AN APPRAISAL OF MORTGAGE OF LANDED PROPERTY AS SECURITY FOR LOAN FROM BANKS IN NIGERIA

BY

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BEING A DISSERTATION SUBMITTED TO THE FACULTY OF LAW, AHMADU BELLOW UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DECREE OF MASTER OF LAW (LL.M)

JANUARY, 2016

DECLARATION

I declare this work is a product of my research efforts undertaken under the supervisor of Professor Y. Aboki and Dr. A. R. Agom and that no part of this thesis has been previously presented for the award of another degree elsewhere.

The information derived from other literatures have been duly acknowledged in the text and references provided.

CERTIFICATION

This dissertation entitled "An Appraisal of Mortgage of Landed Property as Security for Loan under Banking Law in Nigeria" meets the regulation governing the award of the degree of Master of Laws (LL.M) of Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to The Lord and my savior Jesus Christ. I also dedicate this work to my husband and children for their support, encouragement and understanding.

ACKNOWLEDGMENTS

My gratitude goes to my supervisors, Professor Y. Aboki and Dr. A. R. Agom who made sure they examined every aspect of this thesis.

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Above all, I thank the Lord Almighty the Alpha and Omega.

ABBREVIATIONS

All FWLR	-	All Federation Weekly Law Report
CA	-	Conveyancing Act
CTC	-	Certified True Copy
EDL	-	Estate Development Loan
FMBN	-	Federal Mortgage Bank of Nigeria
GIS	-	Geographic Information System
ID	-	Ibid, Ibidem
LUA	-	Land Us Act
NHF	-	National Housing Fund
NRNLR	-	Northern Region of Nigeria Law Report
Op. Cit	-	Opera Citato
PCL	-	Property and Conveyancing Law
PMIS	-	Primary Mortgage Institution
P(PP)	-	Paye (Pages)
SC	-	Supreme Court
SCNI	-	Supreme Court of Nigeria Judgment
SCNLR	-	Supreme Court of Nigeria Law Report
SSS	-	Section (Subsection)
TCC	-	Tax Clearance Certificate
WLR	-	Weekly Law Report
WNLR	-	Western Nigeria Law Report

TABLE OF CASES

Adetona and Anor vs Zenith International Bank Ltd. (2008) All FWLR, pt 440 p. 796. … … … … … … 130

Anambra State Housing Development Corporation vs Emekwe (1996) 1 NMLR (pt 426) p. 505 … … … … … … 36

Awojugbagbe Light Industry Ltd vs Chinukwe (1995) 4 NWLR. (pt 390) pp. 379-99, 436,489,542,309-310,438 … … … 54, 65, 66, 69,70,130

Adedeji vs National Bank of Nigeria Ltd. (1981) 1 NWLR. pp 212, 46-227 … … … … … … … … 59, 62

Abioye vs Yakubu (1991) 5 NWLR. pt. 130 … … … … 80, 145, 146

BON vs Aliyu (1999) 7 NWLR pt 612. Pp. 622, 634 … … 94

Bank of the North vs Babatunde (2002), FWLR, pt 119, pp. 1452, 1473 … … … … … … … … … 96

Bexwell vs Christie (1776) I. Comp. 395 at 396, 98 E.R. p 1150 … 105

B.O.N Ltd vs Akintoye (1999) 12 NWLR, 392, 403… … … 117

Bucknor Macleans vs Inlak Ltd (1980) 8-11 SC. … … … 67

B. Mangfang (Nig) Ltd vs MLOI Ltd (2007) 14 NWRL (pt 1053) p. 114… … … … … … … … … … 70

Barclays Bank DCO vs B. A. Olofintui and Anor (1961) MNLR, pp. 799 – 622… … … … … … … … … 34,36

B. Visioni Ltd vs National Bank of Nigeria Establishment (1985) 11 WNLR p. 8 … … … … … … … … 121-123

TABLE OF CASES

	Pages
C.C.C.T.C.S Ltd vs Ekpo (2008) 6 NWLR (pt. 1093) p. 369 … …	71
Chief Belonwu Ugochukwe vs Cooperative and Commerce Bank of Nigeria Ltd. (1996) 6 NWLR. (pt. 436) 524 … … … …	63
Da Rocha vs Hussain 1958 SCNLR p. 280 … … … … …	96
Dennings vs Edward (1961) AC. 245 … … … … … …	67
Eka-Eteh vs NHDS Ltd. (1973) 6 SC, p. 183 … … … …	108,115, 120
Exomo vs NNB Plc. (2007) All FWLR pt 368, p. 1032 … … …	93
Ejikeme vs Okonkwo (1994) 8 NWLR pt. 362, p. 266 … … …	135
F.C.S. vs Laoye (1989) 2 NWLR. (pt 106) 652 … … … …	59
Federal Mortgage Bank of Nigeria vs Oiloh (2002) All FMLR, pt 167…	28
International Textile Industries (Nig) Ltd vs Aderemi (1999) 11 WNLR. (pt. 614) pp. 264, 293- 294 … … … … … … …	53
Iwuji vs Federal Commission for Establishment (1985) 11 WNLR (pt 3) p. 497 … … … … … … … … … …	58
Ihekwooba vs ACB (1998) 10 NWLR pt 511. pp 563, 590, 608 …	115,116
Kachala vs Banki (2001) NWLR (pt 221). pp. 442, 466. … … …	59
Nig. Advertising Service Ltd vs UBA Plc. (1999) 8NWLR Pt. 616. Pp. 467, 546, 555 … … … … … … … … …	93,105
Nig. Housing Development Society Ltd vs Mumuni (1977) 2 SC. p. 57 … … … … … … … … … … …	94,107, 117-119

TABLE OF CASES

	Pages
Okonkwo vs Cooperative and Commerce Bank (Nig) Plc (2003) FWLR pt 154. p. 457 … … … … … … … …	98
Okunakwe vs Opera (2000) FWLR pt. 13, p. 2281 … … …	106
R vs Minister of Land and Survey (1963) NRNLR. p. 58 … … …	58
Savannah Bank Ltd vs Ajilo (1989) 1 NWLR (pt 97). pp. 305, 421, 540 … … … … … … … … …	7,55,60, 61, 64,72
Solanke vs Abed (1962) All NLR, pp. 92, 230 … … … …	69
Salako vs Federal Loan Board (1967). NCLR 266 at 268 … … …	92
S. O. N Okafor & Sons Ltd. vs Nigeria Housing Development Society (1972) All NLR. p. 362 … … … … … … … …	94
U.B.A. Plc vs Astra Builders Ltd. (2010) 5 NWLR (pt 1186). p.10 …	71
U.B.R.B.D.A vs Alka (1998) NWLR pt 537. p. 328 … … …	85
U.B.N Plc vs Ayodare & Sons (Nig) Ltd (2007) 13 NWLR (pt. 1052), 1052 … … … … … … … … … … …	70
West Africa Breweries Ltd vs Savannah Ventures Ltd. (2002) 5 SCNJ, pp. 269, 294, 1288. … … … … … … … …	111-117, 123, 131
WEMA Bank Plc vs Abiodun (2006) All FWLR, pt 317. p. 430 (2006) NWLR pt, p. 4, 112. … … … … … … …	94, 96
Yaro vs Arewa Construction Ltd. (2008) FWLR pt 400, pp. 603, 609, 634 … … … … … … … … … …	133,140
Zango vs Governor of Kano State (1986) 2 NWLR. (pt 22), pp. 409, 415 … … … … … … … … … …	59
Zakariyau Haruna vs Savannah Bank of Nig. Ltd. (1995) 2 NWLR. (pt 377), 326, 341 – 342 … … … … … … … …	68,69

TABLE OF STATUTES

	Pages
Bank and other Financial Institution Act Vol. 2 Cap B3, LFN 2004. …	4,19
Central Bank of Nigeria Act Cap C4, LFN, 2004. … … … …	19,41
Constitution of the Federal Republic of Nigeria 1991 (as amended) 2010. … … … … … … … …	3,85
Federal Housing Authority Act, Vol. 6, Cap F14, LFN, 2004 … …	23,26
FMB of Nigeria Act Vol. 6, Cap F16, LFN 2004 ... … … …	23,26, 41
Interpretation Act, vol 7, Cap 89, LFN, 1958. … … … …	39
Land Use Act vol. 7, Cap L5, LFN, 2004. … … … … …	3, 6, 33, 46, 47,56,79,83, 89,129,139
Land Instrument Registration Law, Cap 81, Law of Ogun, Kaduna State … … … … … … … … …	129
Mortgage Institution Act Vol. 8, M 19, LFN, 2004.… … … …	3, 19, 22
Property and Conveyancing Law, Cap 100, Law of Western Nigeria 1959. … … … … … … … … …	32,35,93,94, 105, 121,129 130, 131
National Housing Fund Act Vol. 11 Cap N45, LFN 2004. … …	23, 26
Registration of Titles Law, Cap 66, Laws of Lagos State, 1994. … …	140

ABSTRACT

This dissertation aimed at examining the problems associated with mortgage transactions in Nigeria which has created a lacuna in using Landed Property as security for loan. Land being one of the most important security for capital investment business and agriculture because of it's acceptability is used to raise loans and advance from banks. The sources of information relied upon here are, related text materials, Judicial authorities, Statutes, Journals and Conference papers. Based on this sources this research found that mortgage of Landed Property is beset with a lot of litigation, default, delay and high cost of registration, discouraging investors and bankers, making mortgage transaction difficult and unattractive. Therefore using land as security for loan under banking law in Nigeria is hampered by an interplay of institutional, economic and social factors, such as protracted litigation, default, delay and high cost of registration as a result of inefficient and ineffective laws and also the entrenchment of the Land Use Act in the Constitution. On this note, this research was concluded by recommending that there is need to review laws, policies guiding mortgage transactions. There is also the need for a well defined policy in mortgage transaction and institutions to ease the registration process, the need to separate the Land Use Act from the Nigeria Constitution so as to make room for flexibility of transfer, alienation of interest and obtaining Governors consent in mortgage of Landed property.

TABLE OF CONTENTS

Title page - - - - - - - - - - i

Declaration - - - - - - - - - - ii

Certification - - - - - - - - - - iii

Dedication - - - - - - - - - - iv

Acknowledgement - - - - - - - - - v

Abbreviation - - - - - - - - - - vi

Table of Cases - - - - - - - - - vi

Table of Statues - - - - - - - - - x

Abstract - - - - - - - - - - xi

Table of Content - - - - - - - - - xii

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study - - - - - - - 1

1.2 Statement of the Problem - - - - - - - 5

1.3 Aim and Objective of the Study - - - - - - 7

1.4 The Scope of Study - - - - - - - - 8

1.5 Justification - - - - - - - - - 9

1.6 Research Methodology - - - - - - - - 9

1.7 Literature Review - - - - - - - - - 10

1.8 Organizational Layout - - - - - - - - 16

CHAPTER TWO

THE DEVELOPMENT OF MORTGAGE INSTITUTION IN NIGERIA AND CREATION OF MORTGAGE TRANSACTIONS

2.1 Conceptual Clarification of Terms - - - - - 17

2.2 The Legal Framework of Mortgage Institutions in Nigeria - - 19

2.3 Mortgage Institutions- - - - - - - - 24

2.3.1 Federal Mortgage Bank of Nigeria- - - - - 26

2.3.2 Primary Mortgage Institutions - - - - - 29

i. Mortgage Bankers - - - - - - - - 29

ii. Mortgage Corporation of States - - - - - 30

iii. Commercial Banks - - - - - - - - 30

iv. Housing Schemes - - - - - - - - 31

v. Insurance Companies - - - - - - 31

2.4 Creating Mortgage Transaction - - - - - - 32

2.4.1 Legal Mortgages - - - - - - - 32

2.4.2 Equitable Mortgage - - - - - - - 34

CHAPTER THREE

MORTGAGE UNDER THE LAND USE ACT

3.1 Introduction - - - - - - - - - 38

3.2 Importance of Land - - - - - - - - 38

3.2.1 Importance of Land in the Mortgage Industry - - - 40

3.2.2 Land as Security for Loan Under Banking Law - - - 41

3.3 The Land Use Act - - - - - - - - - 43

3.3.1 The Land Use Act - - - - - - - 46

3.3.2 Consent - - - - - - - - 57

3.3.3 Consent Requirement in the Perfection of Legal Mortgages - 60

3.3.4 Outline of the Procedure to obtain the Governors Consent to Mortgage a property covered by statutory Right of Occupation in Kaduna State - - - - - 74

3.4 Developed Land - - - - - - - - 79

3.5 Undeveloped Land - - - - - - - - 81

3.6 Compensation for Development and Undeveloped Land - - 85

CHAPTER FOUR

Breach of Mortgage and Consequences

4.1 Introduction - - - - - - - - - 91

4.2 Enforcement of the Right of Mortgagee in the Event of a Breach - 92

4.3 Rights of a Mortgagor - - - - - - - 133

4.4 Death of the Parties to a Mortgage - - - - - - - 142

CHAPTER FIVE

SUMMARY, FINDINGS AND RECOMMENDATIONS

5.1 Summary - - - - - - - - - 143

5.2 Findings - - - - - - - - - 144

5.3 Recommendation - - - - - - - - 145

Bibliography - - - - - - - - - - 148

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The Legal atmosphere in any given society affects business operation. Business strives well when business legislation are well defined and aimed at creating a favourable environment for business to thrive. These pieces of legislation will further national goals, stimulating the economy, conserving foreign exchange, enhancing competition among business entities, by prohibiting monopolistic tendencies and unfair method of competition by firms. It will also ensure that contracts are entered into and executed, with justice done to the parties and their right adequately protected.

In Nigeria, there is a plethora of business and commercial laws that govern different aspects of business environment for example, banking, insurance, capital market, etc. At this point, it is important to know what "law is". For the purpose of this study, we shall adopt some definitions.

The definition by an eminent Nigerian jurist is that, "the law of a given society is the body of rules, which are recognized as obligatory by its members"[1]

[1] Elias T. O (1956), *Nature of African Customary Law*, Routledge and Kegan Paul, p.55

It is therefore the entire body of principles, norms or regulation that governs human conduct, the observance of which can be enforced.

Also "law" is defined by Cicero 1959 as, "the highest reason implanted in nature, which commands what ought to be done and forbids the opposite . . . what is right and that is also eternal, and does not begin or end with written statutes. .."[2]

This means natural or moral laws which accord with our basic sense of justice of what is wrong and right in the state of nature, as opposed to or in contrast with legislative or man-made law.

Another definition is that, "law is a body of rules designed or formulated to guide human conduct or action which are enforced among members of a given state or society."[3]

This refers to man-made law which exists to ensure legal order and due administration of justice in an organized society.

During the period of the state of nature, man and animals wondered about in the bush, forest, searching for food, a place to rest and eventually to lay head when it is night in order to sleep. Sleep at that time (state of nature) used to be at any place in the bush, like animals without shelter. This was prone to

[2] Fitzgerad P.J. (1966), *Salmond on Jurispruence*. Twelfth Edition, Sweet & Maxwell, London, p. 643

[3] Sanni A. O. (1991), Introduction to Nigerian Legal Method, Obafemi Awolowo University Press Ltd, Ile-Ife, Nigeria, p. 2

attack by animals, reptiles, birds and even stronger human beings. Later, the state was established or founded. This brought the nomadic lifestyle of the man of the state of nature to stagnation by way of shelter. By shelter, it means any enclosure used for resting or sleep built purposely by man for that purpose. This took the form of gathering of grass, sticks, and leaves. Later, with the advancement in technology of that time, mud, wood, stones were gathered to form enclosures and shelter . With further sophistication of technology, man developed skill to build houses, with wood, mud, stones, bricks, just like we have today, with all amenities for comfort and pleasure. Some people nowadays cannot have shelter without assistance from financial institution, though it is a right to have shelter in the Nigerian Constitution[4]. This leads us to the need for mortgages as transaction to secure loan from banks with any given security. The Mortgage Institution Act[5] provides for the establishment of mortgage institution in the country. S. 7 (a) provides that, "a mortgage institution shall not grant a loan or advance for the building, improvement of extension of dividing houses unless adequate securities have been taken on an existing property in respect of which the loan or advance is being granted"

[4] S. 315 (5) *Constitution of the Federal Republic of Nigeria 1999 (as amended) 2011, S. I Land Use Act, Vol. 7 1978 Cap. L 5, Laws of the Federation of Nigeria, 2004.*

[5] S. I (i) Mortgage Institution Act, Vol. 8, Cap. M19, Laws of the Federation of Nigeria, 2004.

The Bank and Other Financial Institution Act[6] also provides for the establishment of loan by banks as follows:

> *a bank shall not without the prior approval in writing grant any advance, loan, credit facilities against the securities of its own share or any unsecured advances, loan, or credit facilities unless in accordance with the bank rules and regulations and where any such rules and regulations require adequate securities such securities shall be provided or, as the case may require deposited with the bank.*

The securities are of diverse kinds, among which are land and other real estates, ships, debentures on assets of a company, life insurance policies, stocks and shares. "The general principles underlying these diverse forms of security are the same, regardless of the different modes of effecting them, as well as the fact that in some instance, the legal rules applicable vary from one kind of security to another"[7].

Landed property has been chosen as the security for loan for the purpose of this work for the following reasons. First, land is a more stable asset. Secondly, the value of land is more likely to appreciate than other assets. Thirdly, arguably, it is easier for the banks to enforce their security in the case of landed properties than other assets such as debentures, insurance securities, guarantees, stock and shares, charge over fixed deposit account,

6 Banks and Other Financial Institution Act, Vol. 2, Cap. B3, Laws of the Federation of Nigeria, 2004.

7. Goldface-Irokalibe I. J (2007), Low of Banking in Nigeria, 1st Edition, Malt House Press Ltd. Lagos p. 95.

trust receipts, bill of sale, letter of set off, trust deed[8]. Also physical control of the property is hardly necessary and its characteristic feature of immovability affords the creditor a reassuring grip on the security.

The banking industry is one of the major institutions involved in mortgage transactions and so there is need to ensure that it has the proper legal frame work for mortgage transactions to thrive. Alongside comes the Land Use Act, which is the single law that defines land rights, obligations and specific conditions precedent for any alienation or encumbrance of land rights in Nigeria.[9] Inspite of this, title to land appears to be more insecure than the ever was.[10] This research therefore seeks to unravel the problems and proffer plausible solutions considering the importance of mortgage transactions to the development of any nation.

1.2 Statement of Problems

As important as mortgage of landed property is to the economy of this nation Nigeria, it is beset with a lot of problems which has discouraged investors and bankers, making mortgage transactions difficult and unattractive. In view of which this research work has come up with the following research questions, that will eventually serve as an enablement to mortgage market development.

9. Smith, I. O (2003). The Land Use Act Twenty Five Years After Department of Private and Property Law. University of Lagos. Nigeria. Foler Prints p. 280.

10. Raime A. L "The Land Use Act 1978 A Blessing or Curse" Ikeja Bar Review, Vol. 1, Pt 1 & 2 p. 88.

i. The enactment of the Land Use Act has seriously eroded the relative security enjoyed by a creditor (the bank) in a mortgage transaction.

This is because of the provisions of some sections of the Act like Section 28 which deals with the power of the Governor to revoke rights of occupancy. The commercial banks are uncertain as to the value of a certificate of occupancy, which they are being asked to take as security for loan, bearing in mind that these certificates can be revoked at the Whims and caprices of the Governors.

ii. The Land Use Act appears to hinder economic progress.

This is because of the unwillingness and inability of banks and other financial institutions to give out loan on mortgage due to the fact that if a right of occupancy is revoked, a mortgagee has no right to the compensation payable, as the definition of "holder" or "occupier" in section 51 of the Land Use Act does not include a mortgagee.

iii. The Land Use Act has reduced considerable the efficacy of land as security for loan in a mortgage transaction and invariably it's value and reliability.

This is because of the consent requirement of section 22, which has been criticized for being responsible for the delay and cost which both mortgagor and mortgagee usually face in mortgage transaction.

iv. The uncertainties surrounding the enforcement of mortgage transactions has remained unsolved.

This is because default by mortgagor is a common practice due to the fact, that the laws on ground to protect mortgagees from defaulting mortgagors who breach their mortgage covenant and vice versa are ineffective.

1.3 Aim and Objectives of the Study

The fundamental aim of this research is to critically analyze and attempt to unravel the problems associated with mortgage transaction in Nigeria. In line with this, it seeks:

i. To identify the provision of the Land Use Act that has hindered the use of land as security for loan in mortgage transaction.

ii. To examine the reasons for default by mortgagors of their essential obligations and proffer plausible solutions that will make mortgage transactions more secure, favourable and rewarding.

iii. To examine the reasons for some of the hardship encountered by mortgagors and how it has discouraged prospective businessmen from embarking on a mortgage transaction to secure loan from banks.

iv. To identify hindrances to the enforcement of legal provision in mortgage transactions and examine the legal machinery and laws on ground and its inability and inadequacy to prevent, enforce and nip in the bud default by mortgagors to liquidate indebtedness. Presently the mortgage industry is struggling with government and law markers to put in place the right legal framework for the industry to be a safe haven, hence the foreclosure bill and mortgage finance corporation.

1.4 **The Scope of Study**

The research work seeks to look at the law affecting mortgage of landed property in Nigeria and if need be those of other countries for comparative purposes. This research also seeks to examine the hindrances, inadequacies and bottlenecks in mortgage transactions and the lack of a well defined legal framework.

1.5 Justification

It is expected that the practical outcome of this study will be beneficial to the following:

i. Those who need loan for investment in the economy of this nation, Nigeria.

ii. The banks and other lending institutions who provide credit facilities for prospective investors in the form of loan.

iii. The executive, judicial and legislative arms of the government who make policies, enact laws, amend, interpret and apply laws affecting mortgage transactions.

iv. Others include legal practitioners, legal luminaries, students, judges, accountants, financial institutions other than banks i.e (Finance houses).

