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The Right of Aliens to hold Interest in Land: Demystifying the Conundrum of "All Nigerians" And "Any Person" As used in the Land Use Act

Oluchi Nwafor-Maduka

Abstract

The role of the courts through its interpretative jurisdiction to the development and overall growth of a nation cannot be overemphasised. The laws become policy statements when given life by the courts. In doing so, the courts must strike a balance between interpreting the letters of the law and adopting an interpretative approach that will enhance the socio-economic development of all persons resident within the territorial jurisdiction of the state. Laws made and interpreted must reflect an intention to protect these sets of individuals and enhance their well-being.

Consequently, this paper examines the provisions of LUA as it relates to the rights of aliens to own interest in land in Nigeria. The aim is to determine whether the lawmakers intend to restrict an alien from holding interest in land. This examination is crucial if it is considered that land plays an important role in economic development of any society. Therefore, this paper argued that the right to work of many occupations is invariably-tied to land and, as a result, the court in interpreting the provisions of the LUA must give it its widest interpretation.

Keywords: Land Use Act, Economic Development, Nigeria, Alien, Court, Interpretation

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* Oluchi Nwafor-Maduka (LLM),Research Assistant, Department of Public Law, University of Ibadan

Introduction

On the 29th of March, 2018, the Land Use Act (LUA) will be celebrating its 40 years Anniversary. Within these years, there have been stringent calls for its amendment and, in some cases, outright repeal of the LUA[1]. Undoubtedly, the LUA has received commendations and criticisms. Ordinarily, such a landmark anniversary presents an opportunity for a reflection on the achievements of the LUA. In human affairs, 40 years is taken to be the age of full adulthood and, as the platitude goes, "a fool at 40 is a fool for ever". This year, therefore, presents unique opportunity for a critical review of the provisions of the LUA and how the provisions had been applied by the courts over the years. LUA takes life only when it is interpreted and applied in practical terms.

The long title of the LUA clearly states the broad purpose for which the Act was enacted. The long title suggests that the Act was enacted with developmental agenda in mind.

However, the practical application of some provisions of the LUA negates this broad developmental purpose. The application of Sections 21 and 22 of LUA[2] to practical situations hinder prompt conclusion of business transactions especially as it relates to credit facilities. It has to be borne in mind that the Governor has discretion to withhold or refuse consent[3] and, in such a situation, the holder of the right of occupancy would not be able to consummate the transaction with the consequential effect of not being able to assess the much-needed credit facility. The courts have insisted that consent must be sought and obtained before any form of interest in land is alienated[4].

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1 This informed the Federal Government of Nigeria inaugurating the Presidential technical committee for Land Reform on 2nd April 2009. The erstwhile Chairman of the Committee opined that though "*the Land Use Act of 1978 was meant to usher in a new land reform in Nigeria, it soon became a clog in the wheel of development over the years*". Mabogunje A. L. 2009. Land reform in Nigeria: progress, problems & prospect. Retrieved April 4, 2017, from http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/mabogunje.pdf

2 Section 22 provides that no alienation of interest in land can be effected in an area designated as urban without the consent of the Governor of the state first sought and obtained. Section 21 deals with land in rural area.

3 See *Associated Discount House Ltd. v. Minister of Federal Capital Territory and Anor.* (2013) *LPELR-20088(SC).*

4 See for example *U.B.N. Plc v. Ayodare & Sons (Nig.) Ltd* (2007) ALL FWLR Pt. 383 1 at 16, Paras. B - C (SC) where the Supreme Court held as follows: *By the provisions of Sections 21, 22 and 26 of the Land Use Act, Cap. 202 Laws of the Federation of Nigeria, 1990, a holder of a statutory right of occupancy who wishes to mortgage the property by assignment must first obtain the consent of the*

The Supreme Court in *Brossette Manufacturing (Nig) LTD v. M/S OLA Ilemobola Ltd (2007) LPELR-809(SC)* held that:

> *The legal consequence of this [land documentation prepared without the consent of the Governor] is that the agreement was inchoate or at best a mere escrow till the consent of the Governor was obtained. What this means is this, that agreement did not and could not transfer title in land. See: Anambra State Housing Development Corporation v. Emekwue (1996) 1 SCNJ 98 at 132-133; (1996) 1 NWLR (Pt. 426) 505 where this Court held as follows: "Being a mere escrow, therefore, the Deed of Lease passed no interest in the property to the defendant. It follows therefore that whatever view one takes of exhibit they did not pass any interest in the property here concerned to the defendant and he consequently acquired no legal title to the property.*

This interpretation, though it conforms to the literal canon of interpretation of the sections, has hindered speedy conclusion of financial and banking transactions[5]. Akeem observed that:

> *the implementation of the consent provisions and the severe bottlenecks in the path of those willing to acquire or transfer land for industrial or*

Governor of the State where the land is situate before carrying out the mortgage transaction. Similarly, the holder of a customary right of occupancy of land not in an urban area must obtain the consent of the local government where the land is situated. Where the requisite consent is not obtained, the transaction or instrument which purports to confer or vest the property in any person shall be null and void'.

