraphs B–C. The law under which the case of *Ogunola 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 capacity to hold interest in land in Kajuru Local Government Area of Kaduna State. This being so and by virtue of the Latin maxim, *Nemo dat quod non habet*, the Appellant cannot benefit from the property which he was incapable of owning."[11]

CAN A FOREIGNER NOT REALLY OWN LAND IN NIGERIA?

Even though the primary issue before the Supreme Court was the issue of a resulting trust, the major question raised by the decision in *Huebner* is whether the LUA limits the right to own land in Nigeria exclusively to Nigerians or whether non-Nigerians can also own land in Nigeria. Although the decision of the court on whether a foreigner can own land in Nigeria was obiter, as it was in *Ogunola v Eiyekole*, the obiter raised a fundamental issue in Nigerian jurisprudence. In his *Essays on The Land Use Act*, Professor Omotola, while commenting on section 1 of the LUA, alluded to the problem as follows: "[t]he Act it will be noted provides that the land of Nigeria shall be for the use and common benefit of all Nigerians who have been constituted beneficiaries. It is unclear whether this means that a non-Nigerian cannot use Nigerian land any longer".[12] The Supreme Court in *Huebner*, relying on its earlier decision in *Ogunola v Eiyekole* and section 1 of the LUA, held that aliens or non-Nigerians cannot validly and legally own land in Nigeria. The provisions of section 1 of the LUA need to be closely scrutinized. It provides: "[s]ubject to the provisions of this Act, all land comprised in the territory of each State in the Federation are [sic] 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 provisions of this Act".

It is important to note that ownership of land in Nigeria since the promulgation of the LUA is restricted to ownership of a right of occupancy (actual or deemed). According to Professor Olawoye:

> "The legal effect of section 1 read with the provisions relating to the right of occupancy is that from the commencement of the Act, it was no longer

11 *Huebner*, above at note 3 at 15–16.

12 Omotola *Essays on The Land Use Act*, above at note 2 at 17.

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> possible to own land allodially. The land itself is incapable of ownership. What is capable of ownership is the right of occupancy. Thus, in effect, the CONCEPT of land ownership has not been destroyed, it has only been re-defined; what the Act has done has been to substitute for the concept of absolute ownership of land that of modified ownership …"[13]

Continuing, he said that: "[t]he vesting of all lands in the State should not be taken as meaning that private interests in land have been abrogated. The Act allows citizens to hold an interest called a right of occupancy".[14] It is therefore correct to assert that the holder of a statutory right of occupancy is in every respect the proprietor of the land during the subsistence of that right.[15] The right of occupancy is alienable. It is a proprietary right that can be alienated by way of an assignment, to anybody, including a foreigner. Close scrutiny of section 1 of the LUA reveals that it has nothing to do with Nigerians' right of alienation as beneficiaries of the trust created by or under that section. The trusteeship constituted by section 1 of the LUA benefits all Nigerians.[16] The purpose of the trusteeship has nothing to do with the beneficiaries' right of alienation. The only requirement for a valid alienation is the necessary consent. In the case of land comprised in an urban area, that consent is solely vested in the governor of the affected state. It is submitted that the only foreigner who cannot legally and validly own land in Nigeria is an enemy alien. The decision in *Huebner* does not take into account that a resident who is not a citizen has as much right as a citizen to own his residence unless and until he is declared a persona non grata. Therefore, it is presumptuous to argue that section 1 of the LUA restricts the rights of aliens to own land in Nigeria provided that such aliens are not illegal aliens and satisfy all other statutory requirements for applying for consent or ownership. The LUA does not contemplate a lack of capacity for aliens to own land and this should not be read into the act. In fact, in apparent recognition

13 CO Olawoye "Statutory shaping of land law and land administration up to the Land Use Act" in JA Omotola (ed) *The Land Use Act: Report of a National Workshop* (1982, Lagos University Press) 14 at 19 (emphasis original). See also IO Smith "The certificate of occupancy: Nature and value" in IO Smith (ed) *The Land Use Act: Twenty-Five Years After* (2003, Department of Private & Public Law, Faculty of Law, University of Lagos) 169.