1.6 Research Methodology

This research used the doctrinal research method, which is library oriented. The materials used are primary documents such as legislations (legislative enactment), decision of superior courts of records (case law) and secondary documents such as discussions, analysis and criticisms made by legal luminaries in textbooks and periodicals, articles and journals.

It also used the Empirical method, which is field oriented research through collection of facts and data through interview. This research was partly conducted in the Land registry in Kaduna State where some facts and data were collected from the principal estate officer (Deed) and deed registrar, bureau of lands, survey and country planning, Governors office, Kaduna.

1.7 Literature Review

It is a fact that volumes of scholarly work have been written on mortgages, but none has been able to put it in the perspective of this research work. Example of which are Goldface Irokalibe in his book, Law of Banking in Nigeria[11]. This research starts with this work because it seems to be the nearest text to this research topic as it relates to banking. However, on reading it, I could not get much from it. Though banking is the main subject matter of the book and not mortgages, the author committed a chapter of it to securities and mentioned land as one of the security for advances. It was rather brief, considering the fact that land is said to be and remains the most valued security for bank lending because of its reliability and the fact that its value appreciates over the years, unlike chattels and other moveable assets whose value depreciate from

11. Goldface-Irokalibe, I. J. (2007), Law of Banking in Nigeria, 1st Edition, Malt House Press Ltd. Lagos. p. 141

year to year. The omission of an indepth study of this topic in the book, "Law of Banking in Nigeria", has created a lacuna in that work inspite of the fact that it is a well researched and enlightening work in the area of the historical development of banking and banking law.

Aboki,[12] in his book "Introduction to Statutory Land Law in Nigeria", exhaustively defined land and traced the historical development of customary land tenure system in Nigeria, right down to the Land Use Act and its effect on landed property in Nigeria. However, though he also dealt with mortgage of landed property, he did not discuss the importance of land and security for advances in the banking industry in mortgage transactions. In Nigeria today and the world over, banks are one of the primary mortgage institutions dealing with mortgage transactions.

Elias,[13] in his book "Nigeria Land Law" which was published before the Land Use Act was enacted in 1978 made no mention on the Land Use Act. This is not unexpected. Though, he dealt with mortgages but did not link it up with banking law. This has created a lacuna in his work in Nigeria today.

12. Aboki, Y. (2010), Introduction to Satatory Land Law in Nigeria, Faculty of Law, A.B.U. Zaria, Enifab Graphic Press, Zaria, pp. 4- 75

13. Ellias, T. O. (1981), Nigeria Land Law 5th Edition, Sweet and Maxwill Ltd. London, p. 304 – 315

Smith,[14] in his book "Practical Approach to Law of Real Property in Nigeria", x-rayed the law of property and everything to do with land, including mortgages and the effect of the Land Use Act on land. But he failed to link it up with banks or other financial institutions. This creates a lacuna in his work that needs to be filled up to create a wholesome picture.

Smith,[15] in his book "The Land Use Act: Twenty Five Years After", focused his research on the effect of the Land Use Act and its effect on various strata of the economy and the legal system of Nigeria and its government, dealing with issues of customary land ownership right down to individual interest in land under the Land Use Act, housing and the Land Use Act and also criminalization of fraudulent dealings in land. Though he dealt with the importance of landed property as security for loan with the banks, he did not relate it with the banking law. But rather, his focus was on its relationship with or effect of the Land Use Act. This creates a lacuna in his work because land provides the physical substratum for social, economic interaction and is an instrument of social engineering which invariably should involve banking law.

14. Smith, I. O (2007) Practical approach to Law of real Property in Nigeria 2nd Edition Ecowatch Publications (Nigeria) Ltd. Lagos. pp. 353 – 422, 469 – 531.

15. Smith, I. O (2003), The Land Use Act: Twenty Five years After, Op. Cit pp. 279-368.

Imhanobi,[16] in his book legal Drafting and Conveyancing, which is a book on legal drafting, deed and conveyance, also dealt with mortgages, but limited it to its relationship with the Land Use Act, leading to the practical aspect of drafting a mortgage agreement. He did not go into an in-depth study of its importance in the banking sector of the economy. Not even the historical development or its relationship with banking law was looked into. This creates a lacuna in his work.

Adekanya,[17] in his book "Elements of Banking in Nigeria" did a good job by tracing the historical development of banking, banking law, and other elements of banking in Nigeria, which is expected of a banker. He went further to deal with securities for bank lending in Nigeria and actually focused on land as one of the most important security for bank lending. But unfortunately, not being a legal luminary, he did not relate it to the effect of the Land Use Act on landed property in Nigeria. This creates a lacuna in his work which was first published in 2002, long after the Land Use Act. In Nigeria, today you cannot do a research on land without the Land Use Act.

16. Imhanobi, S. O (2007), Legal Drafting and Conveyance 2nd Edition, Rock Link Industries Ltd, Maitama, Abuja, pp. 365- 406

17. Adekanya, F. (2010), the Elements of Banking in Nigeria 2nd Edition, fazBurn Publishers, Offa, Nigeria, pp. 203-308

Ohonbamu,[18] in his book "Introduction to Nigeria Law of Mortgages", dealt extensively on mortgage, tracing its historical development from customary law right down to the modern trend of mortgage in English form as at that time. Inevitably, the book having been published in 1972, is now somewhat outdated and does not reflect the recent trend. In not relating mortgages to the Land Use Act and law of banking, there is a big lacuna in that piece of research because it does not reflect the present position of things in Nigeria today.

Olong,[19] in his book, Land Law in Nigeria, just like the other authors on land law, extensively dealt with the historical development and ownership of land in Nigeria, with an exquisite exposition on the Land Use Act, but fell short of relating mortgages to the law of banking and finance, though he highlighted some aspects of the law of mortgage, this creates a lacuna in his research.

Adewale,[20] in his book "The Nigerian Land Law", traced the source of Nigerian Land Law, right down to the Land Use Act. A chapter of the book extensively dealt with mortgages, but failed to look at it as a security for advance from banks, which creates a lacuna in that work.

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18. Ohonbamu, O. (1972), Introduction to Law of Mortgages Carment and Co. Ltd. Yaba, Lagos pp. 3-132
19. Olong, A; M. D (2011), Land Law in Nigeria, 2nd Edition, Malthouse Press Ltd. Lagos. pp. 93-167
20. Adewale, T. (211), The Nigeria Land Law. Ababa Press Ltd. Sango, Ibadan, pp. 100-138, 201-245

Uwakwe,[21] in his book Land Use and Reform in Nigeria, x –rayed the Land Use Act, but made no mention of mortgage or land as security for advance from banks. This is not surprising since his focus was on the Land Use Act, 1978 and its effect on the Nigerian Land Law and Land Reform, and not on the use of Land as security for loan.

Nwabueze,[22] in his book "Nigeria Land Law", thoroughly researched the Nigerian Land Law and received English Land law right before the Land Use Act 1978. Though he dealt with mortgage, it is out dated because in Nigeria today you cannot talk about land without the Land Use Act and he failed to relate it to security for loan from banks, this creates a lacuna in his book.

Finally, *Dadem*,[23] in his book "Property Law and Practice in Nigeria", thoroughly researched property law and practice in Nigeria, a chapter of which dealt with mortgage practice in Nigeria. He looked into mortgage practice in Nigeria under the relevant laws like the Mortgage Institution Act, Land Use Act and others but as expected it was lacking in depth since it was compressed in a chapter thereby creating a lacuna in the work.

21. Uwakwe, A (2012), Land Use and Reform in Nigeria, Immaculate Prints, Gwagwalada, Abuja, pp. 8-224
22. Nwabueze, B. O. (1973), Nigeria land Law, Nwanife Publishers Ltd. Enugu. pp. 3-619
23. Dadem, Y. Y. (2009), Property Law and Practice in Nigeria Jos University Press Ltd. Jos, Nigeria pp. 115 -155

1.8 **Organizational Layout**

This thesis is divided into five chapters. Chapter one, starts with a look into the background of the study, statement of problem, objective, scope of study, significance of study, research methodology, literature review, organizational layout.

Chapter two, starts with clarifying certain terms after which it discusses the legal frame-work of mortgage institution, mortgage institutions generally, creating mortgage transactions.

Chapter three, discusses the importance of Land, Land Law in the mortgage industry, land as security for loan, the Land Use Act, consent requirement in mortgage transaction, developed land, undeveloped land and compensation.

Chapter four, discusses the enforcement of the rights of mortgagee in the event of a breach, rights of a mortgagor and death of parties to a mortgage.

Chapter five, discusses the findings, recommendations, and conclusion.

CHAPTER TWO

THE DEVELOPMENT OF MORTGAGE INSTITUTIONS IN NIGERIA AND CREATION OF MORTGAGE TRANSACTIONS

2.1 Introduction

Our needs automatically lead us to commerce and business and inevitably to banking. Mortgage transactions fall within this category and giving the importance of mortgage transaction to the development of any nation, it is important to understand the legal framework of mortgage institutions in Nigeria and the creation of mortgage transactions.

The Nigerian Mortgage Banking Industry came into existence in 1956 with the establishment of the Nigerian Building Society, now known as the Federal Mortgage Bank (FMBN). The bank operates as an effective vehicle for increasing the mobilization of long term funds, lending, volume and expansion of mortgage lending service to all segments of the Nigerian population. It is the primary institution specialized in retail mortgage banking in Nigeria.[1]

2.2 Meaning of Key Terms

At this point, it is important for us to understand some key terms. But before we proceed, it is worthy to note that mortgage is a transaction, in this case, business transaction between the mortgagor, the owner of the security (property) and the mortgagee the bank that gives the loan.

Black's Law Dictionary defines "security" as: A collateral given or pledged to guarantee the fulfillment of an obligation, especially the assurance that a credit will be paid (usually with interest) any money or credit extended to the debtor.[2]

1. S. I. (i) Mortgage Institution Act, Vol. 8, Cap. M19, LFN, 2004, Federal Mortgage Industry Report, 14th Dec. 2011. http://www.google. Com/search 17th March 2013.

2. Garner B. A (2004), Black's Law Dictionary 8th Edition Thompson West, United States of America, p. 1384

He defined "transactions" as: an agreement that is intended by the parties to prevent or end in which they make reciprocal concession[3]

He defines "loan" as: a thing lent for the borrower's temporary use, especially a sum of money lent at an interest.[4]

He defines "mortgage" as: a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment performance according to the stipulated terms. An instrument (such as a deed or contract specifying the terms of such a transaction. Loosely, the loan on which such a transaction is based.[5]

According to Smith relying on the words of Lord Lindley M.R. in *Santley vs Wilde*, defined a mortgage as:[6], "a legal or equitable conveyance of title as a security for the payment of debt or the discharge of some other obligation for which it is given subject to a condition that the title shall be re-conveyed if the mortgage debt is liquidated."

Chesire said[7], "a mortgage arises where land is conveyed or otherwise dealt with in order to secure the payment of a debt or the discharge of some other obligation."

3. Ibid; p. 1535
4. Ibid, p. 954
5. Ibid; p. 1031
6. Smith I. O (2007) Practical Approach to the law of Real Property in Nigeria 2nd Edition. Ecowatch Publication (Nigerian) Ltd. Lagos, p. 353, (1899) Ch 474, Amodu, N. A (2011), Efficacy of Mortgage Transaction under the Land Use Act Myth or Reality http:/ papers. Ssm.co/5013/papers cfn? Id-1843241. p.2, March 12th 2014, (1899) Ch. p. 474
7. Cheshire, G. (1972). Cheshire's Modern law of Real property. 9th Edition Butterworths p. 547

According to Megerry, "the essential nature of a mortgage is that it is conveyance of a legal or equitable interest in property with a provision for redemption."[8]

"Bank" is defined as:

> *A quasi public institution, for the custody and loan of money, the exchange of bills and drafts, and the issuance of it's own promissory notes, payable to bearer, as currency, or for the exercise of one or more of these functions, not always necessarily chattered, but sometimes so, created to subservice public ends, or a financial institution regulated by law . . . A bank is wholly a creature of statutes doing business by legislative grace and the right to carry on a business through the agency of a corporation in a "franchise" which is dependent on a grant of corporate powers, by the state.*[9]

By implication of Section 55 of the Central Bank of Nigeria Act the definition of bank in the repealed Banking Act 1990 still applies Section[10] 43 defines a bank as any person who carries on banking business. It further defines banking in the following words.

> *Business of receiving monies from outside sources as deposits irrespective of payment of interest or the granting money loans and acceptance of credits or the purchase of bills and cheques or the purchase and sale of securities for, of others or the incurring of the obligation to acquire claims in respect of loan. . .*

2.2 The Legal Framework of Mortgage Institutions in Nigeria

Mortgage institutions in Nigeria are largely regulated by the provision of the mortgage institution Act, the preamble of the Act states that the object of the Act is to make provision for establishment and licensing of mortgage institutions to grant loans and advance to individuals for the purchase or construction of a dwelling house; improvement or extension of an existing dwelling house, and to accept savings and deposits from members of the public and pay interest on the deposit.[11]

8. Garner B. A Op. cit, p. 154.
9. BOFIA S.66, Vol. 2, Cap B3, LFN 2004, , Central Bank of Nigeria Act, Cap. C4, LFN, 2004
10. S. I. (i) Mortgage Institution Act, Vol. 8, Cap M19, Ibid.
11. Ibid S. I. (1)

Failure to obtain a licence before engaging in mortgage business is an offence with a penalty on conviction to a fine of N100 for each day during which the offence continues[12]. A licence is obtained by way of a written application through the Federal Mortgage Bank to the Minister in charge of Works and Housing. The document required to accompany the application depends on whether the company was already in existence and engaged in other business, other than mortgage business. Where it is, section (i) of the Act will not apply[13] but where the company was already in existence and engaged in other business than in mortgage business, the following documents are required[14].

i. a copy of the company's certificate of incorporation, memorandum and articles of association certified by a director, secretary or other senior official of the company.
ii. a copy of the latest balance sheet of the company.
iii. a feasibility survey report in respect of the company's proposal to engage in mortgage business
iv. Such other particulars as may be called for by the Federal Mortgage Bank.

12. Ibid S. 1 (3)
13. Ibid. S. I. (2)
14. Ibid. S2 (2) (a)

In case of a company not yet engaged in any business, the following documents would be required[15]. A copy of the company's certificates of incorporation, memorandum and articles of association certified by the Registrar of companies.

i. A feasibility survey report in respect of the company's proposal to engage in mortgage business and

ii. Such other particulars as may be called for by the Federal Mortgage Bank.

The required minimum paid -up capital for a mortgaged institution or company is not less than N5,000,000[16].

A company which is licensed as a mortgage institution, has the following powers in operating its business[17].

a) To grant loan and advance to an individual for the purchase or construction of a dwelling house;

b) To grant loan and advance to any person for the improvement or extension of a dwelling house;

c) To accept saving and deposits from the public and to pay interest there on.

15. Ibid. S. 2(2) (b)

16. Ibid S. 4

17. Ibid S. 5 (1)

In exercising its operational powers, a mortgage institution is required to conduct proper evaluation of the mortgage loan proposal submitted to it and monitor the construction or extension of any dwelling house in respect of which a loan is granted.[18] However, it has certain restrictions when granting loans. These are[19]:

(a) It cannot grant a loan or advance for the building, improvement or extension of a dwelling house unless adequate security had been taken on an existing property or the property in respect of which the loan or advance is being granted.

(b) It cannot grant to any person any loan, advance or credit facility or give any financial guarantee or incur any other liability) on behalf of such person in excess of twenty percent of the sum of the paid up capital and statutory reserves of the mortgage institution.

(c) It cannot grant any loan, advance or credit facility on the credit facility on the security of its own shares; and

18. Ibid. S. 5 (1)

19. Ibid. S. 5 (7)

(d) It cannot engage in any commercial agricultural, industrial or any other undertaking except as permitted under this Act or as the mortgage institution may in any way acquire in the course of the satisfaction of debts due to it.

The Mortgage Institutions Act, which regulates the framework for the establishment of Primary Mortgage Institution (PMIS) by private entrepreneur does not work in isolation but in partnership with the National Housing f und Act[20], Section 8 states:

- a mortgage institution registered under the Mortgage Institution Act shall utilize the proceeds from the fund to finance mortgage lending in accordance with the provisions of this Act and the Mortgage Institutions Act. It also works in collaboration with the Federal Mortgage Bank of Nigeria Act ,[21] Section 5 of which states:

The function of the Mortgage Bank shall be to

(a) Provide long-term credit facilities to mortgage institutions in Nigeria at such rates and such terms as may be determined by the Board in accordance with the policy directed by the Federal Government, being rates and terms designed to enable the mortgage institutions to grant comparable facilities to Nigerian individuals desiring to acquire houses of their own.

20. National Housing Fund Act Vol. 9, Cap N45, LFN 2004

21. Federal Mortgage Bank of Nigeria Act Vol. 6 Cap F. 16, Ibid.

(b) License and encourage the emergence and growth of the required number of viable secondary mortgage institutions to service the need of hoi; sing delivery in all parts of Nigeria.

(c) Encourage and promote the development of mortgage institutions at rural, local, state and Federal levels;

(d) Supervise and control the activities of mortgage institutions in Nigeria;

(e) Collect, manage and administer the National Housing Fund in accordance with the provisions of the National Fund Act;

(f) Do anything and enter into any transaction which in the opinion of the Board is necessary to ensure the proper performance of its function under this Act.

2.3 Mortgage Institutions

In Nigeria today, dousing is still a big issue unlike other countries like the United States of America and Ghana. Comparatively speaking and this is because, houses are secured mostly through mortgage facilitates. This is due to the intermediate nature of their financial system. Long term loans are extended to citizens by banks with which they pay for the houses. The loans are long term

in nature thereby shielding the citizens from the hardship of repaying.[22]

When housing works, the whole economy works. From mortgage companies to building materials, sellers to brick layers and carpenters and mason, the benefits in terms of job creation and overall economic development are immense.[23]

In Nigeria, latest on the list of mortgage institutions is the incorporation and launching of the Nigeria Mortgage Refinance Company Plc (NMRC). This company is designed to help home/property owners to refinance the mortgage expenses if interest rates drop; using the same property as security or collateral[24].

More importantly, the Jonathan administration sought to use the company promoted by the Federal Government in partnership with the private sector to make it easier for many Nigerians to own their own houses. This is central to the president's vision for improving the economy and improving the welfare of Nigerians generally.[25]

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22. FMBN – Reform and Challenge. http;//www.fmbn.gov.ng. 17th March, 2013.
23. Ngozi Okonjo – Iwala, Minister of Finance at the Launching of Nigeria Mortgage Refinance Company on 16th January 2014, htt://www.proshareng com/news/21979, 12th March 2014.
24. Ibid
25. Ibid

2.3.1 Federal Mortgage Bank of Nigeria

The Nigeria Mortgage Banking Industry came into existence in 1956 with the establishment of the Nigeria Building Society, now known as the Federal Mortgage Bank of Nigeria (FMBN)[26]. The Bank operates as an effective vehicle for increasing the mobilization of long term funds, lending, volume and expansion of mortgage lending services to all segments of the Nigerian population[27]. The Federal Mortgage Bank of Nigeria (FMBN) started management and administration of the contributory saving scheme known as the National Housing Fund (NHF) established 1992[28]. The National Housing Fund (NHF) is a pool that mobilizes long term funds from Nigerian workers, banks, insurance companies and the Federal Government to advance loans at soft interest rates to its contributors[29].

In 1994, the Federal Mortgage Bank of Nigeria, with the promulgation of the FMBN Act (1993) and the Mortgage Institutions Act (1989) was accorded the status of the apex mortgage institutions and thus ceded its retail functions to an autonomous company, Federal Mortgage Finance Limited, which

26. Nigeria Mortgage Banking Industry Report, 14th December, 2011 htt://ww.google.com/search 17th March 2013.
27. Ibid.

28. National Housing Fund Act Vol. 9 Cap N45, Op. cit.
29. Federal Housing Authority Act, Vol. 6, Cap. F. 14, LFN, 2004

is carved out of the FMBN, itself fully owned by the Federal Government.[30]

The FMBN is a secondary mortgage institution which plays the critical role of developing a robust finance system for the country. To meet its mandate, the FMBN has shifted operational emphasis to expand its functions from only social housing on lending under the NHF to include commercial on lending for housing, commercial mortgage financing, mortgage purchasing and warehousing and mortgaged-backed securitizations. It also finances mortgage created by primary mortgage institutions under the National Housing Fund Scheme and also gives Estate Development Loan (EDL) to real estate developers.

More aptly put, the main functions of the bank is the provision of long term credit facilities to mortgage institutions in the country at such rates and upon such terms as may be determined by the Board of the Bank to enable mortgage institutions grant comparable facilities to Nigerian individuals desiring to acquire houses of their own. The mandate of the bank may broadly be stated as follows:

30. http://www.fmbnigeria.org on December 15, 2008. 17th March 2013.
31. Corporate History/Federal Mortgage bank of Nigeria. http://www.fmbn.gov.ng./d 17th March, 2013

i. Linking the capital market with the housing market.

ii. Encouraging the emergence and promoting the growth of viable primary mortgage loan institutions, to serve the needs for housing delivery in Nigeria

iii. Mobilizing domestic and foreign funds into the housing sector in Nigeria

iv. Collecting and administering the National Housing Fund in accordance with the National Housing Funds Act .[32]

In the case of *Federal Mortgage Bank of Nigeria vs Olloh*,[33] the Supreme Court observed that:

> *There is nothing whatsoever in the Federal mortgage Bank Act to suggest that the appellant is an agency of the Federal Government. It is no doubt true that the said Bank was created by an Act of the National Assembly and therefore at best considered the property of the Federal Government with the sole aims of providing financial assistance in the form of long term facilities to "Nigerian individuals desiring to acquire houses of their own and the granting, of long-term credit facilities to mortgage Institutions with a view to enabling those institutions to grant comparable facilities to Nigeria individuals.*

a. The facility granted through its long term and the interest is very low.