See also Onamade v. A.C.B Ltd (1997) 1 NWLR (Pt. 480) 123 at 143 where the Supreme Court held that: *It is beyond dispute that since the coming into operation of the Land Use Act, no alienation of a statutory right of occupancy whether by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever without the consent of the Military Governor first had and obtained shall be lawful.*

5 The banks would not advance credit to businesses unless there is collateral. Land happens to be the major form collateral available to most persons in Nigeria. In most cases, the consent takes several months and, by then, the business opportunity would have been lost.

commercial purposes has betrayed the ideal of making land easily available[6].

It has equally been held that, by the provisions of the LUA, an alien lacks the capacity to hold interest in land in Nigeria[7]. There have been several discourses on the consent regime[8]. This paper principally explores the issue of an alien not being able to hold interest in land in Nigeria and the consequences.

Land and Economic Development

Land, no doubt, is one of the factors of production[9]. Little or no economic activity will take place in absence of land and, in the absence of economic activity, development becomes illusory. Capital is also a crucial factor of production. It was the realisation of the importance of land to economic development that the LUA was enacted. In a 2014 Report, the World Bank reports that one of the principles of land tenure policy which facilitates growth and poverty reduction is the access to land and transferability of rights[10]. This entails allowing some measure of transferability of land rights which will enable the landless to access land through sales and rental markets or through public transfers[11].

The nexus between land rights and economic development has gained recognition in the global development community. This can be seen by the inclusion of

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6 Bello A. O. *Constitutional entrenchment of The Land Use Act- an argument for excision in The Land Use Act- twenty years after* (Smith I. O. ed.). A publication of the Department of Private & Property Law, Faculty of Law, University of Lagos.2003.

7 See *Ogunola & v. Hoda Elyekole* (1990) 4 NWLR (Pt. 146) 632.

8 See for example Akujobi K.O. *Governor's consent under Section 22 of the Land Use Act: the position since Savannah Bank v. Ajilo in The Land Use Act twenty five years after* op cit. 2003. Kasumu A.B. *The question of consent to alienation-effect on development in The Land Use Act-A Report of National Workshop*, P.100 (J.A. Omotolaed.). See Nigerian cases of *Savannah Bank v. Ajilo* (1989) LPELR 3019 (SC), *Awojugbabe Light Industries v. Chinukwe (2007)* 4 NWLR (pg. 390) 379, *Yaro v. Arewa Construction Ltd (2007)* 16 NWLR (pt. 1063) 333 at 374.

9 At least, classical economists treated land as distinct from capital though there is an attempt by some neoclassical scholars to merge land and capital. See Okpighe S. O. "The seven factors of production". *British Journal of Applied Science & Technology*. 2014. Retrieved April 4, 2017, from www.journalrepository.org/media/journals/BJAST_5/2014/Nov/Okpighe532014BJAST12080_1.pdf

10 The World Bank. 2014. *Land Policy: Sector Results Profile*. Retrieved April 10th 2017, from http://www.worldbank.org/en/results/2013/04/15/land-policy-results-profile1

11 Ibid.

land rights in the Sustainable Development Goals (SDGs)[12]. Specifically, goal 2 recognises plan to end hunger and all forms of malnutrition[13] by 2030[14]. This is to be achieved by promoting sustainable agricultural practices through secure and equal access to land[15], ensuring sustainable food production systems and implementation of resilient agricultural practices that increase productivity and production[16]. To actualise these objectives, the goals call for international cooperation and increase investment to enhance agricultural productive capacity in developing countries, in particular least-developed countries[17].

As a developing country, Nigeria and Nigerians may have the land but definitely do not have sufficient capital necessary to fund developmental projects. Nigeria, therefore, will necessarily rely on foreign capital and investment to catalyse meaningful development[18]. In recent years, the Nigerian government has been wooing foreign investors to invest in Nigeria. For these investors to come into Nigeria, there must be a guarantee that land would be easily available to set up businesses as the right to earn a living in many occupations is inseparably tied to the use and enjoyment of land.

Any legislation or policy which denies foreign investors land will, invariably, clog development. It has been suggested elsewhere that the LUA contributed to the underdevelopment of Nigeria[19]. Some decisions of the Supreme Court with respect to the LUA seem to have the opposite effect of what the law makers intended. There is, therefore, need to examine some of these decisions *vis-à-vis* the provisions of the LUA to determine whether the decisions are faithful to the provisions of the LUA.