14 Olawoye, id at 18. See also Omotola *Essays on The Land Use Act*, above note 2 at 15–24.

15 Olawoye, id at 19.

16 Note that the trusteeship created by sec 1 of the LUA is itself a subject of great controversy as academics are agreed on the fact that the provisions do not meet the requirements of trust. See Omotola, *Essays on The Land Use Act*, above note 2 at 16–18; CO Adekoya "Land Use Act and constitutional matters arising" in Smith (ed) *The Land Use* Act, above at note 13, 19 at 36–37; MA Banire "Trusteeship concept under the Land Use Act: Mirage or reality? in Smith, id, 90; U Abugu *Land Use Reform in Nigeria: Law and Practice* (2012, Immaculate Prints) at 19–23; BO Nwabueze *Nigerian Land Law* (1982, Nwamife Publishers Ltd) at 239; IA Umezulike *ABC of Contemporary Land Law in Nigeria* (2013, Snaap Press Ltd) at 135–49.

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of the possible ownership of land by non-Nigerians, the LUA provides in section 46(1)(a) that:

> "The National Council of States may make regulations for the purpose of carrying this Act into effect and particularly with regard to the following matters -
> (a) 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 non-Nigerians".[17]

Note again that, under section 34(1) and (2) of the LUA, where land in an urban area was vested in any person before the commencement of the act, that land should continue to be held by him as if he held a statutory right of occupancy issued by the governor under the act. It is also interesting to note that, unlike section 36(5) of the LUA (under which a holder of a deemed customary right of occupancy may have no alienable right in the land), under section 34 the holder of a statutory right of occupancy has an alienable right in the property even though that alienation requires the governor's consent for its validity. Similarly, under section 21 of the LUA, a person who has a customary right of occupancy also has an alienable interest in the property subject to obtaining the necessary consents. The authors are of the opinion that "any person" in sections 34(1) and 36(1) of the LUA includes aliens.

As stated above, the decision in *Huebner* was based on the Supreme Court's earlier 1990 decision in *Ogunola v Eiyekole*. In that case, the appellants contested title to a piece of land with the respondents, whom the appellants alleged were their customary tenants warranting the appellants to ask for a declaration of title and forfeiture. The appellants' case was that they inherited the land in dispute from their ancestor, Arilegbolorosi, who had come from Ile-Ife more than 200 years earlier and settled on the land. The appellants further claimed that the respondents were Eguns who came from Dahomey as labourers, worked for Arilegbolorosi and became tenants of the plaintiffs / appellants. On the other hand the respondents claimed that the land in dispute was theirs through their ancestor, Agenge, who had migrated from Dahomey to the land in dispute about the same time that the appellants' ancestor reached the land. It was therefore common ground between the parties that the respondents' ancestor migrated from Dahomey, present day Benin.

The trial judge found that the plaintiffs / appellants were the owners of the land and that the respondents were rent-paying tenants. The judge also held that the respondents were occupiers of a portion of the land in dispute immediately before the commencement of the LUA and were, therefore, entitled to possession of the land for agricultural purposes as if a customary right of occupancy had been granted to them. The appellants appealed to the Court of Appeal complaining of the non-grant of the order of forfeiture following

17 See also Omotola *Essays on the Land Use Act*, above at note 2 at 17.

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the declaration of title and the decision that the respondents were entitled to a customary right of occupancy over the portion of land they occupied as tenants. The appellants' appeal was dismissed, whereupon they appealed to the Supreme Court. One of the issues that fell for resolution at the Supreme Court was the applicability of the LUA to non-Nigerians so as to enable the respondents to benefit from the provisions of section 36 of the LUA, which provides:

> "(1) The following provisions of this section shall have effect in respect of land not in an urban area which was immediately before the commencement of this Act held or occupied by any person.
> (2) Any occupier or holder of such land, whether under customary law rights or otherwise howsoever, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government and the reference in this sub-section to land being used for agricultural purposes includes land which is, in accordance with the customary law of the locality concerned, allowed to lie fallow for purposes of recuperation of the said land."