32. Corporate History/Federal Mortgage Bank of Niger. Htt://www.fmbn go.ng/d 17th March, 2013

33. (2002) FWLR, part 107, p. 1244. The major issue in the case was whether the Federal Mortgage Bank was an agency of the Federal Government, S. 30 of the Constitution. (Suspension and Modification Decree No. 107 of 1993 to make the action triable by the Federal High Court and not the State High Courts as Contended by the appellant.

b. The bank has branches in many cities in Nigeria so it is widely spread and easily accessible to many Nigerians.

c. Since the bank is a wholly owned government concern, it has some government support and encouragement to carry out its activities. In fact, its share capital is largely owned by the Federal Government and agencies of the Federal Government[34].

2.3.2 Primary Mortgage Institutions

Aside the Federal Mortgage Bank of Nigeria which is a secondary mortgage institution, we have other primary mortgage institutions set up for mortgage and other banking transactions.

i. Mortgage Bankers

These are banks set up with the sole and singular purpose of providing Nigerian with facilities to own their homes. They are owned by shareholders who have invested in it to carry out the business of mortgage in Nigeria. Where money is advanced by these banks, the title documents of the properties are deposited with them as security for the loan and are released after the repayment of the money advanced and the security. Examples of these banks are Aso Savings and Loans Plc and Union Homes Loans and savings Plc.

34. The new ownership Structure of the Bank is comprised as follows – Federal Government of Nigeria. 50% Central Bank of Nigeria-30% and Nigeria Social Insurance Trust Fund 20%

Their main difference from other banks is that while other banks may deal with other forms and types of banking businesses not related to banking, the mortgage bankers are primarily engaged in mortgage banking only.

ii. **Mortgage Corporation of States**

These are established by the State government. They are involved in developing houses and selling them to members of the public. Payment may be installmental or at once. Example is Lagos State Property and Development Corporation and Plateau State Investment and Property Company Limited, et-cetera. Properties developed by them may be sold to members of the public by way of some mortgage arrangements whereby installmental payments are made to corporations and the title documents released when payments are completed. These Corporations may also be allowed by the laws establishing them to give out loans for construction or purchase of houses. Titles granted by them are secured because the government acquires the land, secures the title, builds the houses before selling them.

iii. Commercial Banks

They make advances for commercial transactions generally and not just mortgage arrangements. Any person may approach a commercial bank for loan for business. The bank may require

some real property as security before it advances any sum of money to the borrower. The title deeds to the property are deposited with the bank. Commercial banks have advantages of being located in many parts of the country. They however have the following disadvantages:

a. They lend at a very high interest rates
b. They give loans on short term basis while investments on properties take longer periods before profits are realized.
c. They are largely concentrated in cities - unavailable to most Nigerians who reside in non-urban areas.

iv. Housing Scheme

These are housing schemes provided by employers through which loans are provided to individuals to acquire houses after a long period of deductions from the employee's emoluments, or to be deducted in the future. The arrangement may also involve banks advancing facilities to employers to be given to their employees. In consideration, the banks make deductions from the salaries of the employee over a period of time.

v. Insurance Companies

Insurance companies may provide loans to a holder of a life insurance policy to purchase a house. The insurance company may

also serve as a guarantor to a holder to borrow from a commercial bank.

2.4 Creating Mortgage Transaction

The Land Use Act preserves the existing laws on mortgages instead of stipulating how a mortgage shall be created. In the early days of common law, creating mortgages was through pledges. Lenders enter into possession of the land and take rents and profits in discharge of both the principal and interest called (Vivum Vadium) or living pledge (Since it automatically discharged the entire debts) or in discharge of the interest only (called Mortum Vadium) or dead pledges since it did not affect the gradual liquidation of the debt).

There is need at this point to look at the mode of mortgages intended in modern times as this will affect its redeemability

2.4.1 **Legal Mortgage**

Creating a legal mortgage may involve a freehold or leasehold interest whether under the common law, PLC[35] (Property and Conveyancing Law) or the Act[36]. Ac common Law, Legal Mortgages are created on a freehold interest either by transfer or conveyance of the whole mortgagors interest to the mortgagee.

35. Amodu, N. A. Op. cit. at p. 3

36. There is the property and convayancing Law (PCL) Cap 100, LWN, 1959 of the Old Western and Mid western Region Applicable in the State Created there from. Many other states have property legislation in existence, e.g, Cap 23 Laws of Abia State of Nigeria 1999. Cap 23 Laws of Abia State of Nigeria 1999. Cap. 100 Law of Akwa Ibom State of Nigeria. 2000, Cap 128 Laws of Kwara State of Nigeria. 1994,/cap 122 Laws of Bauchi State of Nigeria 1991. Cap 114 Laws of Kebbi State Nigeria 1996, to mention a few.

Mortgage transactions on leasehold interest are by way of assignment. Under the PCL, legal mortgages are created on a freehold interest by granting of a lease by the mortgagor to the mortgagees, since outright conveyance of the whole legal estate in a mortgage is disallowed. However, mortgages on leasehold interest under this PCL regime is by way of creating a sublease in favour of the mortgagee. Generally though whether the mortgagor has a freehold or lease hold interest in the property, he may create a charge by deed expressed to be by way of legal mortgage.[37]

The Land Use Act came in 1978 to modify drastically the form and modes of creating mortgagees. It swept away unlimited interest in land substituting it with a statutory Right of Occupancy in Urban Area except Customary Right of occupancy, which means that in the Rural Areas it can be granted for an indefinite time frame similar to fee simple.[38]

All interest in land like freehold and leasehold as understood under the common law has been substituted for a usufactory right. Hence under the PCL states, reference is made to sublease or sub lender leases of interest for the hither to freehold or leasehold or

37. Land Use Act, vol. 7, Cap. L5, LFN 2004.

38. Section 4 &8, and Use Act, Vol. 7, Cap. L5, LFN 2004.

leasehold estates. While for conveyance or assignment of freehold or leasehold estate of common law states are substituted for as segment or both[39].

2.4.2 **Equitable Mortgage**

Unlike Legal Mortgages, there is no variation amongst the states in Nigeria as to the creation of an equitable mortgage. Equitable mortgages are created in anyone of the following ways.

1. Delivery of title Deed: Although a mortgage is an interest in land and therefore, not enforceable in the absence of a written memorandum or act of part performance, an equitable mortgage is created by delivery to the creditor the title deeds relating to the borrower's land provided that it is intended to treat the land as security for loan[40].
2. An actual deposit, though essentially is not itself sufficient, the depositor must go further and prove by parol or by written evidence that the deposit was intended to be by way of security[41]. In the case of ***Barclays Bank DCO vs B.*** *A.* ***Olofintuyi*** *and Anor*[42] the courts ruled that where it can be proved that it is intended to

39. Amodu, N. A. Op. Cit., pp 5, 89. Ibid p. 6, S. 108(1) of the Property and Conveyancing Law (PCL) Cap 100 LWN 1959
40. Ibid at p. 6
41. Olong A. M. D. Op. Cit p. 269
42. (1961) MNLR 799-622

treat land as security, the mere deposit of title documents even without a memorandum of deposit constitutes an equitable mortgage and the onus of proof to the contrary is with the depositors. A simple deposit of title deed accompanied by a memorandum of deposit need not be stamped or registered. In practice however, if the delivery of title deeds is accompanied by a memorandum under seal, the equitable mortgagee is entitled to exercise the power of sale under the law[43]. But since an equitable mortgagee cannot convey the legal estate to a purchaser, it is usual to insert a power of Attorney or a declaration of trust, or both, in the memorandum to enable the equitable mortgagee deal with the legal estate.

Also an equitable mortgage over land by way of deposit of title deeds does not constitute a transfer of title in land to the mortgagee, but is rather treated as constituting a contract to execute a legal mortgage, and as such does not require the consent of the Governor or the registration of the mortgage at the lands or companies registry to be valid[44].

43. Ibid

44. The Statutory power of sale under the conveyancing and Law of property Act 1981, Property and Conveyance Law Cap. 100 L.F.N 1959. And Under the property Legislation of the various states in Nigeria are applicable

3. Agreement to create a legal mortgage. Where this occurs the mortgagee can commence an action for specific performance to ensure that the mortgagor executes a legal mortgage in favour of the mortgagee and gives a right to the equitable mortgagee to convey the legal interest to the buyer after he has sold it[45].
4. A holder of an equitable interest can only create an equitable mortgage i.e. on the interest he holds[46].
5. An "imperfect legal mortgage" (for example one in which the consent of the Governor is yet to be granted) will amount to an equitable mortgage[47].
6. By Operation of Law

Apart from legal and equitable mortgages the court may infer a mortgage relationship from an arrangement involving installmental payment by an allottee of property in circumstance where it would be equitable to revoke such allotment for failure to pay an allotment. In *Anambra State Housing Development Corporation vs Emekwe*[48] the Supreme Court held that a statutory corporation with authority to build

45. Anyenechi O. Enforcement of security interests in banking transaction. Bank Finance and Regulation. Multi Jurisdictional Survey, Nigeria. Templians, Lagos. Yemi anyanechi @ templars. Law.com
46. Barclays Bank D.C.O. vs B. A Olofintuyi and Anor (Op. Cit) of the position under the property of Western Nigeria 1959 and the property Legislation of various State in Nigeria when the subsequent mortgage holds a legal as opposed to equitable mortgage.
47. Dadem Y. Y. (2009), Property Low Practice in Nigeria. Jos, Nigeria University Ltd. p. 127
48. (1996) 1 NWLR (Pt. 426) 505

houses and sell on terms to people, was a mortgagee to the buyer whom the court considered as mortgagor entitled to retain his equity of redemption even after the contractual date for payment had passed. As such, the court held that statutory corporation as mortgagee could not revoke an allotment when the allottee failed to keep up his instalmental payment for some weeks.

CHAPTER THREE

MORTGAGE UNDER THE LAND USE ACT

3.1 Introduction

The importance of land cannot be over emphasized. From time immemorial the existence of other forms of life depends on it. It can therefore be rightly called the mother of all property. The Bible makes an earlier reference to the importance of land thus:

> *And God said, let the waters under the heaven be gathered together unto one place, and let the dry land appear: and it was so.*
>
> *And God called the dry land Earth: and the gathering together of the water called the seas: and God saw that it was good.*
>
> *And God said, let the earth bring forth grass, the herb yielding seed, and the fruit tree yielding fruit after his kind, whose seed is in itself, upon the earth: and it was so*[1].

The above reference shows that it was necessary in the order of priority for God to create land first before the life that will be sustained by it.

3.2 Importance of Land

At common law, land is not only the physical soil, it includes everything permanently attached to the soil or permanently fastened to anything which is attached to the soil. According to this legal principle, he who owns land owns what is attached to it. The Roman Maxim is *"quic quid plantatur solo solo cedit"*. This maxim also means that land can

1. King James Bible Gen. 1:9-10

be owned vertically or horizontally, that is upwardly extending to the air space[2].

This law today applies in Nigeria because it was received and adopted as part of Nigerian Law. The statutory definition of land can be found in S. 3 of the interpretation Act[3], which states that "immovable property or lands include land and everything attached to the earth or permanently fastened to anything which is attached to the earth and all chattels real". The definition in English and Nigeria law is very wide. This explanation is very important in view of the role land plays in the life of mankind.

Inspite of the vast unending expanse of land, land has been the source of many disputes in Nigeria and worldwide. For example, Modakeke -Ile-ife, Tiv - Jukun of Taraba State, Egbira-Bassa, Aguleri-Umureri, etcetera. At the international level, we have Nigeria-Cameroon land dispute over Bakkasi Peninsula, Palestine-Isreal over Gaza strip, Pakistan-India over Kashimir. In the past, a family with a large tract of land was and is still considered rich. Land is synonymous with wealth and was used in the past to acquire services and goods which are now acquired by use of money. Land has always been useful. Anybody who has it can use it not only for economic purpose, but for political leverage over those who haven't just like any

2. Aboki, Y (2010), Lecture Notes on Nigerian Customary Land Law, Dept. of Public Law, Faculty of Law, Ahmadu Bello University, Revised Edition p. 22.

3. Vol. 7, Cap 89 of the Laws of the Federation of Nigeria 2004

other property. For example, the vesting of state lands in the governors by the Land Use Act empowered them not only economically, but politically too. Conversely, the dispossession of land from chiefs, Obas and Emirs was viewed as demunition of power of administration[4].

3.2.1 Importance of Land in the Mortgage Industry

In view of the fact that Land provides the physical subtratum for all social and economic interaction, Land is inevitably an expression of social status and an instrument of social engineering.

Everyone, even the truly homeless live somewhere and each therefore stands in some relation to the land as occupier, holder, tenant, licensee, squatter, pledgee, chargee or mortgagee. In this way, Land impinges upon a vast area of social orderings and expectations, exerting a fundamental influence on the lifestyles of even ordinary people. Apart from the residential dimension, land has a huge economic significance in terms of providing security for capital, investment, business and agriculture[5]. This has made it a much sought after security for investors and the banking industry to secure a loan.

Also, they say change is the most constant thing in life and with time, there must, inevitably be changes. Nigeria is no exception to this. The growth of

4. Aboki, Y. (2010), Nigeria Customary Land Law, Enifab Graphic Press, Zaria, pp 6-7.
5. Smith, I. O (2003), The Land Use Act Twenty five years after, Dept. of Private and Property Law, University of Lagos, Nigeria, Foler Prints, p. 301

the Nigerian economy due mainly to the discovery of oil brought about urbanization, population pressure and made a large number of people and government wealthy.

This development required Land to expand facilities, introduce new ones, build residential houses, public buildings, industries and other social amenities. The provision of necessary infrastructure like roads, offices, airports, parks, barracks and other institutions also put pressure on the need for land[6].

In the light of the above, it is no wonder that land is one of the most sought after security in the mortgage industry in comparison to other securities like shares, stocks, debenture over assets.

3.2.2 Land as Security for Loan under Banking Law

The Federal Mortgage Bank of Nigeria operates as an effective vehicle for increasing the mobilization of long term funds, lending, volume and expansion of mortgage lending services to all segments of the Nigerian population. Its overall mandate is to promote the delivery of affordable and modern houses to Nigerians as provided by its enabling statute.[7] Apart from the Federal Mortgage Bank of Nigeria, one of the key instrument of the Central Bank[8] is to initiate credit limit legislation for bank lending to the banks and financial institutions in the country. This initiative was geared towards making credit available to neglected national areas such as

6. Ibid
7. S. 5 FMBN Act, Op.Cit
8. Central Bank of Nigeria Act, Vol. 1, Cap C 4, Op. Cit

agriculture, manufacturing, housing etc so as to foster economic growth of the nation.

With the foundation provided by the banking industry for mortgage transactions to thrive, especially using land as collateral for loans from the banks, it is important to know that sound lending is based on the premise that the borrower will repay his debt as agreed out of the funds generated from operations and from other known sources. Prudence, however demands that security should, in most cases, be taken as a form of insurance in case there may be any unexpected development which disturbs this normal sequence and jeopardizes the bank's position[9]. The ability to produce tangible security (land) is not the most important criterion for granting credit facilities as the offer of security does not weaken the need for a thorough evaluation of the proposal[10]. This does not mean that security is unimportant. After the bank manager has thoroughly evaluated the proposal, he is able to assess what risk the bank runs in lending to the customer. It is upon this assessment that he bases his request for security. This information is important to both the mortgagor and mortgagee, so that they both do their homework well before entering into the mortgage transaction[11].

Security should never be looked upon as the primary source of repayment. An advance must be granted on the strength of the feasibility of the purposes for

9. Adekanye F. (2010, The Element of Banking in Nigeria, 4th Edition, Offa, Nigeria, p. 263

10. Ibid.

11. Ibid.

which it is required and every lending proposition should be so good that the question of security becomes secondary. Advances are not to be made just because they are secured. In fact, bankers know from experience that the real security for advance is the character of the borrower. The bulk of bank lending is based on trust and faith in the customer and his business[12].

The most common types of security package used in banking transactions in Nigeria are mortgages, charges (fixed or floating), assignments, pledges and lien. However, we are here interested in land as security for mortgage. A mortgage is a legal or equitable conveyance of title as a security for the payment of debt or the discharge of some other obligation for which it is given, subject to a condition that the title shall be re-conveyed if the mortgage debt is liquidated. The conveying party or the obligor is called the mortgagor, the lender or oblige who obtains interest in the security is called a mortgagee and the debt for which the security is created is called the mortgage debt.

3.3 The Land Use Act

It is in view of the- incalculable significance of land that the Land Use Act was promulgated[13] as the single law which defines land rights, obligations and specific conditions precedent for any alienation or encumbrance of

12. Ibid.

13. The Act was originally promulgated as a Decree by the Military Regime (i.e Decree No. 6 1978). But was upon the exit of the military regime and taking over by Civilian Government, Re-designed Act, vide Section 1 of Adaptation of Laws (Designation of etcetera) order No. 13 of 1980.

land rights. The aim for imposing conditions is to restrain and control alienation of encumbrances on land and thus enhance tenurial security[14]. Whether this has been achieved is debatable.

The difficulties associated with land acquisition for development project and individual ownership of land coupled with speculation in urban land were highlighted by the military administration of Murtala or Obasanjo in the Third National Development Plan 1975-1980. In urban areas, acquisition of land both for government project and non-government building purposes became virtually impossible. In addition, there was the problem of insecurity of title under customary law. The poor performance of the economy, the inability of the country to feed itself, inability of both the public and the private sectors to provide sufficient shelter for the people and even the inflationary trends in the economy were blamed largely on the system of tenure[15].

It was against the above background that in 1977, the Federal Military Government set up an eleven-man Land Use Panel with the following terms of reference.

(i) To undertake an in-depth study of the various land use, and land conservation practices in the country and recommend steps to be taken to streamline them;

14. Smith, I. O. Op. Cit. p. 280

15. Olong, A. M. D. (2011), Land Law in Nigeria 2nd Edition, Malthouse Press. Lagos, p. 142

(ii) To study and analyze all the implication of a uniform land policy for the country;

(iii) To examine steps necessary for controlling future land use and also opening and developing new land for the needs of government and Nigeria growing population in both urban and rural areas and make appropriate recommendations[16].

In its three hundred (300) page report, the panel recommended against nationalization of land in Nigeria, only one member of the panel, Prof. R. K. Udo, supported nationalization of Land. All these development above culminated in the promulgation of the Land Use Act, 1978 .

The Act is based on the land Tenure Law which had been in operation in the Northern slates of Nigeria since 1962 and which nationalized practically all land in that part of the country [18].

When the Act was promulgated in 1978, it looked good and promising. It was like the dawn of a new era, an epoch in the history of land law in Nigeria. The preamble to the Act eloquently expresses this sentiment. However, it had been observed that the objectives of the Land Use Act have remained largely unfulfilled and title to land appears to be more insecure now than it ever was .[19]

16. The Federal Government White paper on the Report and Recommendation of the Land Use Panel Published by the Federal Ministry of Information, Lagos p.1
17. Raime A. L "The Land Use Act, 1978, A Blessing or Curse" Ikeja Bar Review, Vol. 1, Pt 1 & 2 at p. 88
18. Sections 48 and 49 of the Land Tenure Law 1962.
19. Raime A. L. Op. Cit

3.3.1 **The Land Use Act and Mortgage**

The Land Use Act unlike the property and conveyancing law did not stipulate how a mortgage should be created, but rather it preserves the existing law on mortgages subject to such modifications as will bring it into conformity with the Act or its general intendment[20].

The Act has made modifications having swept away all unlimited interest on land in urban area, substituting it with a right of occupancy[21] as opposed to a title deed, this is with the exception of customary title which is not limited in duration.[22] Therefore a conveyance of fee simple in common law is no longer possible in creating a mortgage, but rather an assignment of a right of occupancy or any interest created under it such as sub-lease or sub-under lease. Also, where the property and conveyancing law or property law requires that a mortgage of land can only be effected by the demise of fee simple where the estate is freehold or by sub-demise where the estate is leasehold, a sublease or sub-underlease would be substituted respectively.[23]

However, the argument is whether a mortgage can be created by surrendering a certificate of occupancy as security.

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20. Section 22, 34 and 48.Land Use Act Vol. 7, Cap. L5, LFN 2004
21. Ibid; SS, 1, 5 and 6
22. Ibid; S. 4 & 8
23. Ibid; S. 23

According to Omotola, one of the opponents of the Act and some other critics, a holder of certificate of occupancy has no radical title but only a properietory title right (evidence of one's possession of a piece of land)[24]. It is not a title to land and so the contention is that no right could be granted by means of conveyance of certificate of occupancy because it is not the same with title deed. A conveyance is an instrument that transfers title in a property from one person to another (that is the means whereby a right in land arises) whereas a certificate of occupancy is merely an evidence of a right which is in existence. Therefore, it transfers no title to land. He is of the opinion that a holder must follow the old practice and procedure of transferring interest in land if he has to mortgage his right of occupancy[25].

