AN APPRAISAL OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR MORTGAGE FINANCING IN NIGERIA

BY

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DEPARTMENT OF PRIVATE LAW
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AHMADU BELLO UNIVERSITY
ZARIA, NIGERIA

JANUARY, 2021

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A THESIS SUBMITTED TO THE SCHOOL OF

POSTGRADUATE STUDIES AHMADU BELLO UNIVERSITY

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD

OF DEGREE OF DOCTOR OF PHILOSOPHY- (Ph.D.) IN LAW

DEPARTMENT OF PRIVATE LAW,

FACULTY OF LAW,

AHMADU BELLO UNIVERSITY,

ZARIA, NIGERIA

JANUARY, 2021

DECLARATION

I, Farida Aisha Kera, declare that this thesis titled "**An Appraisal of the Legal and Institutional Framework for Mortgage Financing in Nigeria**" was written by me in the Department of Private Law of Ahmadu Bello University, Zaria under the supervision of the learned Professors Yusuf Aboki, A. M. Madaki and D. C John. The information derived from other sources was duly acknowledged. As far as I know, no part of this thesis has been previously presented for another degree, or diploma at this or any other university.

Farida Aisha Kera _____ _____

Signature Date

CERTIFICATION

The thesis titled "**An Appraisal of the Legal and Institutional Framework for Mortgage Financing in Nigeria**" by Farida Aisha Kera meets the regulations governing the award of Doctor of Philosophy of Laws (Ph.D) of Ahmadu Bello University, Zaria, and it is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to Almighty Allah and to the ever green memory of my late parents Alhaji A Abdulkadir and HajiyaMairo Muhammad.

ACKNOWLEDGEMENT

My utmost gratitude goes to Allah (SWT) the cherisher and sustainer of this world, for sparing my life and granting me good health (after a very long health challenge) and eventually made it easy for me to complete this work successfully. Alhamdulillah! May the peace and blessings of Allah be on his Prophet, Muhammad (SAW).

I must acknowledge the Supervisory Committee of this research in persons of Prof. Y. Aboki, Prof. A.M Madaki and Prof. D.C. John. To start with, my deep seated gratitude goes to Prof. Aboki, an erudite scholar, who has always been there right from the beginning of my academic carrier (Diploma to Ph.D.). He has contributed immensely as my teacher, mentor, and as the Chairman of the Supervisory Committee. Without his encouragements, valuable suggestions and criticisms, this work would not have seen the light of the day.

I must appreciate Prof. A.M Madaki, a man of high rectitude for the crucial role he has played in my academic achievements; thank you sir for the kind assistance, guidance and encouragement to ensuring that this work is a reality. To Prof. D. C John; sir, I am grateful for your valuable contribution to the completion of this work. May Almighty Allah continue to bestow his favours on you and the members of your families, amen.

My special appreciation goes to the members of Department of Private Law, Faculty of Law, Ahmadu Bello University, Zaria in persons of Professor K.S Chukkol, Professor NuhuJamo, Professor J.A.M Audi, Dr. Abdulkarim, (my Head of Department), ZainabHaruna, Dr. DahiruSani, Dr. Hassan Bala, Maryam Ibrahim Abdullahi, Abdul Mohammed, M.K Abdallah, AliyuAbdullahi, Abubakar Muhammad Bokani for their support and encouragements; may Allah bless you all.

My profound appreciation goes to Prof. M.T. Ladan, Prof. A. Agom, Prof. SaniIdris, Dr. S.M.G Kanam, Dr. Ibrahim Shehu, Dr. S. A. Apeniga, Prof. Ibrahim Ahmad Aliyu, Prof. Y. Y. Bambale, Prof. I. F. Akande, Dr. S. B. Magashi, Dr. Latifat Bello, Dr. Paul Onu, Dr. Paul Abraham Barr. JamilaShuaibu, Barr. HadizaKabiru and Barr.IshaqOpeyemi for their immeasurable contributions and encouragement to seeing that this work is completed. I also thank Mrs. Laah, Mr. Kadiri and Ahmad Muhammad Bello for typing the manuscript of this work. Ahmad, Bashir, Umar and Baaba I appreciate you all.

I wish to acknowledge all members of the families of AlhajiAbdulkadir, AlhajiKera, Alhaji Idi Feta and AlhajiDogara. Thank you for your moral and financial support. My special appreciation goes to Alhaji Ibrahim Dogara (TafidanShika), my late husband, who rendered all form of support to see the completion of this work. I pray for his eternal rest in Al-JannatFirdaus. I am grossly indebted to my beloved sister and childhood friend, HajiyaRakiya, for her love and support. I also appreciate my special friend and teacher, Hon. Justice Muhammad Lawal Bello for his keen interest in the realization of this work. Jazakallahukhairan your Lordship. I must not forget to mention the contribution of late Alh. HusseiniMuhammed (Maye) to this work. Thank you. I pray that you are resting in Al-Jannah.

To my children, Dija, Ummulkhairi, Karima, Munira, Maryam, Abdulhakeem, Kansila, Shuaibu, Husseini and Munkaila for their patience and prayers while undertaking this work. Finally, Ahmad my son, I thank you very much for your immense contributions, may Allah reward you abundantly.

TABLE OF STATUTES

Bank and other Financial Institutions Act, Cap. B3, LFN, 2004- - - -29

Central Bank of Nigerian Act Cap. C, LFN, 2004- - -- --93, 94, 101, 123

Company and Allied Matters Act, Cap. C20, LFN, 2004- - - - -83, 84

Constitution of the Federal Republic of Nigeria Cap. C23, LFN, 2004 -3, 106, 107, 142

Conveyance Act 1882 (Law of England)- - - - - 64,66, 73

Federal Mortgage Bank of Nigerian Act, Cap. F16, LFN, 2004- - -102, 103, 104

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Registration of Title Law Cap. 166 Laws of Lagos State, 1994- - - -81

Universal Declaration of Human Rights, 1948- - - - - - 2

TABLE OF CASES

Adedejivs. National Bank of Nigeria Ltd (1989) 1 NWLR 212- - - 85,164

AdaranOgundianavs.VS.A.L Araba and Anor (1978) LPELR-SC.470/57 - 60

Awojugbabe Light Industries Ltd. vs.Chinukwe (1992) 5, NWLR, (pt. 390) 409 - - - - - - - - 81

Ayanlerevs. FMB (Nig) Ltd (1998) 11, NWLR, (pt. 575) 621 - - -77

Ayodirevs. Union Bank of Nigeria (2007) 12, NWLR, (pt. 1052) 567 - -164

Brewer vs.Square (1892) 2, ch. 111 - - - - - -

Chief BelonwoUgochukwuvs. Cooperative and Commerce Bank Nigeria Ltd

(1996) 6, NWLR, (pt. 456) 524 - - - - - - 80, 86

Charts worth Properties Ltd vs.Effiom (1971) 1, W.L.R., 144 - - 49

Chief BelonwoUgochukwuvs. Cooperative and Commerce Bank Nigeria Ltd Ogundare(1996) LCN/241(SC)_- - - - 80

Canal Ltd vs. T.C.R. Ltd. (2017) 3, NWLR, (pt. 1553) 34-518 - - 89

Danjaravs. Muhammad Bai (1965) NMLR, 445 - - - - 88

Daily Times Nigeria PLC. vs. Skye Bank PLC (2017) LPELR-43539(CA) - 62

Ecobank Nigeria Limited vs. Anchorage Leisures Limited & Ors (2018) LPELR-SC.406/2016- - - - - - - 60, 131

Federal Mortgage Bank of Nigeria vs.Olloh (2002) FWLR, (pt. 107), 1244. -

123

Four Maids Ltd vs. Dudley Marshall (properties) Ltd (1957) (ch. 317, at 320)- 48

F.B.N Plc. vs.Songonuga (2007), 3, NWLR, (pt 1021) p.230 at 280. - -

36

Faircloughvs. Swan Brewery Co (1912) A.C. 565, - - - - 54

Gosling vs. Veley12 KB 407 - - - - - - - -

157

Hughes vs. Waite.(1957) 1 W.L.R. 713 at 715). - - - - 49

Ihekwoaba vs. A.C.B Ltd (1998)10 NWLR pt. 571, 590- - - - - 71

Labededivs.Odunlana&Anor and Chime vs. Chime - - 71

Nigerian Housing Development Society Ltd vs.Mumini (1977) LEPELR-SC 440/1978 - - - - - - - 53

Okuneye vs. First Bank Nigeria Plc (1996) 6, NWLR, (pt. 457) - - 87

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Osakwevs.Nwokedi&Anor (2009), 12, NWLR, (pt. 1159), at 645-646 paras E-B p.79- - 70

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Queen vs. Minster Lands & Survey (1963) N.N.L.R - - - -

85

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84

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LIST OF ABBREVIATIONS AND ACRONYMS

AC	____	Appeal Cases
ABS	____	Asset-Backed Security
A.D.	____	After Death
BOT	____	Build, Operate and Transfer
BUMLAND	____	Building Materials Producers Association of Nigeria
CDO	____	Collateralized Debt Obligation
CBN	____	Central Bank of Nigeria
CA	____	Conveyancing Act
C of O	____	Certificate of Occupancy
DBS	____	Depository-based Mortgage
EDLs	____	Estate Development Loans
FMBN	____	Federal Mortgage Bank of Nigeria
GDP	____	Gross Domestic Product
G.R.A	____	Government Reserve Areas
IDF	____	Infrastructure Development Fund
ISA	____	Investment and Securities Act
IA	____	Insurance Act
JSC	____	Justice of the Supreme Court
JCA	____	Justice of the Court of Appeal
KADMFL	____	Kaduna State Mortgage and Foreclosure Law
LEDB	____	Lagos Executive Development Board
LTV	____	Loan-to-value Ratio
LUA	____	Land Use Act
LPELR	____	Law Pavilion Electronic Law Report
MGC	____	Mortgage Guarantee Companies