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12 The SDGs are a collection of 17 global goals set by the United Nations in 2015 to succeed the Millennium Development Goals. The goals are set to be achieved by the year 2030.The formal name for the SDGs is: "Transforming our World: the 2030 Agenda for Sustainable Development." That has been shortened to "2030 Agenda. Goals 1,2,5,11,15 and 16 are all land related.

13 Sustainable Development Goal 2.1&2.2.

14 The United Nations, 2015.Transforming our world: the 2030 Agenda for Sustainable Development. Retrieved June 9th 2018 from https://sustainabledevelopment.un.org/post2015/transformingourworld

15 Sustainable Development Goal N0 2.3.

16 Sustainable Development Goal N0 2.4.

17 Sustainable Development Goal N0 2.a.

18 See Olokoyo F. O. "Foreign direct investment and economic growth: a case of Nigeria" Vol. 4, (2012) *Bvimsr's Journal of Management Research*, No 1, page 3.

19 Adeyemi M. 2017. How 1978 Land Use Act underdeveloped Nigeria, byMabogunje. *The Guardian*. Retrieved April 4, 2017, from https://guardian.ng/news/how-1978-land-use-act-underdeveloped-nigeria-by-mabogunje/

Alien Rights to Land in Nigeria

Before the advent of the LUA, aliens were allowed to hold interest in land in southern Nigeria[20], on the condition that any transfer of interest in land to aliens must be with the consent of the Governor or the Minister in charge of land matters first sought and obtained[21]. Where the approval to own land has been granted, the alien cannot alienate such interest to another alien without the consent of the officer in charge[22]. However, consent will not be necessary if he is alienating to a Nigerian.

In northern Nigeria, the Land Tenure Law[23] reserved the grant of customary rights of occupancy only to natives[24]; that is, persons whose fathers were members of tribes indigenous to northern Nigeria; and prohibited the alienation of rights of occupancy to non-natives without the consent of the Minister responsible for land matters who holds and administers the land for the use and common benefits of the "natives"[25]. The implication was that, in northern Nigeria, non-natives including Nigerians who were not indigenous to any tribe in northern Nigeria were treated as aliens for the purpose of customary right of occupancy. Non-natives are entitled to statutory right of occupancy which shall not exceed 1,200 acres in case of agricultural purposes, or 12,500 acres if granted for grazing purposes.[26]

The position was the same in southern and northern Nigeria with respect to alienation to aliens as both jurisdictions require consent of the Minister before alienation. The only difference was that while northern Nigeria regards other Nigerians who were not natives to northern Nigeria as aliens, southern Nigeria regards only non-Nigerians as aliens.

The LUA incorporated the consent provision by stating that all holders of right of occupancy must seek and obtain the consent of the

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20 States in Southern Nigeria include the South West states Lagos, Ondo, Ogun, Osun and Oyo, south east states of Anambra, Enugu, Imo, Abia and Ebonyi and south south states of Delta, Rivers, Cross River, Akwa Ibom and Bayelsa.

21 Section 1(1) (a) Acquisition of Lands by Aliens Edict 1971, Cap. 1, Laws of Lagos State ("Lagos Law"); Section 3(1)-(2) Native Lands Acquisition Law, Cap. 80, Laws of Western Nigeria ("Western Law"); Section 4(1)-(2) Acquisition of Land by Aliens Law, Cap. 2, Laws of Eastern Nigeria ("Eastern Law"); Section 2(1) Acquisition of Land by Aliens Law, CRS 1979 Cap. 1.

22 Section 1(1) (b) Lagos Law; Section 4(2) Eastern Law.

23 Cap. 59 Laws of Northern Nigeria, 1963 Revised Edition, ("Northern Law").

24 Ibid Section 2 Northern Law.

25 Ibid Section 27 & 28.

assignment, mortgage, transfer of possession can be effected[27]. Consent requirement was, therefore, extended to all forms of transactions affecting interest in land in Nigeria. Regrettably, LUA failed to expressly state whether aliens may hold interest in land. This silence has been a source of anguish to aliens who venture to acquire interest in land for business and developmental purposes.

The Supreme Court has been consistent in holding that the LUA debars aliens from having an interest in land in Nigeria. In *Ogunola v. Eiyekole*[28], the respondents, Eguns from Dahomey in present-day Benin Republic, were customary tenants of the appellants before the enactment of LUA. Their challenge of the appellants' title led to the institution of the suit. At the Supreme Court the Respondents conceded that they were actually customary tenants of the Appellants but contended that LUA had abolished forfeiture as an incidence of customary law. The Supreme Court Justices were unanimous that LUA did not abolish the penalty of forfeiture which a customary tenant attracts to himself for misconduct. The court then held that, having admitted that they were in fact customary tenants of the appellants and in view of evidence of challenge to the appellants' title, the respondents must forfeit their right as customary tenants.

