AN ANALYSIS OF SOME CONSTRAINTS TO FOREIGN INVESTMENTS IN NIGERIA’S REAL ESTATE INDUSTRY

Real Estate Investment
September 30, 2016.

ABSTRACT:

This article examines the assurances provided by the Nigerian Government to foreigners who are interested in investing in the real estate sector and the limitations faced by foreign investors within the Nigerian real estate sector. This article also provides recommendations on how to address some of these constraints with particular attention to local regulatory practice and judicial authorities.

1. INTRODUCTION:

Foreign investment refers to the flow of capital from one nation to another as an interchange for the acquisition of significant ownership stake in domestic companies or other domestic assets. Typically, foreign investment denotes that foreigners take a somewhat active role in the management of their investment.

Section 567 of Companies and Allied Matters Act defines a foreign Company as a company incorporated elsewhere than in Nigeria. Section 20(4) of the statute provides as follows:

“Subject to the provisions of any enactment regulating the rights and capacity of aliens to participate or undertake in trade or business, an alien or a foreign company may join in forming of a company”.

1 Adetola Ayanru, Senior Associate Real Estate and Succession Department at SPA Ajibade & Co; Oghenekekwe Odima, Associate Real Estate and Succession Department at SPA Ajibade & Co and Ayi-Ekpeyong Imah, Legal Intern at S. P. A. Ajibade & Co, Lagos, Nigeria.


Similarly, Section 17 of the Nigerian Investment Promotion Commission (NIPC) Act\(^4\) provides that a non-Nigerian may invest and participate in any enterprise in Nigeria within the approved industries.\(^5\)

2. TYPES OF FOREIGN PARTICIPATION:

a. **Foreign Direct Investment**

   This is a mode of foreign investment whereby the investor participates in business in Nigeria directly as a registered company. The investor forms or joins in the formation of a company which is registered with the Corporate Affairs Commission in Nigeria.

b. **Portfolio Investment**

   This is a form of foreign participation under which a foreigner purchases shares in an existing company in Nigeria through the Nigerian capital market. This can be done through a stockbroker by purchasing shares in a public company or by private placement of shares of a private company.

c. **Exempted Companies**

   A foreigner or foreign company may participate in business in Nigeria as an exempted company. These companies are excluded from the general requirement that all foreign companies must be registered in Nigeria before they can participate in business transactions in Nigeria.

   Section 56(1) of CAMA provides that a foreign company or entity may be exempted from registration if it belongs to any of the following categories or types of companies.

   i. A foreign company invited to Nigeria by or with the approval of the Federal Government to execute a specified individual project.

   ii. A foreign company which is in Nigeria for the execution of a specific individual loan project on behalf of the donor organisation or agency.

   iii. A foreign government-owned company engaged solely in export promotion activities.

   iv. Engineering consultants and technical experts engaged in any individual specific project under contract with any of the governments of the Federation or any of their agencies or with any person, where the Government has approved such contract.

---


\(^5\) Nigerians and foreigners are restricted from participating in enterprises contained in the negative list. Such enterprises include production of arms, ammunition etc.; production of and dealing in narcotic drugs and psychotropic substances and production of military and paramilitary wears.
3. ASSURANCES, INCENTIVES AND RELIEFS TO FOREIGN INVESTORS IN NIGERIA:

The Nigerian legal and regulatory framework provides several guarantees and incentives to foreigners who invest in the Nigerian economy. These are as follows:

i. Free importation of capital into Nigeria, provided the capital is imported through an authorised dealer in freely convertible currency.\(^6\)

ii. Guarantees against nationalization or expropriation and payment of adequate compensation in the unlikely event of nationalization.\(^7\)

iii. Full repatriation of profits (net of taxes) and remittance of proceeds (net of taxes) and other obligations in the event of sale or liquidation of the enterprise or any interest attributable to the investment.\(^8\)

iv. Pioneer status certificate for the exemption from payment of tax for 3-5 years.\(^9\)

v. A Nigerian registered foreign company is exempted from paying taxes if it has paid tax in a commonwealth or another country that has signed the double taxation agreement with Nigeria.\(^10\)

vi. Tax relief on foreign loans.\(^11\)

vii. Tax exemption on interest on foreign currency domiciliary accounts in Nigeria accruing on or after 1 January 1990.\(^12\)

viii. Investment allowance to a company that is into the business of providing electricity, water, tarred roads or telecommunications services for the purpose of a trade or business.\(^13\)

4. THE CONSTRAINTS FACED BY FOREIGN INVESTORS:

Having considered the various incentives and assurances put in place to encourage foreign investment in Nigeria, the question is, to what extent has such assurances encouraged investment in the Nigerian real estate sector? It is obvious that irrespective of the reliefs available to foreigners who invest in Nigeria, the Nigerian

---


\(^7\) Section 25.

\(^8\) Section 24.


\(^12\) Section 23 (1).

\(^13\) Section 34 (1) & (2).
real estate industry has been deficient of adequate foreign investments that would accelerate the progress of the sector and the economy as a whole. Some of these constraints relate to compulsory acquisition of land, the challenges of perfecting title in some states of the Federation, restrictions in the grant of statutory rights of occupancy and the lack of adequate funding in the real estate sector.