MDG	____	Millennium Development Goals,
ML	____	Mortgage Loan
MBS	____	Mortgage Backed Securities
N.N.L.R	____	Northern Nigerian Law Report
NMRC	____	Nigerian Mortgage Refinance Company
NIDO	____	Nigerian Industrial Development Bank
NDE	____	National Directorate of Employment
NWLR	____	Nigerian Weekly Law Report
NHF	____	National Housing Fund
NHP	____	National Housing Programme
NBS	____	Nigerian Building Society
NHP	____	National Housing Policy
PMM	____	Primary Mortgage Market
PMIs	____	Primary Mortgage Institutions
PEDs	____	Private Estate Developers
REITs	____	Real Estate Investment Schemes
ROT	____	Repair, Operate and Transfer
REDAN	____	Real Estate Developers Association of Nigeria
SDGs	____	Sustainable Development Goals
SEC	____	Security and Exchange Commission
SPV	____	Special Purpose Vehicle
SMM	____	Secondary Mortgage Market
UUS	____	Uniform Underwriting Standard
UK	____	United Kingdom
UN	____	United Nations

WLR ____ Weekly Law Report

WHO ____ World Health Organisation

ABSTRACT

Housing is one of the priorities of man's needs. In African setting, owning a house mean that a person has graduated group of household, a status which characterized self-autonomy, manhood, some level of independence and capability to bring other relations who want to live there to do so. Owning a house is a dream for all. In the past, it was relatively easy to own a house because the cost was not much, coupled with some community assistance which has made building a house less tedious. But nowadays, owning a house especially in an urban or semi-urban area is a herculean task. There is no assistance from age-mate group or community. Everything is done with money. Even the land upon which to build the house is expensive. Building materials are costly. There are numerous building laws and regulations which must be complied with before one can build a house. In essence, building a house is capital intensive project which cannot be taken lightly. It is because of this that respite is often resorted into by going to financial institutions to borrow money. This thesis appraised the laws and institutions which have been established in the country in order to provide loan for persons wishing to own a house. The methodology adopted in this research is an amalgam of doctrinal, which is library oriented, and empirical, which involves interviewing various stake holders. It was found that despites the numerous laws and mortgage institutions, the system is not making meaningful progress as the country still has huge deficit of housing requirements. The study shows that Nigeria needs about 22 million housing units by year 2020s. The year 2020s are already here, but the country's housing units are far below that projection. This failure is attributed to factors such as stringent land laws which made acquisition of land almost impossible. Other reasons discovered include corruption which constrains the smooth operation of the mortgage laws and institutions. There are also challenges associated with high interest rate, lack of awareness of the existence of mortgage loan, and lack of cash flow to meet the demands of applicants. It is recommended that there should be reform of the land Use Act, National Housing Funds, and the Federal Mortgage Bank Act, among others, in order to see that the impediments crippling mortgage financing in Nigeria are removed. It is also recommended that the interest rate be reduced or subsidized and government should encourage non-interest financing.

Table of Contents

Title Page ..... **Error! Bookmark not defined.**
DECLARATION ii
CERTIFICATION iii
DEDICATION iv
ACKNOWLEDGEMENT v
TABLE OF STATUTES vii
TABLE OF CASES viii
LIST OF ABBREVIATIONS AND ACRONYMS x
ABSTRACT xiii
CHAPTER ONE 1
GENERAL INTRODUCTION 1
1.1 Background of the Study 1
1.2 Statement of the Research Problem 5
1.3 Aims and Objectives of the Study. 8
1.4 Scope of the Research 8
1.5 Methodology 8
1.6 Significance of the Research 9
1.7 Literature Review 9
1.8 ORGANISATIONAL LAYOUT 19
CHAPTER TWO 23
CONCEPTUAL CLARIFICATION OF KEY TERMS AND HISTORICAL DEVELOPMENT 23
2.1. Introduction 23
2.2. Conceptual clarification of key terms 23
2.2.1. Housing 23
2.2.2. Housing Policy 25
2.2.3. Mortgage 26
2.2.4. Collateral /Security 28
2.2.5. Mortgagor 30
2.2.6. Mortgagee 31
2.2.7. Legal Mortgage 34
2.2.8. Equitable Mortgages 35
2.2.9. Mortgage Financing 36
2.2.10. Mortgage Institutions 38
2.2.11. Primary Mortgage institutions 39
2.2.12. Leasehold 40
2.2.13. Property and Possessory Lien 41

2.2.13 The Title and the Lien theory 41
2.3 EVOLUTION AND DEVELOPMENT OF NIGERIAN MORTGAGE MARKET 42
2.3.1 Pre-Colonial 42
2.3.2 Colonial Period 44
2.3.3. Post-Colonial Period 47
CHAPTER THREE 52
LEGAL FRAMEWORK FOR MORTGAGE FINANCING 52
3.1. Introduction 52
3.2 LEGAL FRAMEWORK FOR CREATION OF MORTGAGES IN NIGERIA 52
3.2.1. THE COMMON LAW 52
3.2.1.1 Freehold Estate 53
3.2.1.2 Leasehold 56
3.2.1.3. Sublease or Sub-demise 56
3.2.1.4. By Assignment 57
3.2.2 THE DOCTRINE OF EQUITY 58
3.2.2.1. Deposit of Title Deed with an intention to create a mortgage 58
3.2.2.2. Deposit of Title Deed with an agreement toexecute a legal mortgage 61
3.2.2.3. Equitable Charge of the Mortgagor's Property 62
3.2.2.4. Equitable mortgage of an equitable interest 62
3.2.3 STATUTES OF GENERAL APPLICATION 63
3.2.3.1. Property and Conveyancing Law 63
3.2.3.1.1. Demise 64
3.2.3.1.2. Sub-Demise or Sub-Lease 64
3.2.3.1.3. Legal Charge 65
3.2.3.2. Creation of Equitable Mortgage under the PCL 67
3.2.3.3. Conveyancing Act 68
3.2.3.3.1. Assignment 68
3.2.3.3.2. Sub-Demise 70
3.2.3.3.3. Deed expressed to be by way of statutory mortgage 72
3.2.4. LOCAL LEGISLATIONS 73
3.2.4.1. Legal Mortgage under the Land Use Act 73
3.2.4.2. Legal Mortgage under Mortgage and Property Law of Lagos State 74
3.2.4.2.1. Equitable Mortgage under Mortgage and Property Law of Lagos State 77
3.2.4.3. Legal Mortgage under Mortgage and Foreclosure Law of Kaduna State 78
3.2.4.3.1. Equitable Mortgage under Mortgage and Property Law Lagos State, and Kaduna State Mortgage and Foreclosure Law. 79
3.2.4.4. Registration of Titles Law 80

3.2.4.3.5. Company and Allied Matters Act 81
CHAPTER FOUR 85
INSTITUTIONAL FRAMEWORK 85
4.1 Introduction 85
4.2. The Nigerian Mortgage Markets 87
4.2.1. Primary Mortgage Institutions 88
4.2.1.1. Functions of Primary Mortgage Institutions 90
4.2.2. Commercial Banks/ Deposit Money Banks 93
4.2.3. Merchant and Development Banks 94
4.2.4. Federal Mortgage Finance Limited 94
4.2.5. State Government Financing 94
4.2.6. Mortgage Associations 96
4.2.7. Insurance Companies 96
4.3. Secondary Mortgage Market 98
4.4. Actors in the Secondary Mortgage Market 99
4.4.1. Nigerian Mortgage Refinancing Company 99
4.4.2. Federal Mortgage Bank of Nigeria 101
4.4.2.1 Is Federal Mortgage Bank of Nigeria a Federal Government Agency? 104
4.4.3. National Housing Fund Act 107
4.4.3.1. National House Fund Disbursement 109
4.5. INSTRUMENT USE IN THE SECONDARY MORTGAGE MARKET 112
4.5.1. Standardization 112
4.5.2. Documentation 113
4.5.3. Underwriting 114
4.6 CAPITAL MARKET 116
4.6.1 MORTGAGE ACTORS IN THE CAPITAL MARKET 118
4.6.1.1. Security and Exchange Commission 118
4.6.1.2. Real Estate Investment Scheme 119
4.6.1.3. Central Bank of Nigeria 121
4.6.1.4. Mortgage Guarantee Companies 122
4.7. PROMOTION OF MORTGAGES IN CAPITAL MARKET 123
4.7.1. Bonds 124
4.7.2. Mortgage-Backed Securities and Securitization 124
CHAPTER FIVE 126
CHALLENGES TO MORTGAGE FINANCING 126
IN NIGERIA 126