However, Olatawura, JSC in delivering the leading judgment made pronouncement with respect to Sections 1 and 36 of LUA as it affects aliens. He said:

> *The learned trial Judge in interpreting Section 36(1) of the Land Use Act placed much reliance on the word ANY to include foreigners. 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.*** *I reproduced section 1 of the act if only to re-emphasise that the act was promulgated for the benefit of Nigerians:*
> *'1. Subject to the provisions of this decree, all land comprised in the territory of each state in the Federation are hereby vested in the Military 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 decree.'*
> *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*

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[27] Section 22 LUA.

[28] (1990) NWLR (Pt. 146) 632.

abrogated any law which limits the rights of aliens to own property. I will however share the views of Ololulu-Thomas, J.C.A. 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.

Agbaje JSC, though concurred with the leading judgment, dissented on the effect of Sections 1 and 36 of LUA as it affects aliens. He dissented as follows:

After considering and reconsidering the point, I am inclined to the view that both the trial court and the Court of Appeal are right in the interpretation of section 36(1) of the LUA.
Section 36 is part of the transitional provisions of the act. The following scenarios appear to me to be the situations to which the provisions may be applied.

1. *Owners of land in possession of their land and who have developed it;*
2. *Tenants in possession of land and who have developed it;*
3. *Under 1&2 the tenants or the owners of the land may be Nigerians or non-Nigerians.*

Section 36 is concerned with "a holder" or "an occupier" of land. Both words are defined in the act thus:-
"holder" 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 under-lessee. "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.
It appears to me that neither of the two words is defined by reference to the citizenship of the person involved. I can find no warrant in the whole of the Land Use Act to do this. 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".

. 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 narrow 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. As regards the latter, the instrument of assignment or transfer must be valid according to the relevant law.

Again, a non-Nigerian is entitled in my view to the benefits of section 36(1) of the act as an occupier of land provided in the words of the definition section of the act he is lawfully occupying the land under customary law and he is using or occupying it in accordance with customary law[29].

Recently, in *Gerhard Huebner v. Aeronautical Industrial Engineering and Project Management Company Limited*[30], the Supreme Court was called upon to pronounce among other things on Sections 1 and 36 of the LUA. In 1975, Mr Huebner (A German National) built a weekend hospitality resort on a hilltop in Kajuru village on the authority of the Kachia Local Government Area of Kaduna State and named the resort *"The Kajuru Castle"*. To further expand the resort, he bought and paid for additional 70 hectares of land surrounding the *"The Kajuru Castle"*. In 1986, he was appointed the Managing Director of the respondent. Prior to the perfection of his title

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[29] Ibid at 654.

[30] (2017) LPELR-42078(SC).

documents, he was allegedly advised not to perfect the title documents in his name as he was an alien and, as such, not permitted under the law to own interests in land. He heeded the advice and perfected the land in the name of the respondent. The Certificate of Occupancy and other title documents were issued in the name of the respondent. Things continued to go on smoothly between the two parties until the respondent claimed ownership of the hectares of land. Mr. Huebner, as plaintiff, commenced an action against the respondent at the Kaduna State High Court.

At the end of the trial which spanned slightly over six years and, in a considered judgment delivered on the 5th of November, 2002, Mr Huebner's claims were dismissed for lack of merit. He appealed to the Court of Appeal. However, his appeal was equally dismissed. Both the trial court and the Court of Appeal dismissed the appeal on the ground that the appellant did not produce evidence (documentary) showing that he granted or created a trust in favour of the respondent for his benefit.

However, the Supreme Court ruled that, since there is undisputed evidence that the appellant personally paid for the property, the fact that the property was registered in the name of the respondent will ordinarily suggest an implied or resultant trust. The Supreme Court further held that, in any event, since the appellant is an alien, he cannot hold any interest in land in Nigeria by virtue of Section 1 of the LUA. The Court held that Mr. Huebner acquired no interest in the property which the respondent would hold in trust for him. The Supreme Court, per Galinge, JSC relying on the doctrine of *stare decisis* held as follows:

> *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, Nemodat quod non habet, the Appellant cannot benefit from property which he was incapable of owning.*

The prime responsibility of the Supreme Court is to do justice in its true sense to all manner of persons. Nigeria is a state signatory to the International Covenant on Civil and Political Rights[31] (ICCPR) which it ratified in 1993. Article 12 (1) of ICCPR states: *Everyone lawfully within the territory of a State shall, within that territory, have the right*