On the other hand James has argued that though S. 22 of the Land Use Act prevents a mortgage from holding a right of occupancy as security (this conclusion was reached from the definition of the holder of the right of occupancy which excludes the mortgagee, sub-lease or sub-under lease); the interpretation of the section should not be constructed in isolation from the intendment of section 22 of the Land Use Act in particular, which provides that, "*it shall not be lawful of the holder of a*

24. Section 9 (1) Land Use Act

25. Omotola, J. A (1982) "The Mortgages Power of Sale. A Misnomer or an Illusion" 18 N. B. J. 104 at page 113. Also see Omotola, J. A The Certificate of Occupancy, in Omotola J. A (1982), The land Use Act, Lagos University Press, Akoka, Lagos, pp. 80, 84, 880..

statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub-lease, or otherwise without the consent of the Governor first had and obtained."

He proposes that the proviso to S. 22 which exempts from the consent provision the word "reconveyance or occupier in special cases is explicit on the issue that the Act intends that a certificate of occupancy could be mortgaged. He also suggest that lawyers should be innovative and include in the document of conveyance a covenant to the effect that in the event of the right of occupancy being revoked, the mortgagee's debt shall be secured additionally on any compensation payment due to the mortgagor in respect of the unexhausted improvements of any land granted to him in lieu of revocation[26].

Other critics have also argued that a holder of a right of occupancy cannot mortgage his certificate of occupancy because.

i. Of the nature of the security he holds,

26. James, R. W. (1982), Nigerian Land Use Act. Policy and Principles, University of Ife Press pp. 176, 177

ii. Of the absence of the right of mortgagee to the compensation payments, if any, on the revocation on the right of occupancy which formed his security

iii. Of the ineffectiveness of the remedy to protect the interest of mortgagee[27]

Another problem of the Act as relates to mortgage is the misuse and abuse of section 28 of the Act, which deals with the power of the Governor to revoke rights of occupancy. For instance, commercial banks are uncertain as to the value of certificate of occupancy, which they are being asked to take as security for loans bearing in mind that these certificates can be revoked at the whims and caprices of the Governors. Similarly, the Act appears to hinder economic progress because of the unwillingness and inability of banks and other financial institutions to give out loans on mortgage. This is because, if a right of occupancy is revoked, a mortgagee has no right to the compensation payable, as the definition of "holder", or "occupier" in section 51 of the act does not include a mortgagee[28].

27. Aboki, Y (2010), Introduction to Statutory land law in Nigeria, Lecture Notes on the Land Use Faculty of Law, A. B. U. Zaria. 2001, Enifab Graphic Press pp 54,55.

28. Olong, A. M. D. Op. Cit. p. 146

The ideal thing in this circumstance would be that money advanced to the mortgagor should be returned to the mortgagee and the parties be restored to their status *quo-ante* but the possibility of this happening may be far- fetched, as the mortgagor may not have the wherewithal to do so and this may lead to protracted litigation. Nevertheless, the answer to this succinctly provided by section 26 of the land Use Act which renders null and void any transaction or instrument which purports to confer or vest in any person any interest or right over land other than in accordance with the provision of the Act.

Another seeming problem of the Act is that created by section 22 of the Land Use Act which provides that, "*it shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained."*

This consent requirement has been criticized for being responsible for the delay which both a prospective vendor or purchaser usually face in such transactions in this case of mortgagor and mortgagee.

However, there are exceptions to S. 22 of the Land Use Act which provides that consent of the Governor

a. **shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor,**

b. **shall not be required to the reconveyance or release by a mortgage to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Governor.**

c. **To the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sub-lease containing an option to renew the same.**

Under the above circumstances, that is to say, from the provision of section 22(a) an equitable mortgage is not caught under the consent requirement. The proviso stated that no consent is, however, required for the creation of a legal mortgage over the right of occupancy in respect of a person, in whose favour an equitable

mortgage over the right of occupancy has already been created with the consent of the Governor.

Also S.22 (b) states that the re-conveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged to the mortgagee with consent of the governor, another consent of the governor will not be necessary.

In the case of section 22(c), the consent requirement should not be presumed not necessary in the case of a renewal of a sub-lease just because it had been granted before.

In the case of section 22 which is the main provision, failure to comply with its provision was held to have the effect of denying a mortgagee his most potent remedy, (power of sale) in case of default by the mortgagor.

Arising from the consent requirement, a debtor who wishes to mortgage his property as security for any advance must necessarily obtain the consent of the Governor of the state where the property is situated. What then happens if the consent is not obtained? The answer to this is succinctly provided by section 26 of the Land use Act which renders null and void any transaction or instrument which purports to confer on or vest in any person any interest or

right over land other than in accordance with the provision of the Act so the parties can be restored to their status quo ante. But this does not attach any criminal offence to such default. In *Solanke vs Abed*[28]**, the court held that where a statute declares a contract or a transaction as null and void but does not impose penalty for making it, then as a general rule, the contract is void but not illegal, but when the statute imposes penalty for making it, the contract is not merely void but also illegal. Section 22(2)[30] of the Act provides that the governor may require the holder to submit an instrument executed in evidence of the alienation so that the governor's consent may be signified by endorsement thereon. A strict interpretation of this section would mean that negotiation leading to a written contract for sale is allowed for the purpose of presenting to the governor to signify his consent. This may take the shape of a written sale agreement before the actual deed of assignment. Armed with the consent the parties would proceed, engross and execute a conveyance or assignment.[31] The Supreme Court recognized the two separate stages of effecting a conveyance in interpreting the requirement under section 22(1) in the *case of* *International Textile Industries (Nig.) Ltd. vs. Aderemi*[32]where it was held that, "a** *transfer on sale of an estate in Land is divisible into two*

distinct stages, (i) the contract stage, ending with the formation of a binding contact for sale (ii) the conveyance stage, culminating in the legal title vesting in the purchaser by means of the appropriate instrument.''

30. Land Use Act 1978, Cap L5, LFN 2004.

31. Uwakwe, A. (2012), Land Use and Reform in Nigeria. Immaculate Prints, Gwagwalada, Abuja. 1st Edition p. 98

32. (1999) 8 NWLR (pt. 614) 268 pp. 293 - 294

It then follows that the agreement for a lease was not void for want of governor's consent. It is after a binding contract for sale is arrived at that the need to pursue the procedure for acquiring title will arise. That is when the obtainment of the necessary consent to alienate the property becomes an issue in order to make the alienation valid[33].

In Nigeria, Legal practitioners and conveyancers fuse the result of the negotiation and the actual conveyance for presentation for the signification of the consent of the governor. The Nigeria judiciary has given its blessing to this practice provided that the intention of the parties is not to avoid governor's consent. In *Awojugbabe Light Industry Ltd vs Chinukwe*[34] **the deed of mortgage in issue was not dated; a letter was admitted in evidence showing that the parties agreed that the commencement date of the transaction was to be after consent had been obtained. And the consent was obtained some five years after the mortgagor delivered the deed of mortgage. When the mortgagee enforced the mortgage, the mortgagor sough to annul the transaction on the ground that the consent was not first hand and obtained. The Supreme Court held that the deed of mortgage was delivered in escrow, on condition that**

33. Ibid p. 100

34. (1995) 4 NWLR (pt. 390) 379. 99 436 and 438

it would commence from the date consent was obtained. Iguh JSC addressed the issue thus:

The holder of a statutory right of occupancy is certainly not prohibited by section 22(1) of the Act from entering into some form of negotiation which may end with a written agreement for presentation to the governor for his necessary consent - - -

This is because the (LUA) does not prohibit a written agreement to transfer or alienate land. So long as such a written agreement is understood and entered into subject to the consent of the governor, there will be no contravention of section 22(1) - - - by the mere fact that such a written agreement is executed before it is forwarded to the governor for his consent. In my view, section 22(1) does not cover -- alienation which the parties did not intend to become immediately effective until necessary approval by the governor is obtained. It does however, cover and strike at transaction which effectively purport to enable an assignee of the right of occupancy to exercise his right hereunder without the prior consent of the governor.

There is (nothing) unlawful in entering into or execution of (a document of transfer) before the governor's consent (is) obtained as this procedure is expressly covered by section 22(2). The legal consequence that arises is that no intere a in land passes under the agreement until the necessary consent is obtained. Such an agreement so executed becomes in-chuale until the consent of the governor is obtained after which it can be said to be completed and fully effective

The Principle of consent as a requirement for valid alienation of land was extensively discussed in *Savannah Bank Nig. Ltd. vs Ajilo*[35]**. The issue in this case was: Whether a person who is deemed to be a holder of a right of occupancy pursuant to section 34 of the LUA, requires solely by virtue of that fact, the consent of the Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy. More specifically do the provisions of section 22 of the LUA apply to a person who is deemed to be the holder of a right of occupancy pursuant to section 34 of the Act solely by virtue of his being deemed such holder?**

35 (1989) NWLR Part 97 App. 5, 6, 305

In this case, the plaintiffs had executed a Deed of Mortgage dated 5/9/80 in favour of the first defendant. Upon default by the plaintiffs, the first defendant sought to sell the property involved by advertising the auction sale. The plaintiffs sued for declarations that the Deed of Mortgage was void and also the Auction Notice was also void. The grounds of the action were that:

1. **The property was situated in an urban area in Lagos.**
2. **The property was already vested in the 2nd plaintiff before Land Use Act, 1978 came into force.**
3. **By section 22 of the Land Use Act, the consent of the Governor of Lagos State ought to be first sought and obtained before the execution of the Deed of Mortgage and also the Public Auction[36]**
4. **As no consent was sought as afore said, both the Deed of Mortgage and the Auction Notice were void.**

The contention of the defendant on the other hand was that the provision of section 22 of the LUA did not apply to land being held before the coming into effect of the LUA. After the court had thoroughly considered the provisions of section 22, 26 and 34 (1), (2) and (3). Consequently, it held that the action of the plaintiffs must succeed.

36. Section 21 LUA. Op. Cit. This sections stipulates that the consent of the governor must be sought before any public auction is conducted.

The defendants appealed to the Court of Appeal and it was dismissed. The defendant being dissatisfied with these judgments appealed to the Supreme Court. In the later court, it was unanimously held that the appeal should be dismissed. The reason being that it is the duty of the mortgagor to obtain Governor's consent for the transaction to be valid, but in the case of Savannah bank, the Mortgagor failed in his duty to do so, yet was allowed to benefit from his own wrong doing. According to Belgore, JSC this issue was not raised before the court but that the argument was strictly on the question whether or not consent was required for a deemed grant to be validly mortgaged.

3.3.2 Consent

As simple as the provision of section 22 and 26 of the LUA may appear, their interpretation by the court has given rise to so much problem that one cannot be too categorical about the full meaning and implication of the said sections on mortgage transactions[37]. Though the courts have been very helpful in this respect as we shall see in several cases, it is submitted that the power of the Governor to consent to a proposed disposition of right it of occupancy is discretionary and cannot be enforced as a right[38].

37. Adeoye, F. O (1990/1991), "The Use of a Right of Occupancy as Security for Advance a *caveat"* 13, 14 & 15 SPPL 61, p. 45, In Smith I. O. The Land Use Act: Twenty Five Years After Op. Cit.

38. Yakubu M. G (1985), Land in Nigeria (Macmillan Publishers) p. 206. See also R. vs Minister of Land and Survey (1963) NRNLR 58

Simply put, consent means "agreement, approval, or permission as to some act of purpose, given voluntarily by a competent person; legally effective assent"[39]

Though the consent provisions are couched in discretionary language, the discretion must be exercised fairly and not to the prejudice of the party involved. The discretion must not be exercised arbitrarily. Thus, if consent is to be denied, it must be for good reasons, for example, failure of the applicant to satisfy the conditions precedent to obtaining the consent or that the property for which consent is sought is required for overriding public interest. Any discretion exercised contrary to law and good conscience would be struck down by the court[40]. In *Iwuji vs Federal Commission for Establishment,*[41] it was held that where the exercise of a discretionary power is based upon satisfaction and fulfillment of a condition precedent by the beneficiary of such power, the exercise of the power may be refused only where the condition has not been satisfied.

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39. Garner, B. A (2004), Blacks Law Dictionary 8th Edition, Thomson West United States of America, p. 223

40. R vs Minister of land and Survey, Op. Cit. p. 94

41. (1985) 11 WNLR (Pt. 3) 497

In practice, most governors in Nigeria have made regulations requiring the following as condition precedent to giving consent. Consent fee, tax - clearance certificate, Certified True Copy of the right of occupancy, instrument executed in evidence of the alienation, et-cetera. In other words, these regulations have effectively limited the discretionary powers of the governors. The discretion is to be exercised in accordance with the tenor of such regulations. As such a citizen who fulfills all the conditions should reasonably take the consent for granted and may apply to court to compel the governor to exercise the discretion in his favour where the governor decides otherwise. In the case of *Zango vs. Governor of Kano State*[42]. The court of Appeal observed that "where the court finds that the power had been exercised oppressively or unreasonably or if there is a procedural defect in the exercise of the power, the act maybe condemned as unlawful". This is because as Oputa *JSC* rightly observed in *F.C.S vs. Laoye*,[43] in the unequal combat between those who posses power and those on whom such power bears, the court's primary duty is protection from the abuse of power. The very sagacious and substantive justice- driven position of Her Ladyship, *Nzeako JCA in Kachala vs. Banki*[44] is a clear indication that the era of *withholding consent on grounds of the exigencies of state duties or other capricious excuses is gone for good. She said:*

42. (1986), 2 NWLR (p. 22) 409 at 415

43. (1989) 2 NWLR (pt. 106) 652

44. (2001) NWLR (pt. 221) 442 pp. 466467. The decision in the case was reversed by the Supreme Court but this compass for the direction of giving or withholding of governor's consent to alienate was unscathed

> *If, as often in the case, the governor hugged down by state duties, delays to convey his consent, for an infinite period, would justice be met by holding a purchaser for value who fulfilled all his legal obligations to ransom by rejusing to recognize his legal rights? I think not. It is my humble view that the legal rights of such a purchaser must be deemed to crystallize some reasonable time after he has fulfilled his legal obligation.*

3.3.3 ***Consent Requirement in the Perfection of Legal Mortgages***

The implementation of the Act has brought untold hardship to Nigerians, particularly in respect of consent to alienate. It can take years and an applicant is subjected to the vagaries of bureaucratic action with demands for survey plans, interminable fees, documents, et-cetera. The import of section 22 of the Act is that the consent of the Governor is required before any legal transaction in land can be consummated but in practice it is not so as will be illustrated with cases. This is perhaps a major impediment created by the Act. In practical terms, it is nearly impossible to comply with the provisions of the clause. Consent is not only expensive to obtain, it takes a long time and the entire process could be very frustrating[45]*. It is believed that the consent provision in section 22 of the Act is a clog in the wheel of economic progress and also a veritable avenue for corruption. Against this background, Obaseki declared that*[46]*:*

45. Olong, A. M. D (2001), Land Law in Nigeria, 2nd Edition, Malt-house Press Lagos, p. 145, Nnamani, J. A. (1989) Land Use Act – "11 years After" being an address presented to the NBA Ikeja branch on 3rd of march 1989.

46. Savannah Bank Nig. Vs Ajilo (1989) 1 S. L. N. J. 169 (1989) NWLR (pt. 97) 305

> *It (consent clauses in the Act) is bound to have a suffocating effect on the commercial life of the land and house owning class of the society who use their properties to raise loans and advances from banks. I have no doubt that it will take the working hour of a state Governor to sign consent papers without going half way if these clauses are to be implemented. These areas of the Land Use Act need urgent reviews' to remove their problem nature.*

Suffice to say that the Land Use Act provision which has radically vested title in Land to the State Governor as trustee for all Nigerians and also subjected every alienation of land with consent, hinders business efficiency and creates unnecessary burden on security creation, perfection and realization over land. Before we see the cases it can be said that consent is not necessary before and during the transaction but after the transaction in most cases, as in practice, transaction can take place subject to consent.

However, it seems that the provision of section 21, 22 and 26 not only is consent required at the creation of the mortgage, but also at its realization. This controversy has been highlighted in several cases beginning with the decision of the Supreme Court in Savannah Bank Ltd vs Ammel Ajilo[47] *where the full court of the Supreme Court affirmed the decision of the court of appeal by holding that every holder of a Right of occupancy be it statutory or customary, requires the prior consent of the governor before he can transfer, mortgage or otherwise dispose of his interest in*

47. Op.cit

the Right of occupancy. Accordingly, any deed of mortgage created without the consent of the governor was null and void.

The above mentioned decision naturally created a lot of concern and misgivings in the business community regarding the potency of a deed of mortgage as security for advance. This was particularly so because of so many cases where mortgagors have been known to deliberately frustrate the process of obtaining the governors consent in the hope that this would weaken the efficiency of the security given to the mortgages.

The understandable concerns and misgiving were ably addressed by the Court of Appeal in Adedeji vs. National Bank of Nigeria Ltd. & Anor[48]*. The appellant had by deed of legal mortgage dated 7/3/80 mortgaged his property for a loan from the first respondent. The second respondent was an auctioneer who threatened to sell the property under the terms of the mortgage. The appellant argued that the deed of legal mortgage was null and void because the governor's consent was not obtained. Rejecting the contention, the Court of*

Appeal held that the duty of obtaining consent was on the appellant and so he could not be allowed to rely on his failure to declare the mortgage void. As Akpata, JCA put it.

48. (1989) 1 N. W. L. R (pt. 96) 212 at 216 - 227

> *Apart from the principle of law involved in this case, it is morally despicable for a person who has benefited from an agreement to turn around and say that the agreement is null and void. In pursuance of the principle that law should serve the public interest, the courts have evolve d the technique of construction in bonam patern. One of the principles evolved from such construction in the interpretation of statute is that no one should be allowed to benefit from his own wrong. (Nollus Commondum Ladere dejuria sua propria)*

This put the question of whose responsibility it was to obtain consent to rest, as being that of the mortgagor though in practice it is the mortgagor who does it. Inspite of the succour provided to mortgagees by the principle enunciated in Adedeji vs. NBN Ltd. The purpose and import of section 22 and 26 of the LUA within the context of the Supreme Court decision in Savannah Bank of Nigeria Ltd vs. Ajilo left the financial market in so much confusion that everyone concerned hoped for a clearer position be it judicial or legislative on the matter[49]*. There is however a wave of change and Nigerian courts are now inclined to doing substantial justice rather than relying on technicalities in providing answers to social problems.*

Turning the tide in Ajilo, the supreme court in Chief Belonwu Ugochukwu vs. Cooperative and Commerce Bank Nigeria Ltd.,[50] *frowned at conducts similar to that in Ajilo's case. In that case, the appellant sometimes in 1978 obtained loan facilities from the respondent bank. He was*

49. Olawoyin G. A. Problem of Securities for Advance in Nigeria. MODUS International Law & Business Quarterly.
50. (1996) 6 NWLR (pt. 456) 524

not paying the loan and the interest. Ten years later, the bank informed him of its intention to exercise its right under the mortgage deed to sell the mortgaged property. The appellant promptly filed a suit seeking declaratory reliefs and challenged the validity of the deed of mortgage, on the ground of non-compliance with the Land Use Act relying on the Supreme Court's decision in Savannah Bank Nig Ltd vs. Ajilo. Dismissing his appeal, the court held as follows:

> *The holder of a right of occupancy, evidenced by a certificate of occupancy is the one to seek the consent of the governor to alienate, transfer, mortgage, etc. There is no doubt the consent given in exhibits 3 was at the instance of the appellant who was in need of fund from the respondent by way of mortgages. It is not from him one must hear that the consent he obtained was void. . . The appellant being the holder of the right of occupancy over the house i.e No 239 Cameroun Road, Aba, was to seek consent and it is unconscionable for him to turn roundabout and maintain that the consent of the governor he obtained was flawed having received valuable consideration that is, the loan from the respondent?*[51]

On his part, Ogundare, JSC added:

> *. . . It was the duty of the plaintiff, as mortgagor to seek the consent of the governor for him to mortgage his property to the defendant. This is what the law says: see the Land Use Act. For him to turn round years after executing the mortgage deed (and when as a result of his default, the mortgagee that is the defendant, sought to exercise its right under the mortgage deed) to assert that the mortgage deed was null and void for lack of the governor's consent, is to say the least, rather fraudulent and unconscionable. It has become a vogue these days for mortgagors in similar circumstances to fall upon the decision of this court in Savannah Bank Nig. Ltd vs. Ajilo (1989) 1 NWLR (pt 97) 305 as a vehicle to escape from their liability under the mortgage deed they have*

51. Op.cit Per S. M. Belgore, JSC at 540

> *entered into. I think that this is an unfortunate development and I do not think that case, that is, Savannah Bank vs. Ajilo (supra) decides such a thing. . . . To allow a mortgagor to rescind from his liability on the ground of his failure to do that which the law enjoins him to do will only result in paralysis of economic activities in this country. This court, 1 dare say, will not allow such a situation to arise*[52].

A similar position was taken by the Supreme Court in Awojugbagbe Light Industries Ltd. vs. P. N. Chinukwe & Ors. In that case, the appellant as plaintiff sued the respondent as defendant in the High Court of Oyo State sitting at Ibadan. The appellant challenged the mortgage it executed in favour of the 2nd respondent, NIDB Ltd as being null and void for not having complied with the relevant provisions of the Land Use Act, 1978. In their statement of defence and counter-claim, the respondents pleaded the indebtedness of the appellant; the appointment of the receiver, the 1st respondent, in accordance with the terms of the mortgage deed after the appellant had failed to liquidate the debt when it had become due for repayment. The 2nd respondent counter-claimed for the sum of N364, 142. 08K being the total amount (comprising the principal and the interest) the appellant was indebted to it.