Allowing the appeal, the Supreme Court held among other things that the LUA applies to, and is limited to the benefit of, Nigerians. According to Olatawura JSC, who read the lead judgment:

> "Section 1 of the Act specifically limits its benefits to NIGERIANS. It is my view that a Non-Nigerian cannot apply for a statutory or customary right of occupancy because that section 36(1) provides for ANY PERSON: Aliens are not Nigerians … It is my firm view therefore that the words 'ANY PERSON' under section 36(1) of the Act refer to and mean ANY NIGERIAN. The Act has not abrogated any law which limits the right of aliens to own property. I will however share the views of Omololu-Thomas JCA that any foreigner who has validly owned or occupied any land before the Act is deemed to be an occupier under the Act. This however must be in conformity with the definition of occupier under section 50 of the Land Use Act".[18]

Agbaje JSC dissented from the majority on the interpretation of "any person" in section 36(1) of the LUA and the applicability of the act to non-Nigerians. In his view, both the trial court and the Court of Appeal were right in holding that the word "any person" in section 36(1) of the LUA includes foreigners, because a foreigner who previously owned or occupied land is deemed to be a holder or occupier under the act. According to the dissenting opinion,

18 *Huebner*, above at note 3 at 14 (emphasis original).

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section 36 of the LUA is part of the act's transitional provisions; the scenarios to which those transitional provisions may be applied include where the owner of land, whether a Nigerian or a non-Nigerian, is in possession of the land and has developed it. Section 36 is concerned with "a holder" or "an occupier" of land. Both words are defined in the act:

> "'[H]older' in relation to a right of occupancy means 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. '[O]occupier' means any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-lessee or sub-underlessee of a holder".[19]

According to Agbaje JSC, neither of these two words is defined by reference to the citizenship of the person involved, and he could find no warrant anywhere in the LUA to do that. Accordingly, he held:

> "The expression 'Any Nigerian' obviously refers only to citizens of Nigeria. But the expression 'any person' or 'Any occupier' or 'Any holder of land' in section 36 of the Act cannot in my view be so construed as to limit their application only to Nigerians. It is noteworthy that a citizen of Nigeria or a Nigerian is defined in section 23(1) of the Constitution … I am satisfied from the above statutory and constitutional provisions that the expressions 'Any Nigerian' and 'Any person' in the Land Use Act are not interchangeable. The latter 'Any person' involves a concept of the word 'person' which may even include a body of persons corporate or unincorporated whilst the former, 'Any Nigerian' has to do with a narrower concept of the same word which can only refer to natural persons in the context of section 23 of the 1979 Constitution. In my judgment, a non-Nigerian who is a holder of land is entitled to the benefits of section 36(1) of the Act provided the non-Nigerian in the words of the definition section of the Act is a person entitled to a right of occupancy or a person to whom a right of occupancy has been validly assigned."[20]

The administration and management of land by the governor under the LUA includes giving consent to the alienation of any land by a Nigerian to "any person" for use for the common benefit of all Nigerians. For instance, if such use is for a large scale agricultural project or other investment purposes, it is for the common benefit of all Nigerians. In fact, in this respect, the long title of the LUA is very instructive. It says that the act is:

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19 LUA, sec 50(1).

20 *Ogunola v Eiyekole*, above at note 4 at 655–56.

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> "An Act to vest all land comprised in the territory of each State (except land vested in the Federal Government or its agencies) solely in the Governor of each State, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to *individuals resident in the State* and to organizations for residential, agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on Local Governments."[21]

The act's long title shows unequivocally that the allocation of lands by the governor is to residents in the state (which includes foreigners) and not to citizens nor indigenes only. That is why section 36(1) of the LUA talks about "any person" and not "any citizen". It is instructive that the long title is useful in the interpretation of ambiguous provisions of a law. In *Vacher & Sons Ltd v London Society of Compositors and Others*, Lord Moulton said: "[t]he title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole, and ascertain its scope".[22] In a similar way, in *Bello and Others v AG of Oyo State*, the Supreme Court held that "the long title of a statute is now accepted as an important part of it and may be relied upon as explaining its general scope and aids in its construction … Resort is only to be had to the long title to resolve ambiguities".[23]

It is obvious that neither the earlier Supreme Court decision in *Ogunola v Eiyekole*[24] nor the recent *Huebner* decision had recourse to the long title of the LUA in reaching the decision that aliens cannot own land in Nigeria. The decisions can therefore be said to have been reached *per incuriam,* having been rendered in ignorance of the act's long title. The principles that govern the interpretation of the constitution also govern the interpretation of the LUA, namely, holistic and liberal interpretation. These two principles of interpretation appear to have been jettisoned in deciding *Huebner*. Otherwise, if the Supreme Court had applied both principles, it would have come to the opposite and correct conclusion, taking into account the long title of the LUA, that foreigners, in so far as they are not enemy aliens, can validly own land in Nigeria.