5.1 Introduction 126
5.2 THE CHALLENGES AFFECTING MORTGAGE FINANCING 127
5.2 Legal Challenges 128
5.2.1 Challenges under the land use Act 128
5.2.1.1 Difficulties in Perfecting Title 135
5.2.1.2 Exorbitant Cost 136
5.2.2. Uncertainty to Title 137
5.2.3 Devolution of Right of an Occupier 139
5.2.5. Compensation 140
5.2.6 Restriction on the Age of Mortgagor 141
5.2.7 Lengthy Litigations 142
5.2.8 Enforcement Challenges 143
5.2.9 Conflict of Judicial Pronouncements 143
5.2.10 Low Level of Awareness of Mortgage Institutions 145
5.2.11 High Interest Rates Charged By Domestic Financial Institutions 145
5.2.12 Loss of Focus and Low Level of Capitalization of PMBs 148
5.2.13 Dearth of Long Term Commercial Mortgage Facilities 149
5.2.14 Limited Sources of Fund Supply 150
5.2.15 Lack of Skilled Personnel 150
5.2.16 Macroeconomic Environment 151
5.2.17 Lack of Capacity by Mortgage Institutions and Mortgagors 151
5.2.18 Low level of Savings 151
5.2.19 Non-Payment of Equity Contributions 152
5.2.20 Low Level of FMBN Performance 153
5.2.21 High Cost of Production 155
5.2.22 Only a Few Nigerians are able to Access Mortgage Finance 158
5.2.23 High Level of Poverty 158
5.2.24 Inadequate Housing Supply 158
5.2.25 Security Instability 159
5.2.26 Lack of Policy Implementation 159
5.2.27 Corruption 162
5.2.28 Psychological Factors 163
CHAPTER SIX 164
CONCLUSION 164
6.1 INTRODUCTION 164
6.2 SUMMARY 164

6.3 FINDINGS 169
6.4. CONCLUSION 177
BIBLIOGRAPHY 178

CHAPTER ONE
GENERAL INTRODUCTION

1.1 Background of the Study

Housing is one of the basic needs of every individual, family, and community in general. As a pre-requisite to the survival of man, it ranks second only to food. It is also one indicator of a person's standard of living and his place in society[1]. Most importantly, a citizen's ability to realisethe dream of owning a house is a major indicator of the strength and relevance of a nation's socio-economic structure[2]. In the past, housing was cheap, though they were thought of as temporary. Because most areas were rural, land, building materials, and labour were cheap and affordable. At times, houses were built through communal labour at a family or village level. The nature of houses were not sophisticated or big, as seen in rural and urban areas nowadays. For such old types of houses and the circumstances that prevailed at that time did not call for external support such as financial institutions or government allowance.

However, with changing circumstances, it is almost inevitable for persons who aspire to own houses of appreciable value either in rural or urban areas to turn to the government or financial institution for a loan. In particular, the substantial financial requirement for housing production is often beyond the capacity of medium or low-income group[3]. Because of this, most government and corporate bodies have deliberately established institutions such as banks or financial institutions to give loans on mortgages to assist individuals, corporations, families, and communities in building houses.

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[1]Nubi. T. O. (2002) Financing Low Income Housing in Nigeria Cities: Need for Paradigm Shift.*Proceeding of the Faculty of Environmental Design* Conference O.A.U. Ile Ife. p. 340.

[2]Sanusin, J. O. (2003) Mortgage Financing in Nigeria: Issues and Challenges, Being a Paper Presented at the 9th*John Wood Ekenyong Memorial Lecture*, Organized by the Nigerian Institution of Estate Surveyors and Valuers, January 29, p. 6.

[3]Ebie, F. (2003) Greater Prospects Ahead in the mortgage Sector.*Houses and Property Magazine* 1 (2), p. 43-49

In Nigeria, the housing delivery system is a combination of many interrelated components such as land, infrastructure, building materials, policies, building regulations, and more importantly, mortgage financing[4]. Mortgage financing is the financing provided by approved financial institutions that accept real estate security for a loan. The aim of mortgage financing is typically centered on two specific objectives. First is that the financing seeks to create revenue for the lender.Second, the extension of mortgages allows qualified individual and business entities to secure properties that can be repaid in terms that are within the ability of the recipient of the loan to pay off in a timely manner[5]. Althoughthe primary consideration for every credit transaction is the debtor's creditworthiness, security is taken as it gives assurance of having a property to fall back on upon mortgagor's default[6].

Mortgage loans within home ownership schemes are commercial services that financial institutions and government offer under strict regulations. These services enable a borrower to achieve his/her homeownership while paying towards the specified periodic amount slightly higher than the rent payable to a landlord for a comparative property[7]. Such arrangements are laudable and very important because the right to adequate housing is considered a core human right today. This position is explicitly echoed under Article 25 of the Universal Declaration of Human Rights[8]which recognisedthat citizens have the right to a standard of living and adequate housingbecause the right to life and standard of living would amount to nothing without adequate housing they can enjoy.

In other words, the import of Article 25 above is that it is a recognised human right

[4]Nubi, T. O. op. cit No. 1.
[5] Wise Geek 'What is Mortgage Financing'? availablehttps://www.wisegeek.net/what-is-mortgage-financing.htm,accessed on 15th November, 2014 at 05.00pm
[6]Pedrazzini and Sampson (1999) "The Legal Framework for secured credit: a suitable case for treatment" *B.1.1.* Issue 1, p. 127, see also Smith I. O. (2001) 'Nigerian law of Secured Credit' p. 2.
[7]Dorothy, E. N., and Enefiok, E. E., (2013), "Mortgage of Land as Security under the Land Use Act 1978", *The Nigerian Juridical Review*, Vol. 11.
[8]Article 25 of the Universal Declaration of Human Rights, 1948.

that every individual be entitled to adequate human basic needs such as shelter. Therefore, all member states should protect that right and ensure its enjoyment by its citizens. Moreover, the UN must also guarantee this right to its member states. In line with this,the countries of the world and all the leading international institutions included slum improvement issue as Target 11 under the 7th Millennium Development Goals(MDGs) at a United Nations' Summit in September 2000. The target focuses on significant improvement in the lives of at least 100 million slum dwellers by 2015. Additionally, after the expiration of the MDGs, the Sustainable Development Goals (SDGs) recognised the provision of sustainable cities and communities, which include assurance ofaccess to safe and affordable housing as its eleventh goal.

Section 16 (1) (d) of the Nigerian Constitution[9] enjoined the government to provide suitable and adequate shelter for all citizens. Thus, even before the UN's housing, Nigeria was already ahead in this regard. For instance, the Nigerian Building Society (NBS) was established in 1956 to mobilisesavings from the public for housing loans. The NBS, which was given the mandate to mobilisesavings from the public to grant housing loans, was transformed into the Federal Mortgage Bank of Nigeria (FMBN) in 1977[10]. Furthermore, the National Housing Policy of 1991 created a two-tier housing finance structure with Primary Mortgage Institutions (PMIs) at the first tier and the Federal Mortgage Bank of Nigeria (FMBN), the supervisor and regulator, at the second tier. The Federal Mortgage Bank is the sole institution at the Federal level charged with encouraging the flow of funds from various sources to the Housing Industry through the Primary Mortgage Institutions (PMIS). To perform these functions, the FMBN was re-organisedinto three divisions: The National Housing Fund Division was charged with the

[9]S.16 of the Constitution of Federal Republic of Nigeria Cap.23, L.F.N. 2004.
[10]Kayode, O. (2011). Mortgage Banking/Housing Finance Sector in Nigeria: Past, present, future, being a paper presented at Nigerian Real Estate 2011: *Market Review and Market projections* at Sheraton.

responsibility for the arrangement of the National Housing Fund. The Regulatory and Inspectorate Division charged with the responsibility of monitoring and regulating housing finance sector operations and Corporate Service Division to provide administrative, accounting and management information services to the core divisions. Under the arrangement, the FMBN was to cease operation as a retail housing finance institution. This role is to be performed by the PMIS, and the PMIS serves as Secondary Housing Finance Institutions[11].

Relying on these institutions, successive governments in the country rolled out development plans targeted to provide a specific number of houses to meet the housing needs of the Nigerian populace. For instance, the National Development Plan of 1962-1968 had targeted 61,000 houses, but only 500 were built, leaving a shortfall of 60,500 (99.2%). The National Development Plan of 1970-1974 had the objective of achieving 59,000 houses, but only 17,700 houses were constructed, leaving a shortfall of 41,300 representing 70%. In 1975-1980, another National Development Plan was adopted to build 202,000 houses. However, only 28,500 were built, leaving a shortfall of 173,500 representing 86%[12]. The National Development Plan of 1980-1985 had the target of achieving 200,000 houses. Unfortunately, only 47,200 houses were built, leaving a shortfall of 152,800 equal to 76%[13]. Similarly, the Rolling Plan of 1994-1995 was adopted to build 121,000 houses, but only 17,792 houses were realised, leaving a deficit of 103,208 houses representing 85%.[14] The shortfall ranges from 70% to 99%.[15]

[11] Ibid.
[12] Ademiluyi, I.A. (2010) Public Housing Delivery Strategies in Nigeria: A Historical Perspective of Policies and Programmes, *Journal of Sustainable Development in Africa*. 12(6), 153-16.
[13] Ibid.
[14] Ibid.
[15] Ibid.

1.2 Statement of the Research Problem

Nigeria is the most populous country in Africa, with about 202 million persons, estimated to grow at about 2.62%[16]. With this, the Nigerian population was projected to be 206 million in 2020.It will clock 300 million by 2030 and 407 million by 2050.[17] The current housing deficit stands at 22 million units.[18]The statistics given above is worrisome. Regrettably, houses in Nigeria are mostly purchased through 100% down payment by individuals or corporations because presently, there is no efficient and effective mortgage financing. There is no doubt this represents a massive problem for Nigerians and Nigeria.