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[31] Adopted by the United Nations, General Assembly on 19 December 1966.

to liberty of movement and freedom to choose his residence. It is conceded that ICCPR lacks the force of law in Nigeria[32]; nevertheless, Nigeria having ratified the covenant, Nigeria is bound to ensure that it does not willingly violate the terms of the covenant. The right to have a residence must invariably connote right to hold some interest in land. This right found expression in the long title of the LUA which reads:

> *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 the 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 organisations for residential, agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on Local Government.*

The Governor, therefore, owes all residents in the state (Nigerians and aliens) and organisations an obligation to allocate lands to them for residential, agricultural, commercial and other unspecified purposes. The Supreme Court in *Huebner* was not only construing the LUA but it was also articulating the policy thrust of the Federal Republic of Nigeria[33]. There is need, therefore, for the court to be cautions of not sending the wrong signals to the international investing community. The policy thrust of Nigerian government today is to attract foreign investors. The Supreme Court of Nigeria is pre-eminently positioned to proclaim this policy to the whole world.

It has been argued that the United States has used land ownership rights as immigration tool not just to expel migrants but to attract them[34]. In the American case of

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32 Section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides that no treaty between the Federation and any other country shall have the force of law except it has been enacted into law by the National Assembly.

33 It has been argued that since the Supreme Court of USA has the power of judicial review over the legislative acts of the congress, it is a policy making organ. Nigerian Supreme Court equally has the power of judicial review over legislative Act of the National Assembly. Therefore, it is a policy making organ. See Anon. Criminal justice: an overview of the system. Retrieved April 12, 2017, from http://www.docmckee.com/OER/INTRO/Section_1_1_text.html

34 Tirres A. B. "Ownership without Citizenship: The Creation of Noncitizen Property Rights" 2013 Vol. 19. *Michigan Journal of Race and Law.* Issue 1.

Sei Fujii v. The State of California[35], the State of California under the California Alien Land Law escheated the land bought by the Plaintiff, an alien Japanese. The plaintiff contended that the effect of the California Alien Land Law, as well as its purpose, was to discriminate against aliens ineligible for citizenship solely on the basis of race and that such discrimination is arbitrary and unreasonable. The Supreme Court decided that it was already well-recognised that all aliens, lawfully in the United States, have a right "to work for a living in the common occupations of the community". The court, acknowledging that the right to earn a living in many occupations is inseparably connected with the use and enjoyment of land, restated that legislations which result in such discrimination imposes upon the ineligible alien an economic status inferior to that of all other persons living in the state and interferes with his right to earn a living. The court stated further that nothing in the record indicated, and the court could not assume, that the Japanese came to America for any purpose different from that which prompted millions of others to seek, in the American shores, a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them.

The court, therefore, concluded that the California Alien Land Law was designed and administered as an instrument for effectuating racial discrimination. There is nothing to indicate that those alien residents who are racially-ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare. Accordingly, the court struck down the California Alien Land Law on the ground it violates the Fourteenth Amendment to the American Constitution.[36]

Before the decision in *Sei Fujii*, the court had aligned with legislations prohibiting aliens from owning land in the United States. In *Terrace v. Thompson*[37], the court upheld a Washington law prohibiting landholding by any alien who had failed to file a declaration of intention to become an American citizen. The turning point began in

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35 L. A. No. 21149(1952).

36 That no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

37 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255.

1949, when the Supreme Court of Oregon, in *Kenji Namba v. McCourt*[38], struck down the Oregon Alien Land Law on the basis that it was discriminatory.

The courts in America adequately articulated the policy thrust of the American vision despite restrictive legislations passed by various state assemblies. Equally, Ethiopia has since 2007 been using land policy to attract foreign investments to develop its agricultural sector. There have been large-scale land acquisitions by foreign parties facilitated by the central government[39].

The Purport of Sections 1, 5 (& 6), 34 (&36) and 46 of the Land Use Act

It is now acceptable that the ultimate aim of construction of statute is to determine the intention of the lawmaker. Lord Simonds, though a strict constructionist, said that:

> *The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited*[40].

Some scholars have deplored the intention-seeking approach on the ground that it is mirage in modern-day legislation to seek the common intention of a body of persons who may not be responsible for the drafting of the legislation. Max Radin[41] articulated the position thus:

> *A Legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected and in regard to which many of the approving majority might have had and often demonstrably did have, different ideas and beliefs.*

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38 1949, 185 Or. 579, 204 P.2d 569.