The court's difficulty appears to have arisen with its interpretation of the phrase "for the benefit of all Nigerians". The court appears to have misconceived the real intention of that phrase. For the Supreme Court, that phrase disentitles aliens from owning land in Nigeria. However, it is submitted that the phrase "for the benefit of all Nigerians" does not exclude the right of aliens to own land in Nigeria. Aliens can hold land for the benefit of Nigerians. It could have been different if the LUA had said "for the use and common benefit *by* all Nigerians". Probably, the use of the word "by" instead of "of" would

21 Emphasis added.
22 [1913] All ER 241 at 252; [1913] AC 107 at 128.
23 [1986] 2 NSCC 1257 at 1285, per Karibi-Whyte JSC.
24 Above at note 4.

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have evinced a clear intention to restrict the allocation of land in Nigeria to Nigerians. However, that is not what the LUA did and, therefore, should not be read into it.

It is instructive that in the lead judgment in *Ogunola v Eiyekole*, Olatawura JSC stated correctly that "we cannot go outside the Act to clothe it with powers it does not possess".[25] However, his interpretation that "any person" in section 36(1) of the LUA means "any Nigerian", implying that the LUA excludes non-Nigerians from owning land in Nigeria, is the exact opposite of the principle he enunciated. It is also obvious that, in reaching their opposing views in *Ogunola v Eiyekole*, neither the majority judgment nor the dissenting opinion referred to the act's long title. If they had done so (which would have been consistent with not going outside the act), perhaps the majority decision might have been different and, perhaps, a further strengthened minority opinion might have been able to convince the majority. The authors are therefore of the view that *Ogunola v Eiyekole*, upon which *Huebner* was decided, was itself wrong and given in error.

The effect of the decisions in *Huebner* and *Ogunola v Eiyekole* is to abrogate the right of aliens to own a right or an interest in land in Nigeria, contrary to the well and long established rule that aliens can own land or an interest in land in restricted or limited conditions, as provided for in the various Acquisition of Land by Aliens Laws applicable in the various states of the federation.[26] Section 4 of the LUA provides that, until other provisions are made in that regard and subject to the provisions of the LUA, land under the control and management of the governor under the act shall be administered, in the case of states where the Land Tenure Law applied (that is, states in northern Nigeria), in accordance with the provisions of that law and, in every other case (that is, states in southern Nigeria), in accordance with the land tenure law or state land law applicable in that state. No provisions referred to in section 4 have so far been made. Therefore, the various land tenure laws and state land laws continue to apply, in so far as they do not conflict with the express provisions of the LUA. In *Huebner* itself, the Supreme Court held that the LUA did not abrogate any law that restricted or limited the right of aliens to own land in Nigeria,[27] implying that laws like the Acquisition of Land by Aliens Law of Lagos State and similar laws in the various states of the federation

25 Id at 646.

26 See sec 1(1)(a) of the Acquisition of Land by Aliens Edict 1971, cap 1, Laws of Lagos State 1971, now cap 2, Revised Laws of Lagos State of Nigeria 2017; sec 3(1)–(2) of the Native Land Acquisition Law, cap 80, Laws of Western Nigeria 1959, now adapted by the various states constituting the then Western Nigeria; sec 4(1)–(2) of the Acquisition of Land by Aliens Law, cap 2, Laws of Eastern Nigeria 1963, adapted by the various states constituting the then Eastern Nigeria; and secs 27 and 28 of the Land Tenure Law, cap 59, Revised Laws of Northern Nigeria, 1963. These laws have been re-enacted by the states succeeding to the regions. For example, in Enugu State, the law is re-enacted as the Acquisition of Land by Aliens Law, cap 3, Revised Laws of Enugu State of Nigeria, 2004.