To make the situation worst, the cumbersome legal, regulatory framework for land acquisition poses another challenge to the process of title documentation of land ownership. For instance, under section 21 of the Land Use Act[19], the approval of the local government chairman is required for any alienation by way of assignment, mortgage; transfer of possession or sublease of a customary right of occupancy[20] and in the case of statutory right of occupancy, the governor's consent most be obtained as provided by section 22[21] of the land use act. Consequently, where the requisite consent is not obtained, the mortgage transaction is clearly null and void[22]. However, the major challenge is that there is always delay in the Governor granting the consent. Also, while it is obligatory to obtain the Governor's consent to a landed security transactions (such as that in mortgage transactions), there is no corresponding obligation on the Governor to give his consent if applied for, or to give it within a reasonable time or not to unreasonably with-hold his consent, or to give his reasons in the event of refusing to give his consent. Worse still, even an order of mandamus cannot compel the Governor to grant his consent in

[16]World meters (2019) Nigerias Population,available *@https://www.worldmeters.info/world-population,* accessed on 7th December, 2019 at 07.00pm
[17]Ibid.
[18]Ibid.
[19] S. 26, Land Use Act, Cap. L2, LFN, 2004.
[20]*Queen vs. Minister of Land and Survey, Ex-parte, the Bank of the North* (1963) CCHCJ 1617/73.
[21]Op-sit.
[22] Ibid.

approving mortgage transactions[23]. There is no gain saying that this is one of the problems of mortgage financing in this country.

In addition, mortgage financing in Nigeria is plagued by the persistent refusal by banks to accept communal title to a property, i.e., customary title or ownership, as security for a loan. This is worrisome, especially because most lands in Nigeria are held under customary law (communal title). Practically, it could be seen that almost all lands in Nigeria are held under customary law as only a small percentage, particularly in urban centers that are held under a statutory title. Then if mortgage financing is seen as a way of generating wealth for the improvement of the economic wellbeing of the teeming populace of this country, the neglect or refusal by banks to accept a customary title, is undoubtedly a clog in the wheel of economic development of the people who hold customary title in this country.

Furthermore, Nigeria's interest rate seems too extremely high to attract any meaningful investment in the mortgage sector. Few countries can support a mortgage market at 9% to 13% interest rate given that a mortgage by its very nature is a long-term investment. For instance, if you borrow ₦10,000,000,00 over 25 years to purchase a property, you have to pay a minimum of ₦90,000.00 every year for the next 25 years to pay off the loan. It is natural in such circumstance to guess that anyone who can afford that sort of money would not need a loan in the first place. On the other hand, it is unclear if a low interest rate would encourage banks and other financial institutions to invest in the mortgage sector, especiallyconsidering that there are more and better profitable investment avenues. This is where the problem lies.

As a corollary to the above, the Structure of Bank Deposit Liabilities is preponderantly short term, and the deposit money banks often tend to avoid fund

[23] Ibid.

mismatch, i.e., borrowing short but lending long, which is required in mortgage financing. The key issue that emerges revolves around non-availability of long-term funds to individuals, financial institutions and estate developers who require long-term funds. In other words, the major challenge is how to ensure adequate long-term lending by financial institutions rather than the current short-term lending practice.

Another constrain to mortgage financing in Nigeria is the refusal by workers to register and contribute to the NHF. Part of this problem could be attributed to the failure to enforce the law that makes it mandatory for workers to register and contribute to the Funds. There also seems to be ignorance on the subject matter of mortgage as many people do not believe that it exists and those who know that it exists do not know how to access the funds. Moreover, many people are afraid of debt. Thus mentioning mortgage brings fear into the hearts of those who believe that collecting any loan is bad.

Finally, there is the problem of endemic corruption in the mortgage subsector. For instance, even as a contributor, securing housing loan from public mortgage institutions in Nigeria is difficult.Sometimes officials in these agencies insist on collecting bribe before attending to the applicants. Sometimes failure to comply with such corrupt practices could result in having one's applications not giving the necessary attention. Even after securing the loan, getting genuine land title documents becomes another problem as a prospective land title seeker could be required to bribe some unscrupulous officials of the ministry before getting his or her land title documents processed. The corruption chain equally involves some of the artisans employed during the period of the building projects. With this problem, some building projects are left halfway completedbecause the loan secured was depleted through corrupt practices. In view of the preceding, the following overreaching questions become imperative:

1. How efficient is mortgage financing in Nigeria in the face of the legal

framework?

2. What are the challenges of mortgage institutions as it concerns mortgage financing in Nigeria?
3. What are the possible ways the mortgage sector in Nigeria could attract long term finance?

1.3 Aims and Objectives of the Study.

The aim of this thesis is to make an appraisal of the legal and institutional framework for mortgage financing in Nigeria so as to discover the problems inhibiting mortgage financing and to proffer recommendations to mitigate the inefficiencies observed in the legal framework to create an effective legal regime for the mortgage market and housing finance in Nigeria. To achieve this, the following are the objectives of the study:

1. To examine the legal framework of mortgage creation and financing in Nigeria;
2. To investigate whether the mortgage institutions are delivering houses to meet the demand of the populace of this country;
3. If they are not meeting the demand of the populace, to identify the factors and laws responsible for such clogs and recommend for how they can be removed; and
4. To produce a work that will serve as reference material for students, lawyers, lecturers and the interested public for further research.

1.4 Scope of the Research

This research is centered on the appraisal of the legal and institutional framework of mortgage financing in Nigeria. Hence, the research is limited to examining Nigerian legislation and the various institutional mechanisms for mortgage financing in Nigeria. Though, reference is made to other jurisdiction for guidance where necessary.

1.5 Methodology

The methodology adopted for this research is an amalgamation of the doctrinal and empirical method. The doctrinal method being library oriented analyses material

wasderived from both primary and secondary sources. The primary sources include statutes and judicial decisions while the secondary sources include analysis of books, journals, articles, newspapers and Internet materials. These materials provide the basis for appraising both statutory and institutional framework of mortgage creation and financing in Nigeria with the view to making the necessary recommendations. The empirical method adopted was field-oriented research. In this, the researcher interviewed target groups such as the staffs of Federal Mortgage Bank of Nigeria (FMBN) and Federal Housing Authority (FHA), among others, as to why mortgage financing or mortgage institutions in Nigeria are not functioning well.

1.6 Significance of the Research

A study to examine the legal and institutional framework of mortgage financing toward providing solutions to the problem of housing in Nigeria is of great importance, given the significance of shelter as one of the necessities of life. Therefore the study is relevant in that it provides the following:

1. Information for understanding the statutory and institutional challenges associated with mortgage financing in Nigeria.
2. If carefully adhered to, the information will guide the government in developing favourable policies, and essential amendments to some of our laws, making it difficult for citizens to achieve their dreams of owning a house in the country.
3. Additional reference material for students, researchers, lawyers, and the players in the mortgage market in the country such as Primary Mortgage Institutions (PMIs), Secondary Mortgage Institutions (SMIs), and the general public who want to know about the opportunities available in the mortgage industry.

1.7 Literature Review

Scholars have written books and articles on the subject matter of this research. There have been various opinions and analyses from different perspectives, such as bankers,

estate managers interested in the meaning, importance, functions, of mortgage financing, others such as lawyers who are simply concerned with mortgage financing's legal challenges.

However, despite the contributions that various scholars have madein this area, loopholes and lacuna exist in their works as none seem to give much attention to the legal and institutional framework of mortgage financing which is the focus of this thesis. For instance, AdedokunO. A. et al.[24] stated that, in light of the rapid urbanisation that most developing countries are experiencing, there would be a high latent demand for housing, and self or informal sector financed housing would be inadequate to meet the vast housing requirement that will result. They stated further that mortgage finance improves the operation of the housing market and the economy directly by facilitating transactions, and indirectly by improving the environment in which transactions take place. They also explained that debt allows households to better the timing of their housing expenditures better with the flow of services they receive. According to the authors, housing is a long-lived and durable asset that provides a flow of services over a long period, frequently outliving its occupants. A household can purchase more housing at an earlier stage in the life cycle using debt instead of paying for it all at once through accumulated savings. Furthermore, because housing finance provides such good collateral, mortgages are usually the lowest-cost way for households to finance general borrowing for consumption, non-housing investment, or business formation. Despite the merits of mortgages for financing housing, as shown in this work, the authors did not show why mortgage lending in Nigeria is small in scale and difficult to access.

Akande[25] relying on section 22 of the Land Use Act and the *Savannah Bank (Nig.) Ltd vs. Ajilo (infra)*explained that the Governor's consent must be obtained before any

[24]Adedokun, O.A., et al (2011) "Evaluation of the performance of national Housing Fund Scheme Towards Housing Delivery in Nigeria". *Journalof Emerging Trends in Economics and management Science*, Vol. 2.
[25]Akande, E.O., (2005) *Manual on Real Property Law and Practice*. Nigeria: Ministry of Justice Law Serie.

alienation through a mortgage, assignment, transfer of possession, or sublease.The author explained that failure to obtain the Governor's consent does not render the transaction void; instead, it is ineffective until the consent is obtained. She went further to outline the procedure for obtaining the Governor's consent in general andignored the fact that itvaries according to states in the country.