39 Abbink J. "Land to the Foreigners': Economic, Legal, and Socio-cultural aspects of new land Acquisition Schemes in Ethiopia". Vol. 29, 2011 *Journal of Contemporary African Studies* No. 4. Retrieved April 10th 2017, from https://openaccess.leidenuniv.nl/bitstream/handle/1887/20672/ASC-075287668-3287-01.pdf?sequence=1

40 See *Magor and St Mellons Rural District Council v. Newport Corporation (1952)* AC. 189 at 191.

41 Radin M. "Statutory interpretation" (1930) *Harvard Law Review*, 43(6), 863-885.

However, the concept remains that, in construing a statute the court as "statutory interpreter"[42] is merely seeking to decipher the intention of the legislature. The Supreme Court has, in a long line of decisions, adopted the intention-seeking approach of statutory construction[43]. In *Mandara v. A. G. Federation*", the Court held that:

> *Where in the interpretation of a word appearing in a particular piece of legislation such a word is capable of two meanings, the court has a duty to adopt an interpretation, which would not defeat the intention of the lawmaker.*

In deciphering the intention of the lawmakers, the courts have adopted several canons of interpretation which include: the literal rule, the golden rule, the mischief rule and the purposive approach. The contemporary approach to statutory interpretation is the purposeful approach which Lord Denning enunciated as follows:

> *The literal method is now completely out of date. It has been replaced by the "purposive approach" ... In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision.*

And which Lord Griffiths, L.J. concurred as follows:

> *The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts must adopt a purposive approach which seeks to give effect to the true purpose of the legislation.*

The Supreme Court has embraced the purposive construction of statutes[45]. Very early in the life of LUA, in 1981 the Supreme Court per Udoma, JSC in *Nafiu Rabiu v. State* unequivocally stated that LUA should be given purposive construction. He said:

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42 "Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court" (1982). *Harvard Law Review*, 95(4), 892-915.

43 *Saraki v. Federal Republic of Nigeria L* (2016) LPELR-40013(SC), where the Supreme Court held that: *[T]he main object of statutory interpretation is to discover the intention of the lawmaker, which is to be deduced from the language used.*

44 *(1984) All N.L.R 219*

45 See *National Union Road Transport Workers & anor. v. RTEAN & ors. (2012) LPELR-7840(SC)*. The Court held as follows: *It is basic that one of the vital canons of interpretation of statutes is that a Court*

As a constitutional enactment, the Land Use Act must be given a broad and purposive interpretation in order to achieve the object of the legislature in enacting it.

Of course, this salutary approach of adopting the purposive approach in construing Sections 1 and 36 of LUA would mean considering together all the provisions of the LUA, especially the Long Title, Sections 5 (&6) and[46] thereof.

Indeed, the Supreme Court has held that the Long Title of a statute is an important part of it and may be relied upon in explaining its general scope and aids in its construction[47]. The Long Title of the LUA makes it clear that the purpose of the LUA is to vest the land within a state on the Governor as trustee for the purposes of allocating same to individuals resident in the State for residential, agricultural, commercial and other purposes. It is important to emphasise the allocation is to be made to residents (Nigerians and Non-Nigerians) and not only to nationals of Nigeria.

It is important to note that Section 1 of the LUA states as follows:

Subject to the provisions of this Act, all lands 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 provisions of this Act.

The phrase *"for the use and common benefit of all Nigerians"* has been interpreted to mean for the use and common benefit of only Nigerians. This interpretation clearly violated and raped the spirit of the LUA which was encapsulated in the Long Title. As a rule, statutes are construed to promote the general purpose of the lawmaker. Judges, therefore, are enjoined to consider not only the dry letters of the statute[48] but the spirit of the statute. Therefore, every clause in a statue should be

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of record should be minded to make broad interpretation or what is sometimes referred to as giving same a liberal approach. See: Rabiu v. The State (1980) 8-11 SC 130 at 151, 195. A Court should give a holistic interpretation to a statute as required by law. See Mobil Oil Nig. Plc v. IAL 36 Inc. (supra). A Court should aim at giving a statute purposeful interpretation; I dare say.

46 (1981) 2 NCLR 293 at 326.

47 *Bello v AG Oyo State* (1986) LPELR; 764 (SC).

48 *Omoijahe v. Umoru (1999) 5 SCNJ* 280 at 282.

construed with reference to the context and other clauses so as to make a consistent enactment of the whole statute[49].