52. (1995) 4 NWLR (pt 390) 379

As security for the loan, the appellant's managing director mortgaged his property at No. 60/64 Akobielemu Layout, Ijebu Road, Ibadan to the 2nd respondent at about 1980. The mortgage deed was, however, not perfected until about 8th October, 1985 upon the receipt of the governor's consent. At the conclusion of the hearing, the learned trial judge dismissed all the claims of the appellant and entered judgment for the respondent in the sum counter-claimed. Dissatisfied with the decision, the appellant appealed to the Court of Appeal which dismissed the appeal. It finally appealed to the Supreme Court which also dismissed the appeal. Dismissing the appeal, the Supreme Court held inter alia:

> *need only to remark in passing that it is inequitable and morally despicable for the appellant, after obtaining a loan and after utilizing the same to now turn round and allege that the agreement (exhibit E) between it and the grantor of the loan. i.e. the 2"drespondent, is null and void* [53].

This decision has given a legal impetus to transformation in judicial decisions on the application of the maxim "ex ***turpi causa non oritur action****" and in subsequent cases, courts have been more assertive on the applicability of the maxim.*

More recent decisions would be cited to throw more lights on the consent requirement but we will start by taking another look at section 22 of the Land Use Act which provides that "it shall not be lawful for a

53. Ibid p. 542

holder of a statutory right of occupancy granted by the governor to alienate his right of occupancy or any point thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the governor first had, and obtained. . . ." This provision stipulates that the consent where required, must be first had and obtained before alienation of interest.

However, in the light of the modern economic reality, this interpretation may not be appropriate. A form of agreement evidenced in writing may be necessary before consent is obtained and this should not make such transaction void. In Bucknor-Macleans vs. Inlacks Ltd,[54] the Supreme Court emphasized that the word "void" occurring in statutes must not be construed to mean void for all purposes unless that statute expressly states so.

It is therefore submitted that section 22(1) of the Land Use Act only prohibits transaction or instrument whereby the holder of statutory right of occupancy purports to alienate as a complete action his right of occupancy by assignment, mortgage or transfer of possession. Interpreting a similar provision of the Kenyan Crown Land Ordinance in Dennings vs. Edward,[55] the court noted thus:

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54. (1980) 8-11 SC 1

55. (1961) AC 245

> *Some form of agreement is inescapably necessary before the governor is approached for his consent. Otherwise, negotiations would be impossible. Successful negotiation ends with an agreement to which the consent of the governor cannot be obtained before it is reached. Their lordships were of the opinion that there was nothing wrong in entering into a written agreement before the governor's consent is obtained. The legal consequence that ensued was that the agreement was inchoate till the consent is obtained. After it was obtained, the agreement was completed and effective.*

It should be noted that section 22 (2) of the Land Use Act provides that the governor may require a transferor to submit an instrument executed in evidence of the assignment, mortgage, sublease or transfer on which the governor's consent may be endorsed. It is submitted that this provision supports the view held above that the Act recognizes the need for some form of agreement to be entered into before the governor may be approached for the requisite consent. In the light of this provision, the requirement that the governor's consent must first be had and received before a transfer can be made should mean nothing more than the interpretation that the agreement or instrument of transfer will be inchoate until the governor's consent thereto is obtained[56].

This position was taken by the Court of Appeal, in Zakariyau Haruna vs. Savannah Bank of Nig. Ltd[57]*. In that case, the appellant borrowed the sum M35,000.00 from the 1st respondent. As security for the loan, the appellant mortgaged his landed property at O. 12B Gboko road, Tundun Wada, Jos. Upon default by the appellant, the 1st respondent sold the mortgaged property*

56. Taiwo, A. (2011) Nigeria Land Law, Ababa Press Ltd.

57. (1995) 2 NWLR (pt 377) 326

to the 2nd respondent for the sum of N80,000.00. Aggrieved by the sale, the appellant sued and he was unsuccessful at the trial court as his claim was dismissed. A further appeal to the Court of Appeal was also dismissed. The court held that there is nothing in the provisions of the Land Use Act preventing proper execution of an instrument before an approach is made to the governor for his consent. The provision that the consent of the Governor must first be had and obtained means no more than that the agreement entered into will remain inchoate until the governor's consent is sought and obtained.[58]

It is submitted therefore that the combined effect of sections 22(1) & (2) of the Act therefore does not make an agreement to alienate without first obtaining the governor's consent void. It only makes any such agreement conditional upon obtaining the necessary consent. After the consent is obtained, the agreement becomes complete and effective[59]*. The fact that the prior consent of the governor was not first had and obtained before the sale agreement was concluded would not invalidate the sale*[60]*.*

In Awojugbagbe Light Industries Ltd. vs. Chinukwe,[61] *the Court held as follows:*

> *There is nothing in the Act preventing prior execution of an instrument before an approach is made to Governor for his consent. So the provision that the consent of Governor must be had and obtained. . . means no more than that the agreement entered into*

58. Ibid 341 – 342
59. Taiwo, E. A (2005), "Interpretation and Construction of the Phrase "Consent First had and Obtained" Under Section 22 of the Land Use Act, 1978" Vol. 4 Journal of Private and Business Law, 79-86 at 82.
60. Solanke vs Abed (1962) NRNLR 92
61. (1995) NWLR (P. 270) 485

> *will remain inchoate until the Governor's consent is sought and obtaiuecf* [62]

Thus, in *B. Mangfang (Nig) Ltd. vs. MLOI Ltd*[63] the court held that Section 22(1) of the Land Use Act 1978 is clear and unambiguous. The section clearly prohibits the holder of a Statutory Right of Occupancy from alienating his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, or otherwise without the consent of the Governor first had and obtained. It was further held that the holder of a statutory right of occupancy is certainly not prohibited by Section 22(1) of the Land Use Act 1978, from entering into some form of negotiation which end up with a written agreement for presentation to the Governor for his necessary consent. What this simply means is that transaction can take place subject to consent in practice.

Furthermore, it was also held in U.B. N. Plc vs. Ayodare & Sons (Nig) Ltd[64] *that by virtue of the provisions of Section 21, 22 and 26 of the Land Use Act, Cap. 20, 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 Governor of the State where the land is situate before carrying out the mortgage transaction.*

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62. Ibid pp. 509-510. This was the Court of Appeal Decision

63. (2007) 14 NWRL (pt. 1053) p. 114

64. (2007) 13 NWLR (Pt. 1052) p 1052. It was further held that by virtue of section 22 of the Land Use Act, it is incumbent on the Governor to give consent, but in a situation where the Governor cannot give the consent himself, section 45 (1) of the Act creates an avenue to give consent, the Governor can delegate the power of consent.

Also, in C.C.C.T.C.S. Ltd vs. Ekpo,[65] it was held that Section 22(1) of the Land Use Acc, 1978 clearly provides that it shall be unlawful for a holder of a right of occupancy to alienate some or any part thereof by assignment, mortgage, and transfer of possession, sublease or otherwise without the consent of the Governor first had and obtained.

By the tone and tenor of the provision, it is clear that the said provision is mandatory. It makes obtaining the Governor's consent a precondition for the validity of any alienation of the Right of Occupancy under the Land Use Act 1978.

Nonetheless this decision was recently affirmed in U.B.N Plc vs. Astra Builders Ltd,[66] that by virtue of Section 22(1) of the Land Use Act, 1978, it shall be unlawful for a holder of a certificate of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage or transfer of possession, sublease or otherwise, howsoever, without the consent of the Governor first had and obtained. It was further held that by virtue of the Section 26 of the Land Use Act 1978, any transaction of any instrument which purports to confer on or vest in any person interest or right over land other than in accordance with the provisions of the Land Use Act Section 22 which provides for Governor's consent is null and void.

65. (2008) 6 NWLR (pt. 1093) p. 369. It was further held that the consequence of the unlawful act of alienating a Right of Occupancy without the requisite consent of the Governor is what is stated under section 26 of the Land Use Act 1978. It makes the provision mandatory and not directionary. Thus, alienation made contrary to provision of the act

66. (2010) S NWLR (pt. 1186) p. 10

*Notwithstanding, the consent provision has generated alot of controversies among writers and erudite scholar and they have variously suggested that the Land Use Act be amended to remove the consent provision. Prominent amongst the scholars is Adigun and Utuama who share the same opinion when they said that, "t*he operation of consent provision of the Act has made land transaction more difficult and less economic . . consequently capital formation has not been satisfactory so also is the general development process in the country".[67]

All said and done, the position today is that consent must be obtained at all costs either before or after for the deed to be valid and also not only is consent required at the creation of the mortgage but also at its realization, as the mortgage will require the Governor's consent before he could exercise the mortgagee's power of sale. According to Taiwo . . . "even where the mortgagee had the Governor's consent to the mortgage transaction, any subsequent sale or enforcement of the mortgage poses problems. The mortgagee cannot pass on title to a purchaser without the Governor's consent to the subsequent transfer".[68]

Failure to comply with the provisions of the L.U.A. was held to have the effect of denying a mortgagee his most potent remedy, (power of sale) in the case of default by the mortgagor[69].

67. Smith, I. O The Land Use Act: Twenty Five Years After, Op. Cit. p 228
68. Ladi Taiwo (1991), "Practical Implication of the Land Use Act on Mortgage" in Adigun O. (ed) the Land Use Administration, University of Lagos, p. 140
69. Savannah Bank vs. Ajilo (Op. Cit) p. 421

Apart from the problems mentioned above, the mortgage is also hampered by the bureaucratic red-tapism of government ministries in processing the application for consent, and the exorbitant consent and administrative fees charged. All these aggravate the cost of loan with consequent drawback on business. In the words of James:

> *Delay in the decision making process in obtaining approval to land transaction and grants of right of occupancy, and demands of exorbitant fees for these services - - - have been a source of grave dissatisfaction. It is generally felt that the main objective of the charges, which was to make land available to every Nigerian in need at low cost, was being defeated* [70].

Worthy of note however is the fact that while L. U. A makes it obligatory to obtain Governor's consent to a landed property transaction, there is no corresponding obligation on the Governor to give consent when applied for, or to give it within a reasonable time, or not to unreasonably withhold his consent, or to give reason in the event of refusing to give his consent.

As the law stands. It is not clear that there is anything an applicant can do if the Governor refuses to give his consent to a landed security transaction[71]*. This should be checked because power*

70. Otubu, T. (2003), Land Use Act and Housing in Nigeria, Problem and Prospect. In smith, I. O. The Land Use Act Twenty Five Years After. Dept. of Private Law, Faculty of Law, University. P. 350.

71. Essien E. (2003), Land Use Act and Security in Real Estate in Nigeria. In Smith I. O. The Land Use Act Twenty Five Years After. Dept. of Private law, Faculty of Law. University of Lagos, Nigeria. P. 291

tends to corrupt and absolute power corrupts absolutely. Also it would be good and a welcome development if the courts would further interpret when delay to give consent is unreasonable and where the Governor refuses to give his consent, it should be with reasons. This would ginger up the Governor to act timely and in good faith.

3.3.4 ***Outline of the Procedure to obtain the Governor's Consent to Mortgage a Property Covered by Statutory Right of Occupancy in Kaduna State***

The procedure and cost of obtaining Governor's consent vary from state to state, this research hereby presents that of Kaduna State as an example.

Step 1

i. A search is conducted at the Lands Registry to ascertain that the property to be mortgaged is free from encumbrances and can be pledged as security.

ii. Where ground rent is outstanding, the file is sent to Billing Section for computation of the outstanding ground rent. The ground rent must be settled before submission of application form and the receipt thereof be attached to the application form as evidence of settlement.

Step 2

i. Purchase of application form payable at a designated bank. The teller obtained at the bank is taken to the Accounts Department for collection of official receipt.

ii. Filling of the application form and submission of the form along with the official receipts of purchase of application form and ground rent to the office of the Director General, Ministry of Lands & Survey, Kaduna.

Step 3

i. The Director General endorse the Form to the Permanent Secretary who in turn will endorse the form to the Director, Land Administration. The Director, Land Administration endorses the form to Officer in charge of Land Registry for filing of the form.

Step 4

i. The Officer in charge of Land Registry then minutes the file to the Director, Land Administration.

ii. The Director, Land Administration endorse the document and send the file to the principal Estate Officer (R) for submission.

iii. The Principal Estate Officer (R) make submission by giving the brief history of the property to be pledged, the parties involved in the

application, the consideration and the fees payable to the State Government.

iv. The Principal Estate Officer (R) sends the file to the Director, Land Administration for endorsement. The Director, Land Administration recommends the application to the Permanent Secretary for his necessary action subject to the payment of the necessary fees.

v. The Permanent Secretary will recommend the application to the Director General for approval.

vi. The Director General gives the consent on behalf of the Executive Governor of Kaduna State for the mortgage of the property covered by the Statutory Right of Occupancy.

vii. The Director General sends the file back to the Permanent Secretary who in turn send the file to the Director, Land Administration.

viii. The Director, Land Administration sends the file to the Principal Estate Officer (R) who will then convey the approval to the applicant. The approval letter will state the fact that the payment of the registration fee must be made within 4 months and in bank draft payable to the Kaduna State Ministry of Lands & Survey. The letter will also request the submission of duly stamped mortgaged instrument for registration.

Step 5

i. The amount payable as stamp duty is assessed by the official of the Kaduna State Board of Internal Revenue in case of an individual applicant or Federal Inland Revenue Services in case of corporate body applicant.

ii. The payment of stamp duty is made at the designated bank in favor of Kaduna State Board of Internal Revenue or Federal Inland Revenue Service, as the case may be. The teller plus e-ticket of the payment is obtained from the bank and taken to the Stamp duty office for collection of the official receipt.

iii. 4 copies of the instruments are submitted for stamping by the commissioner for stamp duty.

iv. A copy of the instrument is retained while 3 copies of the instruments are given to the applicant for registration with the Ministry of Lands & Survey.

Step 6

i. The registration fee which is stated in the consent letter is paid to the designated bank. A teller is obtained and taken to the Accounts Department for collection of the official receipt. The official receipt will be photocopied and filed in the file.

ii. The Accounts Department sends the file to the Audit Department for checking.

iii. The Audit Department sends the file to the Land Registry Department after their checking.

iv. The Land Registry Department sends the file to the Deed Unit for registration.

v. The applicant will submit 3 copies of the stamped instruments to the Deed Registrar for registration.

vi. The Deed Registrar will send the file to the Principal Estate Officer (R) where 1 original and 1 counterpart of the instruments are dispatched to the applicant while a copy of the instrument is retained in the Ministry for future reference.

Note: both steps 5 and 6 can be taken simultaneously provided there is enough funds by the applicant

Actual Cost Implications of Obtaining Consent and Registration of a Mortgage on Loan/Borrowings

Respondents

1. Principal Estate Officer (Deed): Bureau of Lands, Survey & Country Planning, Kaduna Office, Kaduna State.
2. Dee Registrar: Bureau of Lands, Survey & Country Planning, Governor's Office, Kaduna State

Actual cost implications of obtaining consent and Registration of a mortgage on loan/Borrowings

S/N	Transaction	Amount Paid
1	Search Fee	N10,000
2	Payment of grounded rent up to date	As per computation
3	Purchase of Application Form	N20,000
4	Registration fee	3% of the consideration

5	Stamp duties	3% of consideration in the case of individual mortgagor and 1.5% of consideration in the case of corporate mortgagor
6	Professional fee	10% of the consideration

Note: The consideration is the amount authorized in writing by the Mortgagee (the lender) for the instruments to be registered.

3.4 **Developed Land**

Section 34(2) provided that where land in urban area is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of the Act as if the holder of the Land was the holder of a statutory right of occupancy issued by the governor under the Act. Such a person shall be entitled to be issued a certificate of occupancy in evidence thereof if the governor is satisfied about his title.

Section 51 defines developed land as Land where there exists any physical improvement in the nature of road, development services such as water, electricity, drainage, building structure or much improvement that *may enhance the value of the land for industrial, agricultural or residential purposes.*

Section 34(4) preserves all pre-existing "interest valid in law" on such land including mortgages, legal or equitable and such interest shall be endorsed on the certificate of occupancy issued in respect thereof. Such "interest valid in law" includes not only vested and alienable interest on the land within the contemplation of section 5 (2) such as leases but also other inferior interest, which may or may not constitute encumbrance on the land such as license, usufructury, easement and profits. The same section extinguishes such inferior interest which do not constitute encumbrance on the land upon the grant of statutory right of occupancy.

Section 36 which deals with land held in non urban areas, though irksome to many has been held by the Supreme Court in Abioye vs. Yakubu's case[74] as the duty of the judge construing the provisions of a statute, not to so construct it by making non-sense of it but to do so as not to defeat the manifest intention of the lawmaker.

It thus provides as follows:

1) *The following provision of this section shall have effect in respect of land not in an urban area which was immediately*

before the commenceinent of this Act held or occupied by a person.

2) *Where the Land is developed, the land shall continue to be held by the person 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 the 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 customary right of occupancy has been granted by the local government.*

3) *No land to which this section applies shall be sub-divided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested as aforesaid.*

In effect, Land in non urban area is subject to the Land Use Act.

3.5 ***Undeveloped land***

Where land in an urban area is undeveloped, section 34(5) provides that one plot or portion of the land not exceeding one

74. (1991) 5 NWLR pt. 130

half of a hectare in area shall continue to be held by the person in whom the land was vested before the commencement of the Act as if the holder of the land was the holder of a statutory right of occupancy granted by the governor in respect of the plot or portion. All the rights formally vested in the holder in respect of the excess land are from the commencement of the Act extinguished. The excess land is taken over by the governor and administered in accordance with the Act. The half hectare rule applies against all previous holders of undeveloped land in urban areas irrespective of whether the holder had such land in different urban areas within the state. All excess land above half-hectare shall be extinguished in favour of the governor.

In practice, however, the governor never took possession of such undeveloped land appropriated in his favour by the Act. As such the previous holder continues to posses and use the Land until such time when the governor exercises his power to grant a right of occupancy in respect of the land in favour of a third party. In that case the previous owner relinquishes possession and use of the land without compensation. No compensation is payable since the land is undeveloped immediately before the commencement of the Act. Thus, any previous holder who proceeds to develop his previously

undeveloped land in excess of half hectare after the commencement of the Act does so at his own peril.

(1) *The import of section 34(2) and 34(5) is to confer something akin to a freehold title under English land law to the beneficiaries. This is however not achieved because of the following reasons:*

i. *The payment of ground rent to the government*

ii. *Upon application, the only evidence of title the government will grant is statutory right of occupancy which amount to a conversion of freehold title into a leasehold title as provided by the Decree*

iii. *The requirement to obtain governor's consent for any transaction by the holder to be legally binding in effect defeats the presumed freehold title which he is supposed to hold.*[76]

(2) *In case of underdeveloped land in non urban area, section 36 provides:*[77]

Any occupier or holder of such land, whether under customary right or otherwise however, shall if that land was on the commencement of this Act being used for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate local government. The reference in this section to land being used for agricultural purposes includes land which is, in

accordance with the custom of the locality concerned, allowed to lie fallow for purpose of recuperation of the soil.

(3) *On the production to the Local Government by the occupier of such land, at his discretion, of a sketch or diagram or other sufficient description of the land in question and on application therefore in the prescribed form, the local government shall if satisfied that the occupier or holder was entitled to the possession of such land whether under customary rights or otherwise howsoever, and that land was being used for agricultural purpose at the commencement of this Act*

(4) *register the holder or occupier as one to whom a customary right of occupancy had been issued in respect of the land in question.*

(5) *Any instrument purporting to transfer any land to which this section relates shall be void and of no effect whatsoever in law and every party*

(6) *to any such instrument shall be guilty of an offence and shall on conviction to a fine of N5,000 or to imprisonment for 1 year.*

In effect, Land in non urban area is also subject to the Land Use Act.

From the foregoing, it is the conclusion of this research that bare land can be mortgaged under the Land Use Act just like developed land because they are both subject to the Land Use Act and bare land has as much value as developed land and appreciates in value over time and can be sold for huge profit.

76. Land Use Act, 1978
77. Ibid

Though it suffers the same limitation with developed land under the land Use Act and in addition, the provision of section 28 and 29 of the Land Use Act which excludes payment of compensation for empty undeveloped land limits its use for mortgage transaction. Nevertheless it can still be used as security for mortgages with the hope that it will not be compulsorily acquired by the government. On the other hand there could be a clause in the conveyance document that if it is acquired compulsorily, it will not affect the responsibility of the mortgagee to pay up his debt by any other means.

3.6 Compensation for Developed and Underdeveloped land

The CFRN, 1999 provides that no movable property or any interest in any immovable property shall be taken possession of compulsorily and no right or interest in such property shall be acquired compulsorily in any part of Nigeria except for public purpose and by or under the provision of a law that amongst other things requires the prompt payment of compensation therefore.[78]

Compensation, prima-facie means recompense for loss. Though the 1999 Constitution failed to use the word "adequate", the 1963 Constitution provided for "adequate compensation"[79]

In assessing what is adequate compensation, reference should be made to the location, development potentiality, the revenue producing qualities of the property, the original cost of the construction, the replacement cost, the depreciation, the trend of business traffic and the nature and assessment of other properties.[80]

In the case of bare land, the argument is that compensation should not be paid because the Land has not been developed. To say that the Governor should pay for bare land is to ask the Governor to pay for his land.

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78. Section 44 (1) the Constitution of the Federal Republic of Nigeria 1999

79. Ibid Section 44 (1) (a) . Where the word "adequate" was omitted.

80 Aboki, Y. Introduction to Statutory Land Law in Nigeria Op. Cit. p. 28, U. B. R. B. D. A. vs Alka (1998) NWLR, Pt. 537, p. 328 LA

This argument can be countered on the ground that in some areas, bare land appreciates in value overtime and could be sold for huge profit.