Aboki[26] argued that land had been the most precious property in the life of man and his development. The professor discussed the problems that are associated with the Land Use Act and called for its review. The Land Use Act is one of the most important legal instruments for mortgage creation in Nigeria.However, being enacted since 1978, it is not inconsonance with Fourth Republic democratic society, and therefore, became the biggest hindrance to the development of Nigerian mortgage industry. The writer argued that the definition of a rights holder under section 50 of the Act did not include the mortgagee. This work intends to find out the effect of this lacuna on the creation mortgages in the country and proffer solution.

Eimunjeze, in her book titled *Real Property Law and Practice in Nigeria*, examined both legal and equitable mortgages. She highlighted the nature and importance of mortgage institutions in Nigeria such as mortgage banks, housing corporations, corporate housing schemes, private property developers, commercial banks and insurance companies. The author concluded that all these, except the commercial banks, assist house owners by a form of mortgage arrangement whereby the mortgagor/buyer deposits his title deeds to the property with the mortgage as security for the repayment of the cost plus interest on the property. He/she will be able to take possession of the property only after the deposits have been paid. However, one concern is that the author has not shown whether the mortgage

[26]Aboki, Y. (2015) Land Ownership and Rule of Law: A Call for the Review/Democritization of the Land Use Act, 1978. In Kabir Danladi (ed) *Transforming Federal Mortgage Bank towards Providing Adaquate Social Security and National Development in Nigeria*: Legal Essays in Honour of Gimba Ya'u Kumo, Managing Director, Federal Mortgage Bank of Nigeria.

institution in Nigeria is delivering houses to meet the demands of the teeming populace of this country. If not, what are the reasons responsible for such deficiencies and how they can be removed to achieve the country's housing policy?

Dadem[27], in his work *Property Law and Practice in Nigeria,* made an exposition of all mortgage institutions and some instruments governing mortgage transactions. He defined mortgagees, provided their features and parties thereto. The author distinguished mortgages from other related transactions and concluded that a mortgage was a security against non-payment of money advances, which gives the mortgagee property right in the property and the right to sale in case of default by the mortgagor. Though he discussed the mortgage institutions, he failed to highlight the challenges bedevilling these institutions that hinder efficient mortgage financing. This work addresses these issues to proffer solutions that will enhance mortgage financing for adequate housing delivery in Nigeria.

Okafor[28] investigated the problems that have bedevilled the housing finance in Africa, including the level of applicant income, ignorance, high interest rates, and high costs of construction, among others. The writer has rightlyassessed the institutional challenges of housing financing.However, he appeared to have neglected other challenges, such as those relating to the legal framework. The work has also not articulated some peculiar challenges banks face in the mobilisation and distribution of mortgage financing in Nigeria. This research strives to address this by employing doctrinal and empirical methods to get to the root of these challenges.

Okoye[29] defined a legal mortgage as one that transfers all or some quantum of legal interest to the title of the mortgagee.The author explained that housing finance creates a

[27]Dadem, Y.Y. (2009), *Properly Law Practice in Nigeria*, Jos University Press Ltd, Jos.
[28]Okafor, B.N., (2016) Investigating the Problem of Real Estate Financing in Nigeria: A study of United Bank of Africa, Awka. Journal of Economics and Sustainable Development vol.7 (14). Retrieved from https://www.iiste.org accessed on 24th April, 2019.
[29]Okoye, A.O (2018) Creation of Legal Mortgages in Nigeria: A Critique. *In Journal of Law, Policy and Globalisation.*ISSN 2224-3259 (Online).Vol. 73.

legal interest in mortgagor's property favouring the mortgagee as security for a loan subject to redemption upon repayment of the loan by the mortgagor. The writer discussed the mode of creating legal mortgage under various laws, including the Land Use Act, Mortgage and Property Law of Lagos State, 2010, Property and Conveyencing Law, 1959, Property and Conyencing Act, 1881 and Common law. Herestricted hisdiscussion to a legal mortgage and ignored other mortgage forms such asan equitable mortgage. Futhermore, the writer restricted his work to the creation of mortgage through assignment and sub-demise but did not examine the mode of mortgage financing in the country.

Ikpambese[30]analysed the concept of mortgage widely, ranging from the definition, classification, creation rights and duties to issue of successive mortgages. He posited that a mortgage is a security for a loan and further indicated that a mortgagor could create more than one mortgage on the same property. The author argued further that if successive mortgages were created between successive mortgagees using the same property as security, this might become insufficient to satisfy all the debts. He, therefore, suggested that a need existed to promote the ranking of competing claims. Although this information is important, his work was limited in scope; hence, it did not examine the mechanisms for mobilising funds the challenges that militate against the institutions for efficient mortgage financing, which is part of what this thesis addresses.

Owoeye[31] discussed the legal framework for creating mortgages in Lagos state, under Mortgage and Property Law, 2010. He explained that the law contained pearl treasures for the development of the mortgage industry, emphasising sections 15, 16 and 18, which deal with the creation of mortgages in Nigeria. The writer has restricted his discussion to mortgage creation alone, ignoring the mode of mortgage finance. Moreover, hecentered

[30]Ikpambese M. A. (2010), *Nigerian Land Law, Principles Practice and Procedure*, Oracle Business Ltd. Makurdi.
[31]Owoeye, O., (2015) The Mortgage and Property Law of Lagos State, 2010: A Diagnosis. In Smith I.O and Oni, B.A., (ed*) Essays on the Lagos State Mortgage and Property Law 2010*. Lagos: Faculty of Law, University of Lagos.

only on Lagos state mode of creation and did not discuss the other legal mechanisms. This research examined both the creation and the legal mechanism put in place for mortgage financing with a view to finding out the challenges that hinders the development of the mortgage industries.

Oniekoro[32] , in his book "Mortgages in Nigeria," wrote on types of mortgage, creation of mortgage, mortgage under the Land Use Act, remedies of a mortgagee and the discharge of mortgages. Nonetheless, the author did not address the legal and institutional challenges of mortgage financing. The problem of mortgage financing in Nigeria is two-way traffic; it is not restricted to legal challenges but includes institutional challenges that this current work examines.

Alubo[33] discussed the Land Use Act extensively as it relates to the administration of land ownership and alienation. The author also discussed mortgages by defining and pointing out the nature and forms of mortgagees, i.e., legal and equitable mortgages, and provided samples of mortgages agreement. However, the author did not analyse the provision of the Land Use Act on mortgages, especially as it relates to consent provision, revocation, compensation and the problems that the Land Use Act poses for mortgage transactions. His write-up is more focused on the provisions of the Conveyancing and Law of Property Act.[34] However, this current work examines the legal framework of all instruments that are relevant to mortgage financing in Nigeria to fill this knowledge gap.

Smith,[35] relying on the words of Lord Lindley M. R. I in *Santley vs. Wilde*[36], defined a mortgage as 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

[32]Onickoro, F. J. (2007), *Mortgages in Nigeria*,Chenglo ltd, Enugu.
[33]ALubo, A. O. (2016), *Contemporary Nigerian Land Law*, (3rd) Mono Expressions Ltd. Jos
[34]Op. Cit at p .9.
[35] Smith, I. O. (1999) *Practical Approach to Law of Real property in Nigeria*, Lagos State University, Press, p. 198
[36] (19\899) Ch. 474.

to a condition that the title shall be re-conveyed if the mortgage debt is liquidated. The learned Professor further maintained that although, a mortgage can be created over land or chattel, land provides a much more reliable and invaluable security for loans and advances in modern times. Physical control of the property is hardly necessary and its characteristic feature of immovability affords the creditor a reassuring grip on the security.

Cheshire[37] in his book 'The Modern Law of Real Property' also pointed out that 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.

Megarry[38],described the nature of a mortgage as a conveyance of a legal or equitable interest in property with a provision for redemption. It is noted however that, the learned authors, i.e. Smith. Cheshire and Megarry seem to use the term "property" in general sense without taking the pain to distinguish between properties acceptable as security for loan in Nigeria and those which are not. This is important because in Nigeria, the position seems to be that propertyheld under customary law is not recognized as security for loan.

Mills in his work *Sound Loan for Community*[39], made an interesting revelation on the causes of mortgage default. He examines community investment loan targeted at low- and medium-income households and communities and found that underwriting practices, bank's unwillingness to restructure loans, commitment to the property on the part of the borrower and knowledge of the borrower are fundamental factors of mortgage default. However, the author only seems to identify the challenges without proffering at least the way out. He did not consider that banks with sound loan underwriting strategies, sound

[37]Cheshire, G. C. (1962) *The Modern Law of Real property*.(9th Edition), Butterworth, p.96.
[38]Megarry, R.E., (2002) *A Manual of law of Real property*. (8th Edition), Sweet and Maxwell, p. 84.
[39] Mills, E. (1993) *Sound loans for Communities: An Analysis of the Performance of community Reinvestment Loans*, Woodstock institute and national Association of Affordable Housing lenders.

credit management styles and good debt recovery measures, are likely to aid borrowers in not defaulting.

Ferguson, in his work *Micro-Finance of Housing: A Key to Housing the Low or Moderate-Income Majority*[40] defines mortgage finance as a long-term loan at market interest rates extended by a formal sector financial institution. He further states that mortgage finance characteristicsinclude fixed monthly payments at a fixed interest rate varying with the inflation rate and use a lien on the property for which the mortgagor must have full legal title. The author identified the advantages of mortgage finance as including community integration, employment opportunities, and encouragement of personal finance management and seemingly improvement in housing conditions. This work is undoubtedly relevant, particularly, to this research as it provides a basis for appreciating the concept and the importance of mortgage finance. However, it is limited in scope in that the author has considered the challenges of mortgage financing in Nigeria, which is one of the concerns of this thesis. The work intends to identify the challenges that stagnates the development of the mortgage industry.