If the phrase "*for the use and benefit of all Nigerians*" is considered with reference to the avowed intention to allocate land to individuals resident in the State as declared in the Long Title, it would not be difficult to come to the conclusion that Section 1 was not considering those eligible to hold interest in land. Section 1 merely created a trust in favour of all Nigerians as *cestuisque trust*, and the Governor as the trustee. The duty of the trustee has always been to manage and administer the trust property for the common benefit of the beneficiaries. The section only vested on the Governor all "*land within a state*" for him to administer as trust property "*for the use and common benefit of all Nigerians*" which is not different from the role of the trustee with respect to the traditional trust property. The Supreme Court in *Savannah Bank Nig. Ltd v. Ajilo*[50] brought to the fore the management aspect of the trust created by LUA; it held thus:

> *There has been no statute like this before. It took away the land from every 'landed gentry' and vested it for administration in the Military Governor of the State in which the land is situated for management and control for the benefit of all Nigerians. The Military Governor has not got the land vested in him as beneficial owner, far from it. The vesting in this instance is for administrative and management purpose, in trust, for all Nigerians. If the Land Tenure Law of Northern Nigeria, 1962 (Cap 59 Laws of Northern Nigeria, 1963) was revolutionary for its time, in a Region tagged, I believe mischievously if not dishonestly, feudalist, this Act is all embracing for it replaced 'indigenes of a State' for 'all Nigerians.' The whole land in each State is thus vested in trust in the Military Governor to be administered for the benefit of all Nigerians irrespective of where they may be. The management and control is in the Governor for land in urban areas and other land (in rural areas to be so designated in accordance with the Act) shall be under the management of the Local Government within which the lands are situated.*

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49 *Abioye v. Yakubu (1991) 6 SCNJ* 69 at 91.

50 (1989) 1 NWLR (Pt. 97) 305 at 351.

It is acceptable practice in managing of trust property that the trustee may lease the trust property to a person who is not a beneficiary[51], as long as the proceeds of the lease will be for the use and common benefit of all the beneficiaries. The incidence of the trust created via Section 1 of the LUA is not different from that of the traditional trust concept. Nothing stops the Governor from granting a lease of 99 years of part of the land within his state to an alien as long as the proceeds (in this case, the ground rent) will be for the use and common benefit of all Nigerians. Adopting this broad interpretation would be in accord with the general purpose of the LUA and would have made it easy for aliens with foreign capital to acquire land for investment purposes.

Sections 5, 6, 34 and 36 of the LUA made references to *"any person"* while Section 1 thereof talks about *"all Nigerian"*. The conundrum is whether the phrase *"all Nigerians"* as used in Section 1, may be used interchangeably with *"any person"* as used in Sections 5, 6, 34 and 36 of the LUA. Section 5 of LUA donated to the Governor the power to grant statutory rights of occupancy to *any person* for all purposes in respect of any land[52]. Sections 34 and 36 of the LUA provide for deemed grant of right of occupancy in respect of urban and non-urban areas respectively. Section 36 (1), (2) and (4) reads:

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 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 subsection 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 soil.*
3. ...

Most times that is the case.
Similar power was granted to the Local Government in respect of land in non-urban area.

4. *Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a customary right of occupancy issued by the Local Government, and if the holder or occupier of such developed land, at his discretion, produces a sketch or diagram showing the area of the land so developed, the Local Government shall, if satisfied that that person immediately before the commencement of this Act has the land vested in him, register the holder or occupier as one in respect of whom a customary right of occupancy has been granted by the Local Government.*

The Supreme Court in *Ononuju & Anor. v. A.G. Anambra State*[53], in interpreting Section 36, concluded that a holder or occupier of land whether developed or undeveloped in any area not in an urban area, under a recognised customary tenure before the commencement of the Act would continue to have the land vested in him and enjoy such rights and privileges on the land as if a Customary Right of Occupancy had been granted him[54].

The LUA intended by its provisions to preserve the existing land holdings or ownership created by the existing laws before its commencement of operation. The LUA recognises the rights and obligations of the land holdings before it came into operation whether they were constituted grant by communities, Local Governments or State Governments[55]. It has earlier been shown that, prior to the advent of LUA, aliens were permitted to hold interest in land subject to the Governor's consent first sought and obtained. The effect of Sections 34 and 36 as it relates to aliens who were holders or occupiers of any parcel of land before the enactment of LUA is that such aliens would continue to have the land vested in them as if right of occupancy had been granted to them. This point was well-appreciated by the Supreme Court in *Ogunola & v. Hoda Eiyekole*[56]. The court said "*that any foreigner who has validly owned or occupied any land before the act is deemed to be an occupier under the act*". This

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53 (2009) 10 NWLR (Pt. 1148) 182.

54 See also *Dzungwe v. Gbishe & Anor. (1985) 2 NWLR (pt.8) 528 at page 540.*

55 *Ibrahim v. Mohammed* (2003) 6 NWLR (Pt. 817) 615.

56 (1990) 4 NWLR (Pt. 146) 632.

clearly demonstrates that LUA never intended to deny aliens the right to hold interest in land.