27 See the judgment of Mary Peter-Odili JSC.

remain in force.[28] All these laws recognize the right of non-Nigerians to own land or an interest in land subject to certain restrictions, usually with the prior approval in writing by an appropriate authority. For instance, under section 1(1) of the Acquisition of Land by Aliens Law of Lagos State[29] (Lagos Law), no alien shall acquire any interest or right in or over land from a native of Nigeria unless the governor has previously approved in writing the transaction under which the interest or right is acquired; provided that, where the interest or right to be acquired by an alien is for less than three years (including any option for renewal), the provisions of the law shall not apply. Where any such interest or right has been lawfully acquired by an alien, that interest or right shall not be transferred, alienated, demised or otherwise disposed of to any other alien, or be sold to any other alien under any process of law, without the governor's prior approval in writing of the transaction or sale, as the case may be; and any agreement or instrument in violation of this provision shall be void and of no effect.

Section 2(1) of the Lagos Law prohibits the acquisition of a right of absolute ownership by an alien in or over any land from a native of Nigeria. Under sections 2(1), 2(2), and 2(3) respectively, the Lagos Law prohibits the acquisition by an alien of a freehold interest over land from a native of Nigeria, prohibits the alienation by an alien to another alien of any such interest that has been legally acquired, and mandates the offer of the right of first refusal to the government of Lagos State and, if declined, then to a native of Nigeria, in the event that any such freehold interest shall become liable to be sold under any legal process. Section 3(1) and (2) of the Lagos Law criminalizes any violation of the provisions of section 1 of the law by any alien or any person claiming through an alien.

These provisions of the Lagos Law, which are similar to the provisions in other states of the federation, show conclusively that Nigeria's law never intended to abrogate the right of aliens to own interest in land in Nigeria. The intention of the law is to recognize the right of aliens to own interests in land in Nigeria, but such rights must be properly regulated by law for reasons of national security and sovereignty. In reaching a decision that foreigners cannot legally own land or an interest in Land in Nigeria, the Supreme

28 See A Wahab and R Erega "Supreme Court decision restricts foreign ownership of land in Nigeria" (2018, Kayode Sofola & Associates), available at: <http://www.kslegal.org/wp-content/uploads/2015/11/Restrictions-on-Foreign-Ownership-of-Land-in-Nigeria.pdf> (last accessed 17 November 2019). See also G Ukwuoma and K Owolabi-Davids "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)" (August 2017) *Advocaat Law Practice Litigation Update*, available at: <http://www.advocaat-law.com/assets/resources/e7d62973ea754e518435746aa22a86ed.pdf> (last accessed 17 November 2019).

29 Enacted as Edict No 7 of 1971, now cap 2, Laws of Lagos State of Nigeria, 2013.

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Court in *Huebner* went beyond the restrictions to prescribe abrogation, erroneously in the authors' view.

The Supreme Court decision in *Huebner* is also manifestly erroneous and cannot be supported because it does not take into account a proper definition of a foreigner or the fact that a foreigner includes all the various multinational companies that, as a result of foreign control, Nigeria has agreed to treat as nationals of other contracting states within the International Centre for the Settlement of Investment Disputes (ICSID) system. Under article 25(1) of the ICSID Convention, "[t]he jurisdiction of the centre shall extend to any legal dispute arising directly out of an investment, between a contracting state (or any constituent sub divisions or agency of a contracting state designated to the centre by that state) and a National of another contracting state, which the parties to the dispute consent in writing to submit to the centre. When parties have given their consent, no party may withdraw its consent unilaterally."

A party who is a national of a contracting state may be a natural person or a juridical entity. Under article 25(2)(b) of the ICSID Convention, a juridical person must have the nationality of another contracting state for the centre to have jurisdiction, but this is not applied strictly. Under this article, a juridical entity incorporated under the law of the state party to the dispute will be treated as a national of another contracting state if "because of foreign control", the parties have agreed that the company be so treated. The Convention does not specify the manner in which the parties' agreement regarding the investor's nationality must be made. The point is that most of the multinational companies operating through subsidiaries incorporated in Nigeria are foreigners or foreign nationals because of foreign control. In the case of natural persons, ICSID has the right to assume jurisdiction in the event of a dispute between such a foreign national and the Nigerian government or its agencies. In the case of legal entities, ICSID also has the right to assume jurisdiction where the legal entity is incorporated under the laws of Nigeria but the Nigerian government has agreed to treat it as a national of another contracting state as a result of foreign control. Agreement to treat such a company as a national of another contracting state may be express or implied. The *Huebner* decision has the effect of creating a paradoxical and absurd situation where a company that is clearly a foreigner in Nigeria under the ICSID system as a result of foreign control has the right to own land because its subsidiary is incorporated in Nigeria, but a natural person who is a foreigner legitimately resident and doing business in Nigeria does not have the right to own land. The authors submit that any multinational company with a subsidiary incorporated in Nigeria but subject to foreign control is a foreigner or an alien. There is no logic to granting the right to the legal entity and denying it to its natural person counterpart.