One of the early studies of efficiency in mortgage markets was that of Lea M.[41]. They compared the efficiency of housing finance arrangements across five developed countries, including the United States,Denmark, France, Germany and the United Kingdom. Their analysis focused on the efficiency with which different mortgage markets deliver mortgage credit to homebuyers. They argued that an efficient housing finance system would penetrate new markets and provided a good framework through which efficiency can be measured. According to them, the efficiency of home mortgage instruments can be measured using the intermediation efficiency of the mortgage system,

[40] Ferguson, B. (1999) Micro-Finance of Housing: A key to Housing the low or moderate-income majority? *Environment and Urbanization*, vol. 11. No. 1, p. 185.
[41] Lea, M. (2005) "Global Trends in Housing Finance." Lecture Notes presented in Wharton International Housing Finance Program.

which they defined to include institutional, transactional, subsidy and risk allocation arrangements with the lowest total public and private costs of providing housing credit. The methodology used was to determine the cost to society of providing housing finance. It was measured by adding the interest rate paid by borrowers to the origination fees, and the cost to society of any subsidies granted. They then compared this with the minimum possible cost, which they defined for developed countries as the cost of issuing sovereign debt by the government. The results showed that although the countries whose mortgage system were studied take different approaches to housing finance, the basic operating costs of intermediating funds were similarand shared many aspects of financial technology. This work would no doubt enhance the substance of this thesis. Despite this, it is imperative to point out that the work did notconsider the Nigerian experience. More importantly, it did not show how the regulatory and the institutional framework of mortgage financing in these countries affected their mortgage sub-sector. An effective way of comparing housing financing efficiency across these five developed countries would have started from their legal and institutional frameworks.

Tiwari and Moriizumi[42] examined the efficiency of the Japanese mortgage system. According to them, focusing on a single country provided a better insight into the housing finance systembecause boundary conditions for all mortgage instruments within any country are similar. They postulated that the outcome of an efficient mortgage finance system could be viewed in terms of an increase in the home ownership rate or quality of housing. They made a case for focusing on efficiency in housing finance markets, stating that it is a major concern for many emerging/developing countries. They cited Warnockand Warnock,[43]stating that according to the theory of efficient capital markets if

[42]Tiwari, P. and Moriizumi, Y. (2003) "Efficiency in Housing Finance: A Comparative Study of Mortgage Instruments in Japan", *European Journal of Housing Policy*, vol. 2.
[43] Warnock, VS.C. and Warnock, E.E. (2007) "Markets and housing Finance', *national Bureau of Economic Research, NBER working paper serie*s, No. 13081.

markets were efficient, funds would flow to those activities with highest after-tax, risk-adjusted returns until the yields in all markets are equalised. The authors assert that inefficiency in the housing finance system is one of the greatest deterrents to the availability of funds for mortgage lending. These works have no doubt provided insight as to the challenges of mortgage financing in different countries. However, their concerns seem to be more on institutional challenges as opposed to legal challenges. This thesis will examine both.

According to Renaud[44] and Warnock[45], without a functional and efficient housing finance system, a well-functioning mortgage market that is instrumental to the housing sector's contribution to economic growth and improved living standards would be lacking. Renaud stated further that in contrast to the growth of housing finance in developed countries, housing finance is developing at a relatively slow pace in most emerging markets as housing remains mostly self-financed by households' equity or financed outside the formal financial sector. Renaud further suggests that basically, the system of housing finance used in a country is determined by the total resources available in the country, the degree of urban concentration, geographical scale, the structure of financial policies, and the kind of regulatory environment, among other reasons. While this work adds to the substance of this Thesis, the quality of housing finance systems in some instances may be determined by the extent to which the cost of housing is minimised, and improved access to fundsenables consumers to predict payment amountsand allow borrowers to refinance easily. Furthermore, the authors did not seem to consider that with rapid urbanisationin developing countries like Nigeria, residential mortgage lending is typically small in scale, difficult to access and is mostly bank-based with little reliance on capital markets.

[44]Renaud, B. M. (2004) "Mortgage Finance in Emerging markets; Constraints on Feasible Development Paths". Paper presented at *Lusk Research Seminar*, University of southern California.
[45]Warnock VS. C. and Warnock, F. E. Op.Cit. No. 35.

Figueiraet al.[46] examined the challenges faced in the provision of housing finance. The authors posit that housing development in Nigeria is hindered by factors such as an inefficient mechanism for transferring property and the absence of long-term finance for home buyers. While these two factors may be understood to mean legal and institutional challenges, the authors did not avert their minds to other factors such as high interest rate, insufficient funds, inflation, and lack of strong intermediary in the mortgage section among others, which this study addresses.

According to Merrill,[47]a sound property appraisal would enhance the efficiency of the overall housing market because it would afford buyers better information to judge the relative value of a property they want to purchase. The author maintained further that a system for accurate assessment of a property's value is also a crucial support function to mortgage finance because the accuracy of valuation determines the proper level of loan-to-value ratio (LTV), and LTV is an important predictor of default. So, sound and accurate property appraisal helps borrowers to value what they want to purchase correctly. It also helps the lender to accurately determineif a borrower has a sufficient capacity to pay back the loan. However, a sound property appraisal is not the only thing required to guarantee efficiency in the mortgage market. Other important factors include the availability of information on the borrower, secured collateral, legal protection for both lender and borrower, mortgage-related insurance, multiple sources of funds and liquidity facilities, among others.

1.8 ORGANISATIONAL LAYOUT

This work is made up of six chapters. Chapter one gives a general introduction to the work. It outlines the statements of the problem, the objectives of the research, the scope,

[46]Figueira, C. (2013) "Does Ownership affect the efficiency of African Banks?" *The Journal of Developing Areas,* Vol. 40.No. 1.

[47] Merrill, S. (2006) "Expanding housing Lending in Africa", *Urban Institute of OPIC Housing Africa conference,* Cape Town.

methodology, significance of the study, literature review and finally provides the organisationallayout of the research.

Chapter two clarifies the meaning of housing, housing policy, mortgage financing, pledge, collateral, mortgage institutions, lien, transmission mechanism, title, and lien theory. The chapter also examines the historical development of mortgage in Nigeria, tracing it from pre-colonial to post-independence period. It also examines the types of mortgage with particular emphasis on a legal and equitable mortgage. The chapter concludes by highlighting the rights of mortgagee and mortgagor such as the right to sale, right to foreclosure, right to reversion and right to notice.

Chapter three examines the creation of mortgage under the Common Law, focusing on assignment, sub-demise, and deed expressed by way of a statutory mortgage. The chapter also examines the creation of mortgage under the Doctrine of Equity, Statutes of General Application and some local statutes such as Conveyancing Law of Western Region, 1959, Property and Conveyancing Law of Lagos, 2010, Registration of Titles Act, Kaduna State Mortgage and Foreclosure Law, 2017 and the Land Use Act among others. Under the latter, the chapter specifically discusses the nature of interest under the Land Use Act, consent provisions, who has a duty of obtaining consent, at what time consent, must be sought, the consequence of failure to obtain the consent as well as a mortgagor using the failure to obtain consent as a shield. The chapter equally examines consent in equitable mortgages and concludes by highlighting the nature of interest created by debenture and shares.

Chapter four discusses the institutional framework of mortgage financing in Nigeria. It identifies and examines institutions such as Federal Mortgage Bank of Nigeria, Federal Housing Authority, Commercial Banks/ Deposit Money Banks, Merchant and Development Banks, Federal Mortgage Finance Limited, as well as state government

financing, Mortgage Associations, Insurance Companies, Capital Market, Real Estate Investment Scheme, Mortgage Guarantee Companies, Nigerian Mortgage Refinancing Company and Central Bank of Nigeria.

Chapter five examines the legal challenges to the mortgage, mortgage creation and finance such as difficulties in perfecting title. The chapter also examines other challenges such as bureaucratic bottlenecks, time of granting consent, uncertainty to the title, restriction on the age of the mortgagor, lengthy litigations, and lack of laws enforcement mechanism. It equally highlightschallenges associated with the mortgage market and institutional framework such as low level of awareness of mortgage infrastructure, high interest rates charged by financial institutions in Nigeria, loss of focus of PMIs, the dearth of long-term commercial mortgage facilities, low interest on NHF Investments, limited sources of fund supply, low level of capitalisationand inadequate branch network of PMBs, lack of skilled personnel, lack of policy implementation, low level of FMBN performance. The chapter also examines challenges associated with the beneficiaries such as low level of savings, high level of poverty, and non-payment of equity contributions. Other challenges discussed under chapter include corruption and the high cost of production.

Chapter six identifies the major findings and makes recommendations accordingly. The chapter also summarisesthe thesis and has concluding remarks.

CHAPTER TWO

CONCEPTUAL CLARIFICATION OF KEY TERMS AND HISTORICAL DEVELOPMENT

2.1. Introduction

As the title implies, this chapter provides clarification of some key terms and concepts. It also provides the historical development and further explains the nature of a mortgage. With this, the chapter lays a background for the easy understanding of the origin of mortgage practices or transactions in Nigeria and the type, creation, rights and duties of the parties to a mortgage transaction.