Developed and bare land as relates to compensation under the Land Use Act appears to hinder economic progress because of the unwillingness and inability of banks and other financial institutions to give out loans due to the uncertainty as to the value of the land which they are to take as security for the loan on mortgage. Another major upsetting provision under the Act as it. affects mortgage transaction is

the definition given to a holder of a right, of occupancy. A holder in relation to a right of occupancy means, a person entitled to a right of occupancy. The unpalatable effect of this is that although the mortgagee may have been preserving his interest in the mortgage security (the right of occupancy and improvements thereon), although he may even be ensuring periodic payment of stipulated rents etcetera, once the Right of Occupancy is revoked, his security is gone and cannot attach automatically to the mortgagor's interest in any changed form. So, whereas, the mortgagor may be entitled to compensation for the value of his unexhausted improvements on the land, our dear mortgagee cannot claim to

such compensation money. This is a major setback in the efficacy of mortgage transaction under the Nigerian Laws .[81]

Section 28 and **29** *of the Land Use Act 1978 purport to exclude payment of compensation for empty undeveloped land exceeding half hectare, while the Act recognizes existing right in land including rights in undeveloped land, it limits the compensation for such land when compulsorily acquired. It is posited that the provision of section 28 and 29 of the Land Use Act do not conform and infact contradicts the*

doctrine of compensation provided for in section 44 of the 1999 constitution. It also does not recognize the right of third parties in government allocated land. So ground rent paid to any other person apart from the Governor or Local Government does not qualify for refund.

*The importance of land and the injustice associated with taking over of over half hectare undeveloped land without compensation has been highlighted by Adedapo Adeniran as follows, "i*t seems unfair that Government should take over without compensation, capital invested in land ownership when capital invested in other fields, for example, government loans, bonds, companies, shares, industries or commercial business are left untouched[82].

81. Amodu, N. A. (2001), efficacy of Mortgage Transaction under the Land Use Act: Myth or Reality http://opapers.ssm.com/5013/paper.cfm? Id – 183241. Pp. 19-20

82. See Adedapo, A. (1978). "The Futility of Land Use Decree" Cited by Oretuyi in his inaugural lecture titled "Title to Land in Nigeria: Past and Present. In Smith I. O. The Land Use Act Twenty Five Year After Op. Cit.

In the case of developed land, the compensation provided for in section 29 and 35 of the Act is grossly inadequate, as it covers structure of whatever description based on the replacement cost of the structure less the depreciation. The method of compensation payable to the holder or occupiers for the value at the date of renovation of their unexhausted improvement, lacks concerned people's confidence, as government appointees under section 2(2) (c), are officers who cannot afford to be neutral assessors. The abuses relating to the revocation of rights of occupancy would have been considerably minimized if the Act had provided an effective procedure for the payment of adequate compensation in the event of revocation of rights of occupancy[83].

The Act also failed to specify how development made on land would be treated when the land reverts to the state. The life of a right of occupancy in most cases is 99 years. The effect of this is that every allottee of state land or indeed owner of a property covered by certificate of occupancy is deemed to be a tenant of the state[84].

The land Use Act has also abolished freehold title to land in Nigeria. Before it came into force, there were holders of freehold titles to land in Nigeria. As said above, every allotee of state land or indeed owner

83. Olong A. M. D. Op. Cit, p. 149

84. Ibid p. 149

of a property covered by a certificate of occupancy is deemed to be a tenant of the state[85], with the exception of customary title which is not limited in duration.[86]

To further complicate matters, the Act Limited the coverts from entertaining cases as provided by S. S9 (1)

The High Court Shall have exclusive jurisdiction in respect of the following proceedings:

S.39 (1) (b)[87]

> *Proceeding to determine any question as to the persons entitled to compensation payable for improvements on land under the Act.*

S.47 (2) [88]

> *No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under the Act.*

While section 4(8) CFRN 1999 provides that the legislative "shall not enact any law that oust or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law."

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85. See Emeka, D. E. (2001), "The Land Use Act: A Time for Review" Vol. 6 of the Economy of June 2001 at p. 31, Section 1, Land Use Act.

86. S. 8 Land Use Act

87. Ibid S. 39 (1) (b)

88. Ibid S. 47 (2)

Most disturbing to financiers and the general public is that the amendment of the Act is made complex by its entrenchment in the constitution. The provision of section 315(5) of the 1999 constitution makes it a near impossibility to expect a reform of the Act from a civilian government. This is due to the rigorous procedure for the amendment of the constitution.

CHAPTER FOUR

BREACH OF MORTGAGE AND CONSEQUENCES

4.1 Introduction

In the event of breach or failure of the mortgagor to meet his contractual obligation on the date fixed for payment of the mortgage debt, the mortgage security gives the mortgagee an assurance of having property to fall back upon[1]*. There is a covenant in every mortgage to repay the loan plus interest on the day fixed. If the mortgagor fails to do this, the mortgagee can sue for the amount just as in the case of normal debt*[2]*.*

In practice, it is often the case that few mortgages are in fact redeemed on the date fixed for repayment which is often regarded as a mere formality[3]*. This is succinctly put by Aboki as follows:*

> *At common law, the effect of failure to redeem on the date fixed is that the legal right of the mortgagor to recover his land is extinguished forever, and he will still pay the mortgage loan. If the loan is worth more than the land, this will be a serious loss for the mortgagor. Furthermore, the mortgagee could still sue the mortgagor for the loan in addition. Thus, at common law, the mortgagee could keep the land and recover the money as well. Equity frowns at this state of affairs and therefore evolved an equitable right to redeem by which it allows the mortgagor to redeem the mortgaged property by paying back the mortgage debt plus or with interest not withstanding that the redemption date has expired or lapsed* [4].

This goes in line with the customary law principle which says "once a pledge always a pledge". Unfortunately it is seriously posing great difficulty since it makes a non-sense of the foreclosure and the rule of larches and acquiescence. To meet with modern day realities, this principle together with what obtains in mortgage practice today should be reformed to meet modern day transactions and contractual obligations where time and reasonableness will be of essence.[5]

1. Smith, I. O (2007) Practical Approach to Law of Real Property in Nigeria 2nd Edition, Ecowatch Publication (Nigeria) Ltd. Lagos, p. 395
2. Aboki, Y. (2010), Introduction to Statutory Land Law in Nigeria. Op. Cit p. 80.
3. Ibid.
4. Ibid

4.2 Enforcement of the Rights of Mortgagee in the Event of a Breach

In the event of a breach of the mortgage covenant, certain measures have been put in place by law to safeguard and enforce the mortgagee's rights. The methods of enforcement put in place by law could be legal or equitable as the case maybe. The methods of enforcement are cumulative not exclusives.[6] So "the mortgagee is entitled in law to pursue any or all of the remedies, such as the power of sale and appointment of a receiver, to the restrictions imposed by agreement or by statute accordingly as the power are express or statutory"[7]. Also, where one method did not satisfy the debt, another method can be adopted accordingly. But once foreclosure proceeding is embarked upon by the mortgagee, he cannot afterwards fall back on any of the other remedies.[8] They are as follows:

5. Olong, A. M. d (2001) land Law in Nigeria, 2nd Edition, Malt-house Press, lagos, pp. 100-101, Iwuchukwu vs Anyanwu (1993) 8 NWLR (pt 311) at 307.
6. Smith, I. O. (2007), Practical Approach to Law of Real Property in Nigeria Op. cit. p. 396
7. Salako vs Federal Loans Board (1967) NCLR 266 at 268
8. Ibid.

1. Action to Repay Loan plus Interest

This is a contractual action based on the covenant to repay. A covenant to repay is necessary in a mortgage agreement, and where it is omitted,

it is implied since in equity the receipt of money carries with it the obligation to repay.[9] In the event of a breach, the mortgagee could institute an action in court against the mortgagor to claim the principal sum advanced to the mortgagee and the interest that has accrued on it. This is a common remedy where the mortgage instrument does not counter an express power of sale on the mortgage[10], even though a legal mortgage does not need to contain an express power of sale before such power of sale is exercised.

2. Right to *Sell* property

In the event of a breach, the mortgagee can sell the property. This is central to legal mortgages created by deed. But it requires that

a. *The mortgage is by deed (legal mortgage)*
b. *The mortgage money has become due and*
c. *There is no contrary intention in the mortgage deed[10]*

The right to sell can only be exercised if the power of Sale arises[11].

9. Exomo vs N. N. B Plc (2007), All FWLR part 368, p. 1032 where the option of court action was utilized
10. Section 19 (1) of the Conveyancing Act: Section 123(1) of the property and Conveyancing Law, Section 122 (1) Abia State Law of Property. These three condition are conjunctive and not disjunctive.
11. Nig. Advertising Services Ltd vs UBA Plc (1999) 8 NWLR, part 616, p. 546. In this case, the court noted at p. 555 that "A mortgagee's power of sale becomes exercisable if it has arisen and once it has so arisen the title of a subsequent purchaser will not be affected by its improper or irregular exercise and the sale will be regarded as valid.

The power of sale arises where the mortgage debt is not paid at the time fixed for payment and if it is payable in installments, the power of sale arises as soon as any installment is in arrears.[12]

The power of sale becomes exercisable only if any of these three conditions are met[13]*. They are:*

i. *Notice requiring payment of the mortgage money has been served on the mortgagor or on several mortgagors and there is default of payment for three months after such service; or*
ii. *Some interest under the mortgage is in arrears and unpaid for two months after becoming due; or*
iii. *There has been a breach of some provisions contained in the mortgage deed or under the provisions of the Conveyancing Act or the Property and Conveyancing Law*[14].

In Bank of the North Ltd. vs. Aliyu[15]*, The respondent claimed against the appellants at the Kano High Court that the public auction of his three properties situate at Bolori ward along Gombe-Biu Road by the 1st appellant to the 2nd appellant is null and void, an injunction restraining all the servants of the*

appellants from taking any step to implement the aforesaid public auction and in the alternative, N500.000 as compensation for the current value of the properties.

It was the claim of the respondent at the trial court that he was not notified of his indebtedness and the intention to sell by the appellant. In clause (3) of the deed of legal mortgage covering the transaction, it was stipulated that a demand for payment should be made by any manager or officer of the 1st appellant bank by letter sent by post addressed to the respondent at the address as given in the deed or at the last known place of residence or abode of the respondent. However, the notice of intention of sale was written to the respondent through the manager of the 1st appellant's main branch in Kano.

Furthermore, the respondent contended that out of his three buildings, situate at Bolori ward, only two were used as security for the mortgage bid the 1st appellant at the public auction sold the three buildings of the respondent.

At the end of the trial, the trial court found for the respondent and accordingly declared the public auction of the respondent's properties null and void.

Being dissatisfied with the judgment of the trial court, the appellants appealed and it was held that a mortgagee shall not exercise his power of sale unless and until a notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors and default has been made in payment of the mortgage money or of part thereof for three (3) months after such service. Thus, the requirement of the law is that notice of intention to sell a mortgaged property must be sent to the mortgagor as the words "shall not" are mandatory and not advisory. Consequently, sale of any mortgaged property without the requisite notice is invalid ab-initio and cannot convey any title to a subsequent purchaser. In this case, there is no evidence that the requisite notice was served on the respondent before the auction sale took place on 29/3/99. The auction sale is invalid because the exercise of the power of sale under the mortgage deed did not comply with the mandatory provisions of the law which prescribe that the power of sale shall not be exercised before the stipulated conditions are met. In this case, they were not met. In effect, the court interpreted these requirements on the exercise of power of sale and held that compliance with them are mandatory and not advisory and that any sale of any mortgaged property without the requisite notice is invalid abinitio *and cannot convey any title to a subsequent purchaser[16]. The correct position is that by sections 19 (2) the Conveyance*

Act and 123 (2) PCL any of the requirements may be excluded either altogether or be varied by agreement of the parties[17] . *Thus in* ***Bank of the North vs. Babatunde,***[18] *The case of the*

appellants was that the building of six flats was built on the same land which the 1st respondent mortgaged to the 1st appellant; that the consent given to the mortgage transaction in the letter of the Chief Lands Officer was valid because the Chief Lands Officer merely conveyed the consent granted by the Commissioner under the power delegated to him by the Governor of the State. The appellants further averred that the notice required under the Auctioneer's law was inapplicable to the transaction between the 1st appellant and 1st respondent because under clause 3(b) of the Deed of Legal Mortgage, the parties executed expressly provided as follows:

> *The statutory power of sale shall be exercisable at any time after the moneys owing on this security shall have become payable without regard to any statute law and in any such sale, the bank may call the fixtures and machinery comprised herein either together with the property to which they are affixed or separately and detached there from.*

In its judgment, the trial court held that the mortgage transaction between the 1st appellant and the 1st respondent was invalid due to lack of consent thereto by the Governor and consequently entered judgment for the respondent and awarded damages against the appellants for trespass.

16. Da Rocha vs Hussain 1958 SCNLR 280

17. WEMA Bank Plc vs Abiodun, (2006) All FWLR, Part 317, p. 430

18. (2002), FWLR, Part 119 p. 1452 at p. 1473

The appellants were dissatisfied with the judgment of the trial court and they appealed to the Court of Appeal. The court held that where consent is required in a deed of legal mortgage and such consent had been obtained when the mortgage was originally created, no consent is required for the upstamping of the mortgage if a further facility is granted on it. In the instant case, there was no legal need for an approval by the Governor to the subsequent mortgage transaction between the 1st appellant and the 1st respondent. In the circumstance, the second mortgage between the parties is valid.

Also where parties are ad-idem *on the terms of a contract, the function of the court is to give effect to the terms of the said contract unless where there are legal reasons why the court should not give effect to the contract; for example, where the contract is against public policy. In the instant case, although the notice stipulated in the newspaper advertisement of the auction of the 1st respondent's property did not comply with the provisions of the Auctioneer's Law, the auction sale was still valid having regard to the agreement between the parties.*

In effect, the court held that where in a mortgage deed, the parties agreed to exclude certain provision of the law to enable the mortgagee exercise his

power of sale, this is not prohibited by law or against public policy. Even though some of these requirements can be waived by agreement of the parties. In this regard, the Supreme Court in ***Okonkwo***

vs. Cooperative and Commerce Bank (Nig.) Pic[19]***,*** *Where the appellant took a loan of N60,000.00 from the 1st respondent bank in 1981. The loan transaction was secured with his property at number 133, Aba-Owerri Road, Aba upon a deed of legal mortgage. The loan was repayable within twelve (12) months.*

Clauses 7 and 8 of the deed of legal mortgage provide as follows:-
The Bank may at any time after the day appointed for the payment of this loan and **without any further consent of the Borrower** *sell the mortgaged property or any part or parts thereof either together or in parcels and either by public auction or private contract.*
The Borrower hereby **"expressly waives his rights to be given notice** *by the Bank under section 20 of the Convenyancing Act, 1881 or under any law or custom in operation in any part of the Federal Republic of Nigeria before the sale of the mortgaged property."*

The appellant defaulted in complying with the terms of the mortgage deed and did not repay the loan for more than six years after the loan became due. As at 29 January, 1988, he was owing the sum of N106,338.00.

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19. (2003) FWLR, part 154 p. 457. The parties in the mortgage deed consideration resolved in clause 8 that the borrower "expressly waives his rights to be given notice by bank under section 20 of the Conveyancing Act 1881 or under law or custom in operation in any part of the Federal Republic of Nigeria before the sale of the mortgaged property"

Inspite of the waiver clause in the deed of legal mortgage, the 1st respondent demanded repayment of the loan and gave relevant notices of intention to sell the mortgaged property, the last of the notice was dated 30th May, 1985, when the indebtedness was about N68,863.99. Meanwhile, the appellant had paid the sum of N21,000.00 to the 1st respondent sometime in 1982 when the 1st respondent first wanted to sell the mortgaged property.

On 30th January, 1988, the appellant saw a publication in the Nigerian Statesman Newspaper whereby the 2nd respondent (auctioneer) had advertised the mortgaged property for sale on behalf of the 1st respondent. The auction sale was scheduled to take place on Monday, 1st February, 1988 at 8.00 a.m. The appellant said he was able to raise the sum of N96,000.0() from friends which he took to the 1st respondent in payment of the mortgage debt so as to stop the auction sale but without success. This was denied by the

respondents. The property was eventually sold to the 3rd respondent who was the highest bidder at the auction sale.

The appellant consequently sued the respondents at the High Court, Aba, At the trial, the appellant testified that there was no auction sale because there was no notice to that effect. This allegation was however denied by the respondents who contended that they gave notice of the intended sale by conspicuously pasting notices on the building and other public places in addition to the publication in the newspaper. They also stated that several people attended the auction sale including the appellant, his brother and agent who bided for the property. The 3rd respondent who also attended the public auction bided. She was the highest bidder and the property was duly sold to her and a deed of assignment executed in her favour.

The appellant contended that the auction sale was not in accordance with section 19 of the Auctioneers Law Cap. 12, Laws of Eastern Nigeria, 1961 applicable in Abia State as notice of same was less than the seven (7) days prescribed by that law. In addition, the appellant argued that the sale was done in bad faith as the 3rd respondent in purchasing the property fronted for her son who was at the time the Chairman of the Is respondent.

The respondents also called witnesses. They denied any fraud and contended that by clause 8 of the mortgage deed, the appellant had waived the operation of section 19 of the Auctioneers Law.

At the conclusion of hearing, the trial court, in its judgment, dismissed the appellant's claim. The appellant appealed to the Court of Appeal, which in an unanimous decision dismissed the appeal.

The appellant further appealed to the Supreme Court. In resolving the appeal, the Supreme Court considered the provisions of section 19 of the Auctioneers Law, Cap. 12, Laws of Eastern Nigeria, 1961 which provides as follows:

> *No sale by auction of any land shall take place until after at least seven days' public notice thereof made at the principal town of the district in which the land is situated and also at the place of the intended sale. The notice shall be made not only by printed or written documents, but also by beat of drum or such other, method intelligible to uneducated persons as may be prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller.*

The court also considered the provisions of section 21(1) of the Conveyancing Act, 1881 which provides as follows:

> *Where a conveyance is made in professed exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeached on the ground that no case has arisen to authorise the sale, or that due notice was not given*

> *or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.*

Dismissing the appeal it was held that by virtue of section 19 of the Auctioneers Law, Cap. 12, Laws of Eastern Nigeria, 1961, no sale by auction of any land shall take place until after at least seven days' public notice thereof made at the principal town of the district in which the land is situated and also at the place of the intended sale. The notice is to be made not only by printed or written documents, but also by beat of drum or such other method intelligible to uneducated persons as may be prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller. The purpose of the provision is for the mortgagee to give adequate notice to the public of the proposed sale. It is not a notice intended to be given to the mortgagor. It is to ensure that a true public auction, where everyone interested in the property may have the opportunity to bid for it. It is conducted for a fair deal, devoid of unconscionable bargain through connivance or collusion. It is therefore not a notice which can be waived by the mortgagor. Indeed, it does not lie with him to do so as it is not meant for him. In the instant case, the Court of Appeal was in error to have held that the waiver contained in clause 8 of the mortgage deed extended to section 19. **(pp. 385-386, paras. E-B)**

Per UWAIFO, J.S.C. at pages 385-386, paras. E-C: "The only serious issues to be considered in this appeal are: (1) whether section 19 of the Auctioneers Law, Cap. 12, Laws of Eastern Nigeria, 1961 applicable in Abia State was waived by the appellant by operation of clause 8 of exhibit B; (2) whether such a statutory provision can be waived; (3) what is the effect of non-compliance with the provision. The provision of section 19 reads thus:

> *No sale by auction of any land shall take place until after at least seven days' public notice thereof made at the principal town of the district in which the land is situated and also at the place of the intended sale. The notice shall be made not only by printed or written documents, but also by beat of drum or such other method intelligible to uneducated persons as may be prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and J. ... place of residence of the seller*

Although, some aspects of this provision have become anachronistic owing to socio-political changes, it cannot be denied that the purpose of the provision is for the mortgagee to give adequate notice to the public of the proposed sale. It is not a notice intended to be given to the mortgagor. This is to ensure that a true public auction, where everyone interested in the property may have the opportunity to bid for it, is conducted for a fair deal, devoid of unconscionable bargain through connivance or collusion.

This is not a notice which can be waived by the mortgagor. Actually, it does not lie with him to do so as it is not meant for him. The court below was

therefore in error to have held that the waiver contained in clause 8 of exhibit B extended to section 19. There is absolutely no connection between the two. The former is a waiver of a private right of the mortgagor. The latter is to ensure that the auction, to borrow the words of Lord Mansfield in Bexwell vs. Christie[20] *is not "a fraud upon the sale, and upon the public."*

The mortgagee must wait for the power of sale to arise and also to become exercisable before he sells. A purchaser who purchases a property before the power of sale arises will not get a good title. A purchaser who buys without the power become exercisable will have a good title notwithstanding this irregularity. The remedy of the mortgagor will only lie in damages against the mortgagee. Where a conveyance is made in exercise of the power of sale, the title of the purchaser is unimpeachable and will not be set aside simply because no case has arisen to authorize the sale or that due notice was not given or that the power was improperly or irregularly exercised, but a person damnified by the improper exercise of power of sale shall have his remedy in damages against the person exercising the power[21]*. A power of sale does not become exercisable until it arises and the title of a subsequent purchaser will not be affected by its improper or irregular exercise and the*

sale will be regarded as valid. In this regard in the case of Nigeria Advertising Services Ltd vs. UBA[22], *where sometime in 1972*

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20. I. Comp. at 395-396; E. R. p 1150

21 Section 21(2) Conveyancing Act; Section 126 Property and Conveyancing Law. Section 125 (2) Abia State Property Law; Okwunakwe vs Opera (2000) FWLR part 13, p. 2282

22 (1998) 8 NWLR part 616 p. 546 at 555

the 1st appellant took a loan from the 1st respondent. The loan was secured by the 2nd appellant's property situated in Ikoyi. Upon the failure of the mortgagor to repay the loan in spite of repeated demands, the 1st respondent sold the property to the 2nd respondent.