The Supreme Court decision in *Huebner* is at variance with all other legislation in Nigeria enabling foreign investors to own 100 per cent of their investments in Nigeria. In fact, the decision is inconsistent with Nigeria's international obligations under various bilateral investment treaties. The decision is therefore anti foreign direct investment and manifestly unsupportable

in a liberalized economic environment. The decision does not refer to the fact that investments, under the various bilateral investment treaties (BITs) or investment promotion and protection agreements entered into by the Nigerian government with the governments of other countries, include land. Article 1(i)(a) of the BIT between Nigeria and France[30] provides: "[t]he term investment means every kind of goods, rights and interests of whatever nature, in particular though not limited to the following: movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights". Article 2 of that BIT then defines nationals as physical persons possessing the nationality of either contracting party in accordance with the legislation of that contracting party, while article 4 provides for both national treatment and most-favoured nation treatment of investors.

Nigeria is a party to the ICSID Convention, which it domesticated through the ICSID (Enforcement of Awards) Act No 49 of 1967.[31] In fact, Nigeria was the first country to ratify the ICSID Convention. By ratifying and domesticating the ICSID Convention, Nigeria became bound by all BITs incorporating ICSID arbitration, particularly where the investors involved are nationals of ICSID contracting states. By section 26 of the Nigerian Investment Promotion Commission Act,[32] Nigeria further undertakes to abide by ICSID arbitration and, in fact, gives consent to what is now known as "investor-only arbitration", that is, a situation where the element of mutuality as a fundamental requirement for valid arbitration is no longer required and an investor can commence an ICSID arbitration with or without the consent of the contracting state party or its agencies.[33] Moreover, under the provisions of section 1 of the ICSID (Enforcement of Awards) Act, the resulting award from such arbitration is for all purposes to have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly. The clear implication is that, if an issue of land ownership arises for arbitration, an ICSID arbitral tribunal could award ownership to an investor and that award would take effect as a final judgment of the Supreme Court. In that case, can it still be seriously argued that a foreigner cannot own land in Nigeria? The authors think not.

30 Entered into on 27 February 1990. See also art 1 of the BIT between Nigeria and the United Kingdom, entered into at Abuja on 11 December, 1990; arts 1 and 3 of the BIT between Nigeria and the Netherlands, entered into at Abuja on 2 November 1992; art 1 of the BIT between Nigeria and Democratic People's Republic of Korea, entered into at Lagos on 26 April 1996; and art 1 of the BIT between Nigeria and China, entered into at Abuja on 12 May 1997.

31 Now cap 120, LFN 2004.

32 Cap N 117, LFN 2004.

33 See J Werner "Trade explosion and some likely effects on international arbitration" (1997) 14/2 *Journal of International Arbitration* 1 at 6.

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CONCLUSION

Nigeria is currently pursuing a market-driven / private sector led economy aimed at attracting foreign direct investment. Decisions such as *Huebner* tend to discourage foreign investors. The decision in *Huebner* to the effect that foreigners cannot validly and legally own land in Nigeria is not only erroneous and manifestly unsupportable but was also given *per incuriam*. The decision as it were constitutes an assault on individual property rights in Nigeria. It is hoped that the Supreme Court will use the earliest opportunity to re-examine the ratio with a view to overruling it, because one of the cardinal principles of Nigeria's judicial process is that the court should not persevere in error. The notion that a non-Nigerian cannot own or apply for a right of occupancy in Nigeria is wrong. The only foreigner who cannot own land in Nigeria is an enemy alien. The LUA itself expressly provides that it protects citizens as well as residents, which include foreigners.

CONFLICTS OF INTEREST

None

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