It is not clear which of the above canons that the court used in coming to the decision in *Huebner's case*[37] that an alien has no legal capacity to hold interest in land in Nigeria. Had the Court adopted the literal rule, it would have given *"any person"* in Sections5, 6, 34 and 36 its literal meaning to include any person whether *"Nigerian or non-Nigerian"*. It is also not certain that they adopted the golden rule as the interpretation of *"any person"* to include non-Nigerians will not lead to any absurdity. The Court did not also refer to any mischief which non-Nigerians holding land in Nigeria caused to warrant the legislature disentitling them from holding interest in land. It is equally not in doubt that the court did not employ the purposeful approach in considering the sections. The only principle emanating from the decision is that the court considered itself bound to its earlier decision in *Ogunola v. Eiyekole*, despite its amplitude powers to overrule itself in deserving cases.

Section 46 of the LUA is very instrumental is determining the intention of the lawmaker with respect to aliens holding interest in land. This section has nothing to do with aliens who were already holding interest in land before the promulgation of LUA; those aliens are deemed grantees. This section only relates to transfer to aliens occurring after the promulgation of the LUA. The section ascribes to the National Council of States the responsibility of making regulations that will guide the transfer of any rights of occupancy to aliens. The section implies that interest in land may be transferred to aliens but expressly left the making of the regulations that will guide such transfer to The National Council of States. There is nothing to suggest that National Council of States has made any such regulation. In absence of the regulation, the best that may be said is that right of aliens to acquire interest in land after the advent of LUA is inchoate or in abeyance.

As espoused in *Nafiu Rabiu v. State*[38], applying the broad and purposive interpretational approach would better achieve the lofty ideals of the LUA. The *"modern principle"* of statutory interpretation which was professed by Driedger reads:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and*

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37 2017) LPELR-42078(SC).

38 *1980) 8-11 SC 130 at 151, 195.*

ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament[59].

Adhering to the above approach would mean that "*all Nigerians*" and "*any person*" used in the LUA should be read harmoniously and in a way not to do violence to purpose of the LUA. *All Nigerians* should be interpreted to mean all Nigerians while *any persons* should be given its widest meaning. Exposition of the relevant sections revealed that it was not the intention of the lawmaker to deny aliens right to hold property.

Interpreting the provisions of LUA to restrict aliens from holding interest in land would trigger interested aliens to acquire property in a circuitous manner. There is nothing in our corporate law that debars aliens from incorporating a company in Nigeria which will be known as a Nigerian company. This Nigerian company would be entitled to own interest in land in Nigeria. It follows, therefore, that nothing stops an alien from incorporating a Nigerian company with his spouse wherein he will hold 99 per cent of the shares and, thereafter, the new company will acquire an interest in land. The result would be that the alien, as the significant shareholder, owns the company while the company owns the interest in land. Assuming that the lawmaker intends the alien not to hold any interest in land, it would have been imperative to insert in the LUA that, where shares of a company are significantly owned by an alien, such a company will not be allowed to hold any interest in land in Nigeria.

Conclusion and Recommendation

Land has acquired international recognition which warranted its inclusion in the SDGs. The SDGs require international collaboration and investment, especially in agriculture, so that its dreams of 2030 will be achieved. This international effort is directed towards developing and least-developed countries.

International treaties recognise aliens and their rights to residence and work. Any legislation or policy restricting aliens from holding interest in land is unfair as the right to work of most occupation is tied to land. According to the US Supreme Court in *Sei Fujii v. The State* of California, such laws are discriminatory. The Courts, in interpreting such laws, much adopt a modern principle of interpretation which includes the scheme

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59 Driedger E. A. *The Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, at 87.

of the Act, the object of the Act and the intention of Parliament. When this is complied with, it will not be difficult to see that a harmonious interpretation of Sections 1, 5 (& 6), 34 (&36) and 46 of the Land Use Act did not restrict aliens from holding interest in land as found by the Supreme Court in *Gerhard Huebner v. Aeronautical Industrial Engineering and Project Management Company Limited*.[60]

The rights of an alien to own land in Nigeria is dependent on the National Council of States making rules to that effect. If, in 39 years of the LUA, the National Council of States is yet to make rule in that regard, it shows the leadership ineptitude of the Nigerian government. The Supreme Court should have spoken truth to power.

This paper urges the Nigerian Supreme Court to reconsider its position and toe the line of their counterpart in the United States, as interpreting the LUA in such a way to limit the rights to own interest in land in Nigeria to only Nigerians, is a technical way of shutting aliens out of Nigerian investment ambience. The implication is that an alien interested in investing in Nigeria must, first of all, incorporate a company and then use the company to acquire land in Nigeria for investment purposes. This, no doubt, will limit the opportunities available for economic development in Nigeria.

[60] 2017) LPELR-42078(SC)