The sale was effected on 28th April, 1989 for N1.2 million, although the 2nd appellant had applied for more time to enable him redeem the property. He later made available to the 1st respondent a bank draft of N1.3million on 11th of May, 1989 at which time the property had been sold.

The appellant instituted an action against the 1st respondent at the High Court claiming mainly an order setting aside the sale of the mortgaged property on the ground that it was fraudulent. The 1st respondent counter - claimed for possession and manse profits in respect of the property. At the end of the trial, the court dismissed the appellants claim and granted the counter-claim of the 1st respondent for possession.

Aggrieved with the decision of the trial court, the appellants appealed and it was held that Mortgagee's power of sale becomes exercisable if it has arisen and once it has arisen, the title of a subsequent purchase will not be affected by its improper or irregular exercise and the sale will be regarded as valid. In the instant case, the title of the 2nd respondent - the purchaser remains unimpeachable for all time.

In exercising the power of sale, a mortgagee is under a duty to take reasonable care to obtain the true value of the property.

A mortgagee will not be restrained on the exercise of his power of sale merely because the mortgagor objects to the manner in which the sale is being arranged or because the mortgagor has commenced a redemption action in court, but he will be restrained if the mortgagor pays the amount claimed by the mortgagee into court. In Nigerian Housing Development Society Ltd vs. Mumuni,[23] per Aderemi, J.C.A observes

> *No money was paid into the court by the mortgagor. Rather all the mortgagor did was to make a spirited effort by presenting a cheque dated 11/5/98 for M1.3 million after the property had been sold on 28/4/89. Although, the appellants tried to show that they asked for an extension of time within which to pay the loan. There is no evidence that such request met with the 1st respondent's favour. In fact such a concession could not have been granted because as at the time it was made, the property had been*

> *sold to a third party - the 2nd respondent. That was a spirited attempt to redeem.*

Once the mortgagee exercises his right of sale bona fide for the purpose of realising his debt, as in the instant case, and without collusion with the ultimate purchaser, the court will not interfere even if the sale is disadvantageous unless the price is so low as in itself to the evidence of fraud. This is because a mortgagee is not regarded as a trustee of the power of sale. What is required of the mortgagee is to act honestly and in good faith. Thus, a mortgagor will only be protected from unreasonable conduct on the part of the mortgagee, such as fraud or a sale at a price considered unconscionable. In the instant case, there is no evidence of any such unreasonable behaviour against the mortgagor.

23. Op. cit.

The remedy of a mortgagor who holds himself out as having been daminified by the improper or irregular exercise of a mortgagee's power of sale is in damages against the person who exercise it.

In exercising his power of sale, the mortgagee is not a trustee of the mortgagor of the power of sale. The power is given to the mortgagee for his own benefit to enable him realize his security. He must also not attempt to sell by auction before selling by private contract and his motive for selling is immaterial even if it means to spite the mortgagor or it is disadvantageous to

the mortgagor. But he cannot sell to himself -directly or through his agent. He only needed to act honestly and in good faith. In Eka-Eteh vs. NHDS Ltd [24] *the claim was to set aside the sale of the plaintiffs property by 1st defendants to 2nd defendant. The plaintiff also claimed damages for wrongful sale in the alternative.*

24. (1973) 6SC pp. 373-383

The property had been mortgaged by the plaintiff to the 1st defendant in consideration of the sum of £2,500 advanced to him by the 1st defendant. The 1st defendant sold the property in exercise of their statutory power of sale. The learned trial Judge found that the property was sold at an undervalue, but was unable to award the plaintiff any damages because he further found that there was no evidence before him upon which he could determine the price which the property would have fetched. The plaintiff appealed against the refusal of the trial Judge to award him damages and also for refusing to set aside the deed of conveyance in favour of 2nd defendant, while the 1st defendant cross- appealed against the finding that the sale was at an undervalue. It was held:

i. *That a sale at an undervalue alone is not enough to vitiate the exercise of a mortgagee's power of sale and that it must be*

shown that the sale was made at a fraudulent or gross undervalue.

ii. *That if a mortgagee selling under a power of sale takes pains, in exercising that power, to act in good faith, his conduct in regard to that sale cannot be impeached.*

iii. *Since there is no evidence of mala* **fides** *or collusion on the part of the defendants, the sale to the 2nd defendant could not be set aside, nor was there any case made out by the plaintiff for the award of damages in respect of the sale*

The court has no right to inquire into the motives of a mortgagee for exercising his power of sale since the power is bestowed on the mortgagee for his own interest. Where the mortgagee exercises the power bonafide, nothing can be done. The only circumstances in which the exercise of the power of sale can be set aside are as follows:

i. *Where there is some corruption or collusion in respect of the sale by the mortgagee to amount to fraud.*

ii. *Where the sale is at such a low value that it raises an inference that there is fraud in the sale.*

iii. *Where there is evidence that the money has not been paid in full*

iv. *Where the mortgagee sells to itself or to its privy.*

Where fraud is alleged in a sale, it must be specifically pleaded. Fraud is something dishonest or morally wrong and as such must be clearly pleaded and proved in evidence. A mortgagee or receiver exercising powers of sale must act in good faith.

Allegation of lack of good faith does not necessarily imply dishonesty, even though allegation of dishonesty will imply absence of good faith.

In West African Breweries Ltd vs. Savannah Ventures Ltd[25]*. North Brewery was grossly indebted to U.B.A. and five other banks who had granted it credit facilities. It had utilised a charge over all its assets as security for repayment of the credit facilities whose total value was N17.5m. U.B.A. on behalf of itself and the other five banks appointed the 3rd respondent as the receiver/manager of North Brewery. In pursuance of the appointment, the 2nd respondent took over the management and control of North Brewery and in that capacity he entered into an agreement to sell all the assets of North Brewery to the 1st respondent for a consideration of N15m. It was provided in the agreement that* ***'the Purchaser (that is, Savannah Ventures) shall be responsible for the payment of the Company's (that is, North Brewery's) other secured creditors and other priority creditors.***

The assets of the North Brewery agreed to be sold as enumerated in the schedule to the agreement consisted of five groups classified as A, B, C, D and E.

The appellant owned 50% of the equity in North Brewery while the Federal Government of Nigeria owned the remaining 50%. There were three separate valuations of the assets comprised in group A. Two were in 1986 and 1990 by Knight Frank & Rutley (K.F.R.), a firm of valuers

25. (2002) 5 SCNJ. pp. 270-293

commissioned by North Brewery. 28 items of landed properties were comprised in group A. They were valued by KFR in 1986 and 1990 at N39,690,000.00 in exhibit and at Nl58,840,000.00 in exhibit E respectively. These 28 items of properties consisted of the factory of North Brewery only. The receiver/manager commissioned another firm of valuers, Williams and Partners, who carried out valuation of all the assets of North Brewery in which the factory formed only a part of in 1991 and the firm put the value at N59,724,920.00 in exhibit A. There was the third valuation. It was this valuation that the receiver/manager utilizes for his administration instead of the earlier valuation reports.[26]

To the knowledge of the receiver the appellant had, before the valuation commissioned by receiver/manager, commenced negotiation to purchase Federal

Government shares in North Brewery. The negotiations continued to the knowledge of the receiver after the valuation. Also to the receiver's knowledge, the appellant had undertaken to pay off North Brewery's indebtedness to the creditor banks after conclusion of the sale agreement with the Federal Government. The appellant concluded the agreement of sale of the Federal Government shares to it. later, the appellant became aware of the sale of some of the assets of the West African Brewery to Savannah Ventures.[27]

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26. Ibid p. 276
27. Ibid

Being dissatisfied with the result of the valuation commissioned by the receiver which was regarded as an under-valuation and the good faith of the receiver in the whole transaction of sale of, or agreement to sell, the asset of the North Brewery to Savannah Ventures and his activities as receiver, the plaintiff commenced this action claiming that:[28]

(i) *the valuation of the assets of North Brewery by or on behalf of the receiver on 27th September, 1991 was neither made bona fide nor represented a fair value of the assets of North Brewery;*

(ii) *the sale or proposed sale of North Brewery's assets by the receiver was a breach of the receiver's statutory and fiduciary duties to the North Brewery and its employees; and,*

(iii) *The sale or proposed sale of the said assets, machinery and property by the receiver to Savannah Ventures and/or 5th defendant was unlawful, void and of no effect whatsoever, and sought declarations on those lines.*

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28. Ibid

It also asked for order of injunction to restrain the defendants from selling, transferring or disposing of the assets of the North Brewery or doing so at the value contained in the valuation report dated 27 September, 1992 or at any value below N232million and an order setting aside the sale of the assets of North Brewery to Savannah Bank by virtue of a sale agreement dated 22nd June, 1992 and damages.[29]

In his judgment the trial judge in the High Court considered the valuation reports of Knight Frank and Rutley and Williams and Partners along with the oral evidence and came to the conclusion that the valuation report rendered

by Williams and Partners was unreliable and that, in any event, the valuation was gross under — valuation of the assets of the North Brewery.[30] *He* held that the conduct *of* the receiver in regard *to* the *disposition of the assets of the North Brewery, particularly in regard to the transaction of sale embodied in Exhibit F made between him and the 4th and 5th defendants, savoured of both fraud and collusion between him and 4th and 5th defendants. He also held that since the sale evidenced by Exhibit F was based on the under-valuation by Williams and Partners, the sale must be at undervalue and that the sale of the assets of*

29. Ibid
30 Ibid p. 272

North Brewery to Savannah Ventures and its Managing Director the 5th defendant, ought to be set aside on the grounds of uncertainty of the consideration and want of bona fides on the part of the Receiver and that the actions of the 1st Defendant in the sale of the Company's properties Exhibit F to the 4th Defendant are reprehensible, as they are at least savour or are suggestive or admission of fraud and collusion and have thereby seriously eroded, dented and cast unlimited doubts and aspersions on the bona fides of the 1st Defendant. Finally, the trial judge granted the declarations sought and set aside the sale of the assets of the North Brewery to Savannah Ventures.[31]

A mortgagee is only required by law to obtain a proper price and not the best price for a property when exercising his power of sale. Once he has acted bona fide, his exercise of sale cannot be impugned on grounds of undervalue. Undervalue per se *is not enough to vitiate a mortgagee's power of sale, but it must be shown that the sale was fraudulent[32]. It must be shown that the sale was made at a fraudulent or gross undervalue.[33] Sale at a very ridiculously low price played itself out in the case of Ihekwoaba vs. ACB .[34] In this case, the property was valued at the sum of Nl94,000.00 (a property of 8 flats). It was sold in 1987 (ten years after) for N115, 000.00. The Court of Appeal held that in the absence of evidence that it has depreciated, the sale was set aside as evidence of fraud.*

The Supreme Court however, reversed the decision of the Court of Appeal. It held that where a party alleges fraud in a sale of property at a very low price, such party must proffer evidence against the sale and the standard of proof will be proof beyond reasonable doubt. To help in discharging the burden, the party making the allegation should produce a valuation report of what the property would have earned. In the words of the court.

> *True enough there was evidence that the property was valued by a valuer at the time the mortgage was being executed at Ml94,000.00. But no valuer gave evidence as to the value of the property at the time of sale. A number of factors would have to be taken into consideration in determining whether the value of the property had appreciated or depreciated. This would depend on such factors as the state of repairs of the property at the time of sale and the market value of real property at that time[35].*

31. Ibid p. 272

32. Ibid, at p. 288

33. Eka-Eteh vs NHDS Ltd. (Op. Cit)

34. (1998) 10 NWLR Pt. 511 p. 590 at 608

In West African Breweries Limited vs. Savannah Ventures Limited,[36] *two valuation reports were made of the mortgaged properties. While one property only was valued at* ***N****158,848,000.00 in 1990, a second valuation in 1991 valued the entire assets at N59,724,000.00. The sale of the property was set aside for being grossly undervalued. In the words of the court, "*if just one item was M158,848,000.00 how could any transaction of sale of that one item plus several other items at far less than the value of just one item, have been at anything near the proper value"[37]

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35. Per Ogundare ISC, at p. 568
36. Per Ayola JSC, p. 289

The only way a mortgagor can stop the exercise of a power of sale is for him to pay the money in full. So long as he does not, he cannot stop it even if the parties are in dispute on the amount under the mortgage agreement [38]*. Where the mortgagor has commenced an action in court, for example, a redemption action, the court can only stop sale where the money is paid into court. In Nigeria Housing Dev. Society Ltd & Finance vs. Mumuni*[39]*. The plaintiff in 1961 by a mortgage deed mortgaged his leasehold land with the buildings thereon to the 1st defendant as security for a loan of £3,000 on terms that the principal sum with interest thereon be repayable by regular monthly*

installments of £30:2s:6d, the first such installment to be, and was in fact paid in December, 1961. Thereafter the installments were to be paid on the last day of each succeeding month until the complete liquidation of the mortgage debt. In terms of the mortgage deed, the plaintiff covenanted to repay the 1st defendant the principal sum and interest due thereon at the rate stipulated and

reserved in the mortgage deed on the 31st day of

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37. Ibid p. 66
38. B. O. N. Ltd. Vs Akintoye (1999) 12 NWLR, p. 392, at 403
39. (1977) 2 SC 57 pp. 66-76

December or 30th day of June whichever next happened after the date of the advance. The 1st defendant in turn also covenanted to accept repayment of the principal money with interest due thereon by installments at the times and in the manner aforesaid and to refrain from requiring payment of such principal money otherwise than by such installments, if payment was made by the plaintiff as stipulated, and if there was no breach of obligations, statutory or otherwise imposed upon the plaintiff. Notwithstanding the said covenant the principal money was to be deemed due within the meaning of the

Conveyancing and Law of Property Act, 1881 on the date stipulated in Clause 1 of the deed.[40]

The plaintiff paid his installments fairly regularly between 1961 and 1967 but markedly defaulted between 1967 and 1968 because his business was bad. So that by March, 1968, the plaintiff was five months in arrears with his installments. As a result the 1st defendant decided to enforce the terms of the mortgage deed and to exercise his power of sale within the provisions of the Conveyancing and Law of Property Act, 1881.[41] *The mortgaged property was accordingly advertised for sale in the Daily Times newspaper issue of 27th March, 1968 by an Auctioneer retained for the purpose. The plaintiff, having learnt that installments in arrear unpaid amounted to the sum of £210:17s:6d, went and paid a total*

40. Ibid p. 66
41. Ibid

sum of £240 on 26th April, 1968 as representing installments up to and including May, 1968. The mortgaged property was sold on 29th April, 1968 and conveyed by deed dated 1st May, 1968 to the 2nd defendant, who immediately gave the plaintiff notice to quit and deliver up possession of the mortgaged property. Thereupon the plaintiff instituted the action, which has resulted in this appeal, seeking an order of court to set aside the sale; and an

injunction to restrain the 1st and 2nd defendants from interfering with the plaintiffs possession of the property.[42]

In his judgment, the trial Judge granted a declaration that the sale and conveyance by the 1st defendant to the 2nd defendant of the mortgaged property was void. He then set aside not only the sale but also the conveyance to the 2nd defendant. He also granted the plaintiff the injunction sought, ordered the 1st defendant to supply to the plaintiff a full statement of account relating to the installment payments made by the plaintiff in the mortgage transaction. The counter-claim by the 2nd defendant for the possession of the mortgaged property was dismissed. Held:[43]

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42. Ibid
43. Ibid

That the judgment must be set aside on the ground that the plaintiff having breached his covenant to repay the mortgage debt by regular installments, was not entitled to succeed, the 1st defendant was entitled to exercise his power of sale under the Conveyancing and Law of Property Act, 1881, the debt having been deemed to have become due and payable in 1962, and that nothing short of the payment in full of the principal money with interest could have restrained the 1st defendant from selling the property.

Where sale is completed, the proceeds should be used to satisfy the principle and interest otherwise the mortgagee can sue the mortgagor to recover the balance from other properties of the mortgagor not subject to the mortgage because this is the mortgagor primary undertaking in the mortgage transaction.

On the other hand, where all the mortgagor's indebtedness has been settled even to the extent of another mortgage, the balance must be returned to the mortgagor.[44]

The order in which the proceeds of the sale of a mortgaged property should take is as follows:[45]

44. Eka-Eteh vs NHDS, Op. Ct. p. 380

45. Dadem, Y. Y. (2009) Op. Cit p. 149

i. *Pay up all mortgages having priority e.g. legal mortgage*

ii. *Pay* ***commission to the auctioneer and ah other costs of sale;***

iii. *Pay up outstanding interests*

iv. *Pay up outstanding mortgage sum; and*

v. *Pay balance to person entitled to equity of redemption*

A purchaser of a mortgaged property is protected under law. In B. Visioni Limited vs. National Bank of Nigeria Ltd[46]. The defendant bank agreed to grant standing overdraft of N20,000 to the first plaintiff/company and the second plaintiff to Managing Director mortgaged his properties at Bidda and Kachia Roads as securities. Subsequently the first plaintiff applied for an increase of the overdraft to N3 0,000.00. Without (he authority of defendant, the branch manager of the defendant contrary to instructions approved the increase and permitted the first plaintiff to draw N30.000 on several occasions. Another manager took over the branch while the account of the first plaintiff was overdrawn by the N24.000; the bank dishonoured several cheques issued by the first plaintiff. The plaintiffs contended that as a result of the dishonour their business collapsed and suffered loss estimated at N273.000.

46. (1975) NWLR. p. 8.-12, Section 21(3) Conveyancing and Section 127 Property and Conveyancing Law

Furthermore the defendant served notice of sale of the mortgaged property at Bidda Road at N85.000. After deducting N29,143.30 being principal money, interest and expenses of sale, the sum of N55,856.70 being the balance of proceeds of sale, was credited by the defendant to the account of first

plaintiff. Substantial parts of this sum were paid to creditors of the first plaintiff as a result of garnishee orders.

The first plaintiff claimed $4250,193 as damages for breach of overdraft agreement. It was contended that the manager of the defendant acted within his authority to increase the overdraft to N30.000 and that the first plaintiff had therefore sufficient credit to meet the dishonoured cheques by virtue of the increase. The defence case was that the action of their manager was ultra vires and that the first plaintiff had no sufficient funds in the account under the original agreement to meet any of the dishonoured cheques.[47]

The second plaintiff claimed that the sale of his property was wrongful in that the notice was improper in that it notified him of the intended sale of Bidda Road property when in fact the defendant sold the Kachia Road property. He also claimed $455,856.70 balance of proceeds of sale which the defendant wrongfully credited to the account of the first plaintiff.[48]

Held: [49]*(1) It is a general principle of law that a master is liable for a contract entered into on his behalf by his servant if the servant has expressed apparent or implied authority of the matter to enter into such contract.*

A notice for sale of mortgaged property need not particularize the property. It is sufficient to describe it as the property comprised in the mortgage; that

47. Ibid p. 9
48. Ibid

the notice in this case complied with this requirement and the fact that property other than the one particularized was sold did not, make the sale invalid.

Accordingly, where a conveyance is made in professed exercise of the power of sale, the title of the purchaser will not be impeached on the ground that no case had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised. In the case of WEMA Bank Plc. vs. Abiodun[50]**,** *the respondent was resident in Ibadan and the appellant, a banker also carried on business in Ibadan, Oyo State. Both were parties to contracts of loan and banking advances. The respondent was a director of a company called Rasamin Industries Limited and a customer of a personal current account No. 1729 with the appellant's branch in Mokola. Ibadan. The said company also held a separate current account with the appellant bank.*

Sometime in 1981, the respondent executed a deed of legal mortgage over his house at No. 16 Ajileye Street, Bariga, Lagos as collateral for credit facilities to Rasamin Industries Limited. The deed was dated the 11th day of May, 1981 and registered as No. 19 at page 19 in Volume 1829.

49. Ibid
50. (2006) 9 NWLR pt. 984 , p.4

Subsequently, the money due on the company's account was duly repaid but a release or discharge was not made of the legal mortgage. The reason for the refusal of release was based on an allegation by the appellant that subsequent to the repayment of the first mortgage, the respondent had again agreed to use the same mortgaged property to secure the account of another company called Niks Travels Limited, another customer of the appellant bank at the same Mokola, Ibadan branch. The chief promoter and managing director of the latter company was one Mrs. Adenike Giwa, a daughter of the respondent.

The latter company held a current account No. 4427 with a loan account No. 304 opened at the same Mokola branch of the appellant at Ibadan. The appellant further alleged that in the documentation of the latter contract of loan and security, the respondent wrote a letter dated 17 September, 1984 and later executed a contract of guarantee as well as a memorandum of deposit both dated 26th March, 1985. Sometime in 1987, Niks Travels Limited defaulted and the appellant, in seeking to recover the money due, did set out to sell the respondent's said landed property.

The respondent in reacting to the proposed sale filed an action in suit No. 1/779/88 in the High Court of Oyo State, Ibadan and claimed against the

appellant a declaration that the appellant was not entitled to exercise any power of sale as mortgagee and an injunction to restrain the proposed sale.

Parties joined issues in their pleadings but the case did not go to trial. Both parties agreed to a term of settlement which was signed and filed in court upon which the court's judgment was predicated. Paragraphs 3 and 4 of the terms of settlement read as follows:

The plaintiff shall make monthly installmental payment of $45,000.00 into the account No. 364/4427 until the debt is finally liquidated.

The plaintiff agrees that failure to pay the installments for a period of three (3) months would make the whole debt fall due and the bank will be entitled to sell the mortgaged property by public or private auction. Notwithstanding the said terms agreed upon by the parties and despite several reminders by the appellant, the respondent repeatedly failed to make payments. Consequently, the appellant instructed an auctioneer to sell the property in issue and this was done.