A. Compulsory Acquisition

Although the right of every landowner to acquire and own property is preserved by law, several legal frameworks have been enacted to empower government to compulsorily acquire land from individuals, families, communities and companies. The first of such framework is the Land Acquisition Act of 1917. However, since the enactment of the 1917 Act, we also now have the Land Use Act of 1978 which empowers the government to revoke land allocation in appropriate cases. Under the Land Use Act, every right of occupancy is subject to compulsory acquisition by way of revocation. The grounds upon which a right of occupancy may be revoked are: (i) for overriding public interest, (ii) presidential declaration and (iii) breach of terms and conditions contained in the certificate of occupancy.

The procedure for revocation is as follows:

i. Revocation must be by the Governor of the concerned State or his delegate.

ii. Adequate notice must be given.

iii. Notice must be served on the holder.

iv. Receipt of the notice must be proved.

The law demands that the revocation provisions of the Land Use Act must be strictly complied with.

B. The Difficulty in Perfecting title in some States of the Federation

Having acquired a property, a foreign investor is expected to perfect the title over the property he has acquired. Perfection is the process of obtaining the consent of the Governor/Minister to the transaction and registration of title or interest in property. It is done in order to ensure compliance with the relevant statute. For instance, Section 22 of the Land Use Act prohibits alienation of a statutory right of occupancy without

---

14 Cap. 167 of 1917.
16 For overriding public interest like building of schools, hospitals, roads, etc.
17 Section 28 (1) of the Land Use Act 1978.
18 Section 28 (1), (4) & (5).
19 See section 28 and 44.
the consent of the Governor. In Nigeria, perfection of title involves three procedures, which are: obtaining the consent of the Governor of the State where the land is situated, stamping of the Deed of assignment and registration of the Deed at the land registry of the state where the land is located. The consequences of not perfecting the title document are as follows:

i. Failure to obtain the Governor’s consent to the transaction will make it inchoate thereby rendering the transfer of legal interest in the property void.  

ii. Failure to stamp the title deeds will make it unacceptable for registration and makes it inadmissible as evidence in court for the purpose of proving one’s title to the property.

iii. Failure to register the title document will cause the document to lose its priority status and make it inadmissible in evidence for the purpose of proving title to the land.

Although the benefits of perfecting title are numerous, the procedures for perfection of title in some states appear to be quite cumbersome. In some states in Nigeria, it takes more than a year to perfect title subject of a land transaction or to process the relevant certificate of occupancy. In view of the consequences of failure or negligence in perfecting such title, dishonest vendors have attempted severally to void land transactions on the basis that the requisite governor’s consent was not obtained.

C. Restriction on the grant of statutory right of occupancy

Right of occupancy is the right to use and occupy a land. It may be statutory or customary right of occupancy. Section 51 of the Land Use Act defines a statutory right of occupancy as a right of occupancy granted by the Governor. This can be granted either expressly or by operation of law (Deemed grant). The Act empowers the Governor to grant statutory right of occupancy in respect of any land whether in urban or rural areas for all or any purpose. However, there are certain restrictions on the grant of statutory right of occupancy. It has been the rule in Nigeria that non-

---


24 Section 5 (1) of the Land Use Act 1978.
Nigerians are restricted in their rights to acquire and alienate any interest in land in the country.25

D. **Lack of Adequate Funding**

There is a limited source of funding for real estate developers in Nigeria. Real estate development/investment is highly capital intensive and as such there is need for the Federal Government, State Governments and financial institutions to be highly disposed to granting financial support for laudable projects embarked upon by investors/developers. A huge impediment to real estate development is the high interest rates chargeable on loans by commercial banks which is a disadvantage for prospective developers.

5. **CONCLUSION**

Nigeria's construction and real estate sectors are growing at more than 10 and 12 percent annually. Successful real estate investors in Nigeria enjoy high returns on their investments especially in cities such as Lagos and Abuja.26 The real estate sector has huge potential which need to be adequately harnessed by potential foreign investors. Though there are sizeable challenges to overcome, Nigeria is an ideal location for real estate investment with her large population, rapid urbanization and a growing middle class. The Government is also taking steps to create better legal and regulatory framework to assist with the facilitation of foreign investment within the Nigerian real estate Sector. As a way of encouraging more capital inflow into the Nigerian real estate sector, there is a need for government to take advantage of technology wave by computerizing the various land registries and bureaus to enable easy and quick verification of title documents resulting in obtaining necessary land documentation and information less cumbersome.

---

For further information on this article and area of law please contact Adetola Ayanru/Oghenekewwe Odima/Ayi-Ekpeyong Imah at S. P. A. Ajibade & Co, Lagos by telephone (+234 1 472 9890), fax (+234 1 4605092) mobile (+234 807 819 1720) or email (aayanru@spaajibade.com); (oodima@spaajibade.com) and;

(aimah@spaajibade.com)

www.spaajibade.com

---

25 See generally Acquisition of Lands by Aliens Law Ch. A1 Laws of Lagos State, 2015 which provides that an alien cannot acquire land except with the approval of the Governor.