2.2. Conceptual clarification of key terms

The same words may have different meanings to people, especially if they work in different disciplines. This chapter explains some key terms and phrases commonly used in this thesis to provide their context meaning to enable an easy understanding and grasp of the subject matter of discussion. The clarification of the terms is also intended to broaden the scope of the terms discussed in the work for easy interpretation and comprehension. Some terms and concepts deserving clarification include but are not limited to the following: housing, housing policy, mortgage institutions, financing, and primary mortgage institutions (PMIs), among others.

2.2.1. Housing

The definition of housing varies from person to person depending on the point of view of the writer and taste and wellbeing of the person who wants to have a house. For instance, housing has been defined as the provision or availability of safe, comfortable, attractive, functional affordable and identifiable shelter in a proper setting within a neighbourhood supported by continuous maintenance of the built environment for the daily living activities of individuals/families within the community while reflecting their socio-economic,

cultural aspirations and preferences.[1] It was also defined as the process of providing a large number of residential buildings on a permanent basis with adequate physical infrastructure and social services in planned, decent, safe and sanitary neighbourhood to meet the basic and special needs of the population.[2] The World Health Organisation[3] stated that a good house should have a good roof to keep out the rain; sound walls and doors to protect against bad weather and to keep out animals; sunshades all around the house to protect it from direct sunlight in hot weather; and wire nettings at windows and door, to keep out insects like houseflies and mosquitoes.

It follows from the above definition that housing quality can be judged from the physical appearance of the buildings, facilities provided, quality of walls used in the building construction, eminence of the roofing materials, condition of other structural components of the house, and the environmental condition of the house. In reality, however, the above definition of housing is simply a statement of what ought to be, but not what is realistic even in some Western countries. It is a utopian definition of housing, and not all countries can meet this standard. Insisting on such standards will automatically give rise to the challenge of affordability and sustainability. It should also be stated that many Nigerian live in houses, but the fact that the houses do not meet the above standards cannot be taken as meaning that such Nigerians do not have houses.

It is imperative to consider this position because there are different types of houses. In the open desert, people live in shades in settlements and among animals such as goats, cows, cattle, donkeys, etc. In some other places, people live in tents in the open field or bushes or forest. In some villages, the houses are not better than yam barns where the

[1]National Housing Policy, 2001.Ibimilua, A.F. (2011), "The Nigerian National Housing Policy in perspective: A Critical Analysis", *Journal of Social Development in Africa*, 26 (2) p.165-188.
[2]Akeju.A.A. (2007), "Challenges to Providing Affordable Housing in Nigeria", Paper Presented at 2nd Emerging Urban *International Conference on Housing Finance in Nigeria,* Held at ShehuYar-Adua Centre. Abuja, Nigeria, October 17th-19th 2007.
[3] World Health Organisation (1961), "Expert Committee on the Public Aspect of Housing", WHO Technical Report Series No. 225. Geneva.

houses are built in small muddy huts with red earth; in other villages, most buildings are made of blocks from cement. These are the various types of houses available mostly in the rural and semi-urban areas and townships like capital cities. Thus, in the context of this study, housing refers to the process of providing a decent and affordable building that one lives in. Affordability here applies in terms of price and convenience and environment and location.

2.2.2. Housing Policy

A policy is a statement on paper by the government or an establishment regardinghow identified problems are to be solved[4]. It is a tool used in town planning for solving housing problems, and consequently for the achievement of sustainable housing. A housing policy is derived from laws, regulations and administrative practices that can aid the production and delivery of housing. The main goal of housing policy is to make decent shelter available and affordable for all. Above all, a housing policy requires a strategy for the enforcement of the purpose of the intended programmes of action. It addresses the role of government which may vary from the planning and control of all aspects of housing production such as land, investment, construction and occupancy, to intervention at certain levels when solutions are needed to specific problems involving such matters as land use plans and controls, credit and financial aids, subsidies to low-income groups, rent control, slum clearance and relocation.[5]

A housing policy also considers other vital issues like health, finance, cooperation, infrastructure provision, building materials (emphasising local building materials), periodic maintenance and repair, and policy reform. The Nigerian policy on housing empowered the Federal Mortgage Bank of Nigeria to provide housing research, construction, and delivery loans. The Nigerian Building and Research institute was also empowered to conduct

[4]Sulyma, A.O. (2000), *Introduction to Housing: Basic Concept and Applications*, Olad Publishers, p. 20.
[5]Lawal, M.I. (1997), *Principles and Practice of Housing Management*, Ile-Ife, ILCO Books, p. 139.

adequate research into housing construction and delivery in Nigeria. Also, the Standard Organisation of Nigeria was bestowed with the responsibility of ensuring the delivery of standard materials for buildings. Other organisations include the Real Estate Development Association of Nigeria (REDAN) and the Building Materials Producers Association of Nigeria (BUMPAN).[6] Housing policy also emphasised access to infrastructural services like portable water, communication, transport services, electricity, the participation of the government, non-governmental agencies, and community-based organisationsin housing production and delivery.[7] All the above cooperate to make housing policy realisable.

In the context of this research, therefore, housing policy means channelling a deliberate effort or making a deliberate, conscious road map for harvesting houses for citizens of Nigeria. It is a targeted or deliberate action to harvest houses for the teeming number of people in communities, regions or the entire country. Whether the houses are of the highest standards is not really a matter of high priority. What matters in such policies is the desire to see that the targeted number of houses planned for building is met.

2.2.3. Mortgage

A mortgage is a disposition of property as security for a debt.It is a contract that uses a specific property as a collateral to secure a debt repayment.[8] Section 2(vi) of the Conveyancing Act[9] defined mortgage to include any charge on anyproperty for securing money or money's worth. In a broader sense, a mortgage is a form of security created by contract, conferring an interest in the property upon performing the condition of paying a

[6]Jonna, P. and Dean.G. (2012) Evaluating UK Housing Policies to Tackle Housing Affordability.*International Journal or Housing Market and Analysis* 5 (3) 253-271.
[7]Mtulu.A.Z.; Siku.N. and Diana M. (2011) Understanding Pro-poor Housing Finance in Malawi, London, *International Institute of environment and Development*, p.23.
[8]Atilola, M.I., Shittu, W.O. and Olowoleru, O.A. (2015), "Factors responsible for mortgage default in Nigeria: A comparative study of commercial banks and primary mortgage institutions", in: Laryea, S. And Leiringer, R.(Eds) Proceedings of 6th West Africa Built Environment Research (WABER) Conference, 10-12 August at Accra, Ghana, p.545.
[9] 1881.

given sum of money, with or without interest orperforming some other obligation.[10] It is the transfer or creation of an interest in a property, be it legal or equitable, by the owner of a property, in favour of a lender, in consideration of and as security for a loan, subject to redemption of theproperty upon repayment of the loan.[11] It can also be defined as a conveyance of land or assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.

It follows that whenever a disposition is intended to serve as a security for money, whether such intention appears from the deed itself or any other instrument or oral evidence, it qualifies as a mortgage and redeemable. The legal implication is that the mortgage property owner becomes divested of the right to dispose of the property until he has secured a release of it from the mortgagee.[12] Thus the essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in a property, with a provision for redemption, that is, upon repayment of the loan or performance of some other obligation the conveyance shall become void or the interest shall be reconvened.[13]

In essence, a mortgage is a lien against a property granted to secure an obligation (such as a debt) extinguished upon payment or performance according to stipulated terms. Therefore, a mortgage of land means the transfer or conveyance of title or interest in land by a debtor or a third party to the creditor to assure repayment of debt or discharge of any obligation. It is a transaction whereby, as security for a loan of money, the borrower transfers to the lender an interest in some property of the borrower on the condition that the lender's interest in the property will be terminated on repayment of the loan.

In a mortgage transaction, another phrase that is commonly used is "first mortgage".

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[10]Tyler, E. L. G., (1988), *Fisher and Lightwood's Law of Mortgage*, London, Butterworths, p. 4.
[11]Gravells, N.P., *Land Law* (2004, 3rd ed), Sweet & Maxwell, p. 892; and Section. 67 Mortgage and Property Law, Lagos 2010.
Mortgages in Nigeria(Chenglo Ltd.) 1.
[12]*Bank of the North Limited vs. Bello* (2000), 7 NWLR (Pt. 664) 2442.
[13]*Halsbury's Laws of England* (4th Ed.), Vol. 32, p.187.

This simply means that the party holding such an instrument has recorded a mortgage first in a point of time and thus has priority over any subsequently recorded mortgages in case of foreclosure for the private creditors.[14] Generally, a mortgage is distinguishable from a pledge because the latter is simply bailment of personal property to secure an obligation of the bailee. The distinction between pledge and mortgage transactions lies in the nature of the security granted to the creditor and raises questions of substance and not term. If the agreement is intended to give the creditor some propriety estate or interest in the property, then irrespective of the fact that the creditor takes possession of the property under an express stipulation or by operation of the law, the transaction is a mortgage transaction the legal or equitable title to the property is transferred from the mortgagor to the mortgagee. Property may therefore be classified as a possessory security while a common-law mortgage is a propriety security. It is out of the possession granted under the agreement that the pledges right spring. In other words, the chief distinction between a mortgage and a pledge is that by a mortgage, the general title is transferred to the mortgagee, subject to be relisted by the performance of the conditions. In contrast, by a pledge, the pledgor retains the general title to himself, and part with the possession for a special purpose. In a mortgage,a title is transferred, while a pledge is a possession.