The respondent was aggrieved by the sale and she sued the appellant, the auctioneer and the buyer as the 1st, 2nd and 3rd defendants respectively at the High Court, Lagos State.

In Lagos State, a mortgagee's power of sale arises immediately a mortgage debt becomes due but the power is not exercisable until statutory notice of three months has been given. This is provided for by the provision of sections 19(1) and 20 Conveyancing and Law of Property Act, 1881. The foregoing requirement may, however, be excluded either altogether or be varied by agreement of parties. In the instant case, the issue of notice had been done away with as a result of exhibit D2 which was the terms of settlement entered into by the parties.

By virtue of section 21(1) of the Conveyancing and Law of Property Act, 1881 applicable in Lagos State, where a conveyance is made in the professed exercise of the powers of sale conferred by the Act, the title of the purchaser shall not be impeached on the ground that no case has arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The provision of section 21(2) of the Conveyancing Act, 1881 is to protect a purchaser buying and a mortgagee selling the mortgaged property in good faith. It cannot be used as an instrument of fraud. It has therefore always

been recognized that the right to exercise a power of sale must have arisen before a mortgagee can pass a good title to the purchaser free from the equity of redemption. In other words, the mortgage debt must have fallen due, and consequently, even if the stipulated notice to sell the mortgaged property has not been giveft by the mortgagee to the mortgagor, a purchaser buying from the mortgagee will acquire an unimpeachable title. It follows from the foregoing therefore that the provision of section 21 of the Conveyancing and Law of Property Act seeks to protect the mortgagee as well as the purchaser in good faith. In other words, it is significant that the mortgage debt must have fallen due and also that both mortgagee and the purchaser sold and bought in good faith. In the case at hand, there was no evidence of any fraud or exercise imputed upon either the mortgagee or the purchaser. The appellant's power of sale had also arisen under exhibit D2.

3. Foreclosure

An order of foreclosure is a common remedy for equitable mortgages since a legal mortgagee would rather exercise the power to sell the property in the event of a default. Foreclosure is an order of court by which the equity of redemption of the mortgagor and all persons claiming through him including subsequent encumbrances are

extinguished so as to vest the mortgaged property absolutely in the mortgagee. The equitable right to redeem is the right granted by equity to the mortgagor to still recover his security by paying the money under the mortgage although the time fixed for the payment of *that money has passed and even if this is against the expressed intention of the parties.*

*Under foreclosure, a mortgagee applies to transfer the mortgagors' title to him. The court may also grant an order for judicial sale as an alternative to foreclosure in the course of foreclosure proceedings. Usually, foreclosure order is granted in stages- first-**nisi** (unless) and then secondly, **absolute.** When an order is made **nisi,** redemption is still possible for a period of six months and where the mortgagor still fails to redeem, then upon another application by mortgagee, a decree absolute would be granted. The court may exercise its powers pursuant to a judgment made by it to order for a sale of a property. The court would then issue a certificate of purchase which is a certificate usually issued to purchasers in case of a judicial sale. A certificate of purchase in certain jurisdictions is an instrument that is required to be registered and failure to register it will make it inadmissible in evidence[51]. Such purchaser where the land is subject to a customary right of occupancy*

36. Section 2 Instrument Registration Law Ogun State and Kaduna State

would have to apply for the consent of the Governor to have the legal title of the property vested in him[52].

*4. **Right to Take Possession***

A legal mortgagee has a right to take possession of the mortgaged property. This right is immediate, not contingent upon the default of payment of the amount[53]**.** *This power extends to the right of the mortgagee while in possession to cut and sell timber and other trees ripe for cutting. But the mortgagee who takes possession is bound to account strictly to the mortgagor for his actions while in possession. This explains why in practice mortgagees do not take possession until there is default by the mortgagor.*

51. Section 2 land Instrument Registration Law, Cap 81, Law of Ogun State and Kaduna State.

52. Section 21(a) of the Land Use Act provides that it shall not be lawful for any customary Right of Occupancy or by pass thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise however without the consent of the Governor in cases where the property is to be sold by a or under the order of any court under the provision of the applicable Sheriffs and Civil process Law.

53. Section 19 (1) (iii) Conveyancing Act and Section 123 property and Conveyancing law.

*5 **Appointment of a Receiver***

A legal mortgagee has the power to appoint a receiver where the mortgagor defaults to pay[54]*. Where the mortgage is an equitable mortgage created by deed, the deed should provide for the power to appoint a receiver. In Adetona and Anor. vs. Zenith International Bank*

Limited[55] *the court defines a receiver as a person appointed by the court for the purpose for preserving the property of a debtor pending an action against him or applying the property in satisfaction of a creditor's claim whenever there is danger that in the absence of such appointment, the property will be lost, removed or injured. A receiver usually exercises protective duty over property he possesses and may collect rent and profits accruing on the property and discharge rates and other outgoings. The powers, duties and rights of a receiver so appointed are regulated as follows:*

a. *That the receiver shall have the power to demand and recover all the income of the property of which he is appointed receiver;*

b. *He shall be entitled to remuneration out of the money received by him to pay taxes, rates and other outgoing affecting the mortgaged property;*

c. *To pay interest accruing in respect of any principal money due under mortgage;*

d. *To pay the residue of the money received by him to the person who is entitled to receive the income of the mortgaged property.*

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54. Section 19 (i) Conveyancing Ac Section 123 Property and Conveyancing Law; Awojugbagbe vs Chinukwe Op.cit p. 40.

55. (2008) All FWLR part 440 p. 796

In the case of equitable mortgage, where there is no clause on the appointment of a receiver, the mortgagee may apply to court for one to be appointed. His duties may be regulated by the order of court appointing him. The receiver appointed by the court is personally liable for his acts. He must therefore give security before assuming his office. He must act in good faith and where he has colluded to undervalue the property and have it sold at gross undervalue, the sale will be set aside as evidence of bad faith[56].

6. Other Rights of a Mortgagee

(a) Possession of title deeds by the mortgagee, but which must be returned upon redemption of the mortgage and also right to insure [57]

56. West Africa Breweries Ltd Vs. Savannah Ventures Ltd. (2002) SCNJ, p. 269

57. Adewale, T. (2011), The Nigerian Land Law, Ababa Press Ltd. Sango, Ibadan. P. 129 - 130

(b) Right to consolidation: This is a right granted to a mortgagee where he has more than one mortgage against the mortgagor to say that the mortgagor cannot redeem one without the other. This is not really a right except where the mortgage deed expressly provides for it. Since sections 17 Conveyance Act and 115 PLC, are against consolidation, the mortgage deed must expressly negate them and allow for consolidation[58].

(c). Right to fixture and to Grant and Accept leases. A mortgage includes all fixtures attached to the land either at the date of the mortgage or thereafter, subject to any contrary intention. The power to remove certain fixtures allowed to a tenant is not allowed to a mortgagor. Further, if a mortgagee takes possession of land with a view to utilize the profits in satisfaction of the money due to him, he is authorized by statute to grant leases within the limits made applicable to a mortgagor who is in actual possession[59].

58. Dadem, Y. Y. (2009), Property Law Practice in Nigeria Jos University Press Ltd, Jos Nigeria. P. 150

59. Adewale, T. Op. Cit. p. 129

4.3 Rights of a Mortgagor

1. Right to Redeem

A basic nature and character of mortgages is that the property used as collateral is always redeemable and the mortgagor must be given an opportunity to redeem at the legal due date and after that to exercise his equitable right of redemption. Therefore, any clause or clog in a mortgage against redemption is void. In *Yaro vs. Arewa Construction*

Ltd[60] the 1st respondent entered into a mortgage agreement with the 2nd respondent, depositing the title documents of its property with the 2nd respondent as security for the loan. When the 1st respondent ran into financial difficulties, it decided to sell the property to Incar Nigeria Ltd. The company could not pay the purchase money for the property so the deal was brought to an end. The appellant, a director in Incar Nigeria Ltd decided to buy the property. He paid the sum of N1.8 million (one million, eight hundred thousand naira) out of the N2.3 million (two million, three hundred thousand naira) demanded for by the 1st respondent. He was put in possession of property. He also carried out extensive renovation work on the property.

Upon discovery that the title documents were with the 2nd respondent, he demanded but was refused the delivery of the certificate of occupancy. The second respondent demanded the N500,0000 balance still owed it by the 1st respondent. When the appellant failed to make the N500.000 balance payment at the time fixed by the 2nd respondent, the 2nd respondent refused the release the document owing to the fact that the time fixed by it had lapsed.

The appellant instituted an action at the High Court of Justice, Kano State claiming inter alia, a declaration that the agreement to purchase the 1st respondent's property cannot be unilaterally rescinded by the 1st respondent and as such he was entitled to the title documents, $4500,000.00 special and general damages.

At the end of the trial, the trial Judge in a considered judgment held in the respondents' favour. The appellant aggrieved, appealed to the Court of Appeal which also dismissed the appellant's claims. Dissatisfied still, the appellant appealed to the Supreme Court where it was held that an important feature of mortgages both legal and equitable is that once a mortgage, always a mortgage and nothing but a mortgage.

The nature of a mortgagor's interest left after mortgaging his property is known as equity of redemption, which otherwise is an estate in land.

The mortgagor could always discharge his obligations before the sale of the property and the right to redeem is so inseparable an incident of mortgage that it cannot be taken away by an express agreement of the parties that the mortgage is not to be redeemed or that the right is to be confined to a particular time or to a particular description of persons.

Ejikeme vs. Okonkwo.[61] Sometime in 1966 Lawrence Okonkwo and Samuel Okonkwo (both now deceased) borrowed from Edwin O.C. Ejikeme (the appellant) the sum of £3.7 with which they developed a property at 3 Iweka Road Onitsha. The parties entered into an agreement made under seal which agreement was registered in the Lands Registry office at Enugu. Part of the recitals of the agreement reads as follows:

The Borrowers are in course of erecting on the said property dwelling house and has requested the mortgagee for the purpose of completing such dwelling house to lend to them the sum of £3.700 ($47,400.00).

And whereas the mortgagee has agreed with the borrowers to lend to them the sum of £3,700 out of the money belonging to his family upon having the repayment thereof as hereinafter mentioned and secured in a manner hereinafter appearing.

61. (1994) 8 NWLR pt. 362, p. 266

The agreement demised unto the lender

All that plot of land with the dwelling house thereon situate at and known as and called No. 3 Iweka Road, Onitsha to hold the same unto the mortgagee for the term of 35 years from the first day of July, 1966.

Paragraph 6 of the agreement or deed provides

Provided always that if the said sum of £3,700.00 with compound interest thereon as aforesaid shall be paid to the mortgagee by way of half the rents collected from the secured property monthly for a period of 35 years and in accordance with the foregoing covenant, the said hereditaments comprised in this security shall at the request and cost of the Borrowers and Mortgagee be re-assigned to him at the end of 35 years from the date of this mortgage.

The lender by virtue of the agreement was being paid by the borrowers half the rent they were collecting from tenants in the house. The borrowers died during the civil war and Veronica Okonkwo and Ndubisi Okonkwo - wife and son respectively of Lawrence Okonkwo took out letters of administration with one other person Elder Okonkwo in respect of the estate of Lawrence Okonkwo. In 1982 by a letter dated 19th May and addressed to the appellant, Veronica gave notice of her intention to pay off all the outstanding balance of the loan plus interest due thereon as at 20th June 1982. The appellant replied through his solicitor that he would insist on his rights under the agreement, that is he would continue to collect 50% of the rent accruing from the property for 35 years as stipulated in the agreement. He therefore refused to accept the offer made by Veronica Okonkwo. As a result, Veronica refused to

share the rent with the appellant who then instituted the action leading to this appeal. It was held that fixing a date for repayment in a mortgage deed does not generally indicate the parties' intention that actual payment is to be made on the named date but only that the mortgagee may call for payment on or at any time after the date if so minded, but not before. The date fixed is usually six months from the date of the loan or deed, but may be at the end of three months or any other period, or the loan may be made repayable upon demand. In general, the mortgagor may not repay prior to the date fixed for repayment.

Where a mortgage deed or agreement does not stipulate a covenant to pay the principal debt and the interest on a given date, there is an implied promise to pay the principal debt and interest at a reasonable time.

Incident to every mortgage is a right of the mortgagor to redeem. This right is generally referred to as the equity of redemption.

The right to redeem is so inseparable an incident of a mortgage that the mortgage is not to be redeemable or that the right is to be confined to a particular time or to a particular description of persons. The right continues unless and until the mortgagor's title is extinguished or his interest is

destroyed by sale cither under the process of the court or of a power in the mortgage incident to the security. In the instant case, the contention of the appellant that the mortgage cannot be redeemed until the expiration of the 35 years lease granted the appellant by Exhibit 'A' would amount to a clog on the equity of redemption.

It is a settled rule of equity that any agreement which directly bars the mortgagor's right to redemption is ineffectual. Similarly stipulations which even indirectly tend to have the effect of making a mortgage irredeemable are equally void and unenforceable as clogging the equity of redemption, a doctrine which applies to all types of mortgages, whether legal or equitable. In the instant case, Exhibit 'A' is redeemable and the appellant was wrong in his contention that the respondents could not redeem that mortgage by payment of the balance of all money owed under the transaction until the expiration of 35 years from tin- 1st day of July 1966 on which date the mortgage was entered into.

Where a mortgage is created, the mortgagor has two rights to redeem - legal and equitable. The legal right to redeem is expressed in the deed by the agreement of the parties. Upon the expiration of the specified

dates for payment the legal right to redeem expires, but the equitable right to redeem continue to exist.

Aside these two rights to redeem, the mortgagor has the equity of redemption which is an estate in land that could be sold, disposed of, or even mortgaged. It is this equity of redemption that is destroyed or extinguished by a sale, foreclosure or release by money.[62]

2. Redemption, Re-Conveyance and Discharge of Mortgages

In all cases the consent of the Governor is not required for the reconveyance or release of mortgage that had been created with his consent[63]. This is because section 22 (b) states that the reconveyance which that holder or occupier has mortgaged to the mortgagee with consent of the governor, another consent of the governor will not be necessary.

62. Dadem, Y. Y, Op. Cit. p. 151

63. Section 22(1) (b) of the LUA

Discharge of a mortgage takes place after redemption of mortgage. Redemption is the process by which land that has been mortgaged or pledged is bought back or reclaimed. It is accomplished through a payment of the debt owed or a fulfillment of the other condition[64].

Discharge of a mortgage takes place after the redemption of the mortgage. The manner of discharge depends on the mode of its creation.

i) Legal Mortgage is created (by way of sub-demise or assignment) in States where the Conveyance Act 1881 applies and is discharged by a deed of discharge or a deed of release or surrender which is registerable in the lands registry where the mortgage was registered. This is because a legal mortgage is also created by deed and registered at the lands registry in accordance with the provision of the law in the state applicable[65]. The object of registering it is to serve as evidence of discharge of the mortgage[66].

ii) This is because in the state applicable, the law provides that alongside the deposit of title deed is an agreement to create a legal mortgage in favour of the mortgage.[67] And so a receipt

64. West Encyclopedia of American Law, The Gale Group, Inc 2nd Edition 2008; Legal Dictionary.

65. Section 12(1), 16 of the Registration of Tiles Law, Chapter 66, Law of Lagos State, 1994

66. Yaro, vs Arewa Construction Ltd. (op. Cit)

67. Section 18, Registration of Title Law, Op. Cit

indorsed on, written at the foot of, or annexed to a deed of mortgage for all money secured by it, which states the name of the person who pays the money and is executed by a charge expressed to be by way of legal mortgage or the person in whom the mortgaged property is

50. Section 12(1), 16, of the Registration of Titles Law, Chapter 66, Laws of Lagos State, 1994

51. Yaro, vs Arewa Construction Ltd. (Op. Cit)

52. Section 18, Registration of Title Law, Op. Cit.

vested and who is legally entitled to give a receipt for the mortgage money shall operate, without any conveyance, surrender or release[68].

iii) Equitable mortgages are discharged by receipt of payment of the principal and interest.

3. **Other Rights of the Mortgagor**

The Mortgagor in lawful possession of land could sue at common law to protect that possession. In equity, he is regarded as owner of the land, subject to the mortgage (mortgagee or someone claiming through him) and could obtain equitable remedies such as an injunction against any person to prevent injury to the property, or to enforce a restrictive covenant.[69]

He also has a right to seek an order of court to sell the mortgaged property, to inspect the title deeds, and to compel a transfer of the mortgage[70].

68. Section 41(1) 4 (1) Ibid, Yaro vs Arewa Construction (Op. Cit) p. 609. The deposit of the title deeds with a bank as security for a loan creates an equitable mortgage as against legal Mortgage which is created by deed of transferring the legal estate to the mortgage

69. Adewale, T. Op. Cit. p. 138

70. Ibid

4.4 Death of the Parties to a Mortgage

A mortgage transaction survives the death of the parties. A mortgagor's equity of redemption was considered a realty and passed accordingly to the devisee or heir in the same way as other realty, except he leaves a will showing a contrary intention. Otherwise his devisee or heir was entitled to call upon the personal representatives of the deceased to pay

off the mortgage out of the estate in the same way as the other debts of the deceased had to be paid. This also applies in case of the death of the mortgagee. His personal representatives/executors take over the mortgage. In modern time however, the Administration of Estate Law governs the above position[71].

71. Ibid

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

The use of Landed property as security for loan by banks is important to the economy of every nation, underdeveloped, developed. This leads us to the need for mortgage transactions to secure loan from banks, for

this reason landed property has been chosen as the security for loan in mortgage transactions for the purpose of this research work because of it's value and the important role it plays in society.

This research work has also taken a look at the development of mortgage institutions and the creation of mortgage transaction so as to facilitate the use of landed property as security for loan under banking law.

It further takes a look at the Land Use Act which is the single law which defines land rights, obligations and specific conditions precedent for any alienation or encumbrance of land rights and how it affects mortgage of land property with the aid of decided cases.

Finally this research work looks at the several ways of enforcing the rights of the mortgagee and mortgagor in the event of a breach and the consequences of the breach of a mortgage transaction, with the aid of decided cases.

2.2 Findings

This research work has discovered the need to review the existing law affecting mortgage of landed property so as to encourage the use of

landed property as security for loan and remove the obstacles and hindrances militating mortgage transactions. Thereby coming up with these findings

i. Enactment of Effective law to Discourage Defaulters in Mortgage Transaction

This research found out that there are laws on ground to protect mortgagees from defaulting mortgagors who breach their mortgage covenant, but this has not stopped defaulters. Infact default by mortgagors is a common practice due to the fact that the laws are ineffective. Therefore the need for appraisal of mortgage transaction under banking law in Nigeria.

ii. Entrenchment of the LUA in the Constitution

It is the opinion of this research work that it has not been possible to amend the Land Use Act without first amending the constitution, contrary to the argument in *Abioye Vs Yakubu*[1] where it was said that the LUA is only annexed to the constitution. This has made it impossible to review some of the sections militating mortgage transactions.

iii. Delay and Cost of Registration of Mortgage and Obtaining Governors Consent.

The bureaucracy experienced by mortgages can be stifling and costly. This has discouraged prospective businesses from embarking on mortgage transaction to secure loan from banks under the banking law in Nigeria.

5.3 **Recommendations**

Having found some militating factors in mortgage of landed property as security for loan under banking law in Nigeria. This research work has come up with the following recommendations.

i. Enactment of Effective Laws

Enactment of effective laws to curb malpractice in the mortgage industry and facilitate recovery of mortgaged property and loan.

ii. Separation of the Land Use Act from the constitution.

There should be a separation of the Land Use Act from the Constitution of the Federal Republic of Nigeria in order to ensure flexibility of its review. If this is not done, the Land Use Act cannot be amended without first emending the constitution. That is if we are not going by the position in *Abioye vs Yakubu*[2] which

1. (1991) 5 NWLR. pt. 150 pp. 82, 145-147

1. Ibid

says the LUA is only an appendage to the constitution and can be amended.

iii. Improving mortgage Registration and process of Obtaining Governors Consent.

Mortgage registration and the process of obtaining Governors consents are still very frustrating in most states in Nigeria. It is expensive, inefficient, time consuming and prone to corruption. This can be curbed by eliminating some of the cumbersome measures, enacting law to sanction corrupt officers in the ministry and introducing Geographic information system (G.I.S) in land registration. This has been done in Abuja and Lagos with encourage results. Other states should quickly follow suit.

In conclusion the need for an enabling environment for the mortgage industry in Nigeria to thrive cannot be overemphasized, especially the potency of Land as security for capital, investment, business and agriculture, which are all essential to the development of any nation, especially infrastructural. Unfortunately, the situation on ground in Nigeria leaves much to be desired.

2. Ibid

A lot could still be done by both government and private sector to boost mortgage transaction. There have been law and policies over the years to do this. This work

has therefore attempted to X-ray some of the bottlenecks and attendant inadequacies like structural issues, titling, poor property registration system, the Land Use Act, inadequate legal regulatory frame work, including frustrating judicial remedies like foreclosure amongst others.

In the process, attempt was also made in this work to suggest some workable solution and most importantly the review of some of the laws affecting mortgage transaction which hinders the use of Land as security for mortgage and the enactment of laws to punish defaulters.

This is because using landed property as security for loan in mortgage transaction will go a long way to encourage citizens of this country, Nigeria, to obtain long term loan from banks and because they are long term in nature, they are shielded from the hardship of repaying the loan within a short time. This is very relevant to Nigeria's quest to achieve and secure decent and affordable housing for all, which is still a big issue in Nigeria. In the words of the Minister of Finance, when housing works, the whole economy works, right down from mortgage companies to building materials sellers, to brick layers and carpenters and masons. The benefit in term of job creation and overall economic development are immense.

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