2.2.4. Collateral /Security

Collateral means a security or guarantee (usually an asset) pledged to repay a loan if one cannot procure enough funds to repay. It is usually a comfort for guaranteeing the satisfaction of a debt.[15] Simply put, collateral is the safety value upon which the mortgagee would fall back should the mortgagor fail to honour all or some of his contractual undertaking or obligations in continuation with the mortgage. Collateral creates or provides

[14] Dobson, S.W. (1976), Development in the Capital Market in the United State. *Business Review*, Federal Reserve Bank of Dallas, p.21.
[15] The Chartered Institute of Bankers of Nigeria (2002), *Proceedings of the National Seminar on Banking and Allied Matters for Judges*, CIBN Press Limited, Yaba-Lagos, p.79.

assurance, hope, expectation, and certainty on the part of the mortgagee that no matter the circumstance, he would at least recuperate the capital he invested in the mortgage. Housing is very vital as people must secure a roof over their heads. To achieve this, people often borrow money to finance their housing needs either from informal financial institutions or formal institutions like banks. In practice, therefore, lenders often ensure adequate security backing the loaned money. The essence of taking a mortgage security is to assure the mortgagee of having property to fall back on if the mortgagor fails to meet his/her contractual obligations on the specified date fixed for payment of the mortgage debt.Therefore, it follows that the debtor is entitled to have back his security on repaying the debt. This means that the debtor has equity of redemption.

Therefore, collateral is the threshold of every mortgage as it is the interest that the mortgagee will fall back on to prevent his/her investment from becoming wastage. Thus, it could safely be said that collateral is an auxiliary or supplementary guarantee. Althoughthe primary consideration for every credit transaction is the debtor's creditworthiness, security is a second thought as it gives assurance of having a property to fall back on upon mortgagor's default.[16] Key to understanding the role of collateral is its standby status as an alternative source of repayment when the borrower is unable or unwilling to repay from cash flow. To this end, Section 7(a) of the Mortgage Institution Act provides that a mortgage institution shall not grant a loan or advance for the building, improvement or extension of dwelling houses unless adequate securities have been taken on an existing property in respect of which the loan or advance is being granted. Similarly, Section 20 (1) (b) of the Bank and Other Financial Institution Act (BOFIA)[17] makes it mandatory for banks and other financial institution to obtain security when giving out credits.

[16]Pedrazzini and Sampson. (1999) "The Legal framework for secured credit: a suitable ease for treatment" *B.I.I* Issue I, p. 127, see also Smith I.O. 'Nigeria Law of secured credit' (2001) p. 2.
[17] BOFIA, Cap. B1, LFN, 2004.

Some collateral maintains better value in liquidation than other types.For example,cash is better than inventory in holding its value.In mortgage transactions in Nigeria, land seems to be the most common and acceptable properties that may be mortgaged because land provides a much more reliable and invaluable security for loans and advances in modern times. This is mainly because physical control of the property is unnecessary, and its characteristic feature of immovability affords a creditor a reassuring grip on the security.

2.2.5. Mortgagor

The mortgagor is one of the parties to a mortgage transaction. Specifically, he is the borrower who provides security in exchange for the loan advanced.[18] Typically, the mortgagor will be individual homeowners, landlords, or businesses purchasinga property through a loan. Being so, he/she could lease the mortgaged property provided he is in possession which is normally a question of agreement with the mortgagee in whom he vests the right to possession.[19]He/She may equally exercise his statutory right to sell the mortgaged property as provided under Section 25 (1) of the Conveyancing Act (CA)[20]; and Section 114 (1) of the Property and Conveyancing Law (PCL)[21].Even after the mortgagee's right of sale has arisen so long as the mortgagee has not exercised the right, the mortgagor must apply to a court for an order of sale.[22]

As the borrower, a mortgagor can also redeem the property provided he meets the conditions of the underlying loan or other obligation to redeem the security. This may be done at any time as soon as the mortgage is created or the parties may postpone the exercise of this right for a reasonable time. In some deeds, the date of redemption is fixed

[18]Oyedokun, T.B., et al. (2013). Investigation of Mortgage Lending: An Overview of Nigerian Practice. Research *Journal of Finance and Accounting*.Vol.4. No. 12.p.2.
[19] Brown, M.E., and Evangel, A. (2013), Mortgage, Pledge and Charge Transaction in Nigeria: Comparative/Distinctive Analysis and Legal Examination. *In Journal of Business and Management*.p.100. available @ *www.iosrjournals.org*,accessed on 17th April, 2019.
[20]CA, 1881.
[21]PCL, 1959.
[22] Brown, op. cit. p. 104.

by the parties. If the contractual redemption date is unconscionably far in the future, the right to redeem arises after a reasonable time.[23]*Faircloughvs. Swan Brewery Co*[24] was held that the postponement of the right to redeem a mortgage for a twenty-year lease until six weeks before the term's expiration was void because it effectively prevented redemption, as it was "oppressive and unconscionable". It may be noted that whether the postponement of the right to redeem is valid or unconscionable is a question of fact.

2.2.6. Mortgagee

A mortgagee is a lender who advanced loan to the mortgagor. Usually, a mortgagee is an investor that lends money secured by a mortgage on real estate. Thus, in a mortgage transaction, the loan's purpose advanced by the lender to the borrower is to financea housing project.[25] Therefore, some certain necessary rights and powersare enshrined in mortgage transactions to ensure that the lender recovers the loan advanced or its equivalent in case of default. One of these is to sell the collateral or security to pay off the loan if the borrower fails to pay. Legally, this is possible because a mortgage runs with the security, and the mortgagee is always in custody of the title deeds provided the mortgage is not by way of sub-demise. In which case, the mortgagee will only be like a sub-tenant who is not entitled to title deeds except such a right is expressly stipulated in the deed. Hence, even if the borrower transfers the property to someone else, the mortgagee still has the right to sell it if the borrower fails to pay off the loan[26]. This power could be exercised after it has arisen. The power is said to have arisen after the mortgagee has given notice to the mortgagor that he is in default for three months; there are arrears of interest for at least two months, which the mortgagee has also notify the mortgagor; and there is a breach of the

[23] Ibid.
[24](1912) A.C. 565.
[25]Chris O. U., and Owor, M. K., (2017), "Mortgage Financing and Housing Development in Nigeria", *International Journal of Research,* 5(5), p. 182.
[26] Brown, op. cit, p.104.

mortgage covenant[27]. Thus, once these conditions are met because the power of sale is given to the mortgagee for his/her own benefit, it follows that if h/she exercises its bonafides for that purpose without corruption or collision with the purchaser, or such willful or reckless impropriety as to be tantamount to fraud, the court will not interfere even though the sale was disadvantageous, unless indeed the price is so low as to in itself be evidence of fraud.[28]

In addition to being in custody of the title, the mortgagee may also take possession of the property the moment the mortgage is executed until the amount of the loan is recovered unless the mortgagee expressly contracted himself out of this right.[29] Though, under Section 64 of the Kaduna State Mortgage and Foreclosure Law (KM&FL)[30], a mortgagee may only enter into possession after serving the mortgagor with the notice of his intention. It seems the right of possession does not avail an equitable mortgagee because he/she has no legal right to the property except where such a right is conferred on him by the court or the mortgage deed.[31]However, the implication is that because the mortgagor still has a beneficial interest in the property, a mortgagee who takes possession of the property becomes the property manager and must therefore account to the mortgagor for all rents and profits received during the period he had been in possession.

This is in addition to insuring the property or keeping it in a good state of repairs and if it is a leasehold property, pay all present and future rents to prevent forfeiture and thus preserve the property.[32] Thoughthe need to insure the property arises immediately after the execution of the mortgage, this need occurs only when the mortgagee has taken

[27] S.125 of the Property and ConveyancingLaw , 1959 of Western Nigeria.
[28]Mustapha, A. (2011). An examination of the legal implication of mortgages in Nigeria. Being a desertation submitted to the department if commercial law, Ahmadu Bello University, Zaria in partial fulfillment for the award of masters in law. p. 46
[29]*Four Maids Ltd vs. Dudley Marshall (properties) Ltd (1957) ch. 317 at 320).*
[30]KM&FL, 2017.
[31]*Walsh vs. Lonsdale,* (1981) 21 ch .9.
[32] Ibid.

possession of the property.[33]Except otherwise provided by the agreement, Section 130 of the Property and Conveyancing Law[34] requires that the amount of insurance cover should not exceed two-thirds of the amount that would be required to restore the property in the event of destruction. The mortgagee in possession may equally lease the mortgaged property to third parties subject to the rule of accountability highlighted above. Where the mortgagee is not in possession, the mortgagor's power to grant leases of the mortgaged property is subject to acquiring the consent of the mortgagee. Without obtaining such consent, the lease is only binding between the mortgagor and the lessee. In this case, the mortgagee has the right to eject the tenant because his title is paramount to that of the mortgagor.[35]

A mortgagee, particularly in an equitable mortgage, may foreclose the mortgage if there is a default. By equity of redemption, a mortgagor can still recover his/her property by which he/she has given as a security to the mortgagee by paying the money under the mortgage even after the legal day of payment. However, this right does not exist in perpetuity as allowing so would put a mortgagee's investment in jeopardy. Thus, to protect the mortgagee's investment, the law vested him/her with the right of foreclosure. Foreclosure is an order of court by which the equity of redemption of the mortgagor and all persons claiming through including subsequent encumbrances are extinguished so as to vest the mortgaged property absolutely in the mortgagee[36]. It is a judicial process by which a mortgagee, by order of a court, terminates the mortgagor's equity of redemption and become absolutely vested with the title to the mortgaged property.[37]

[33]S. 123(1), PCL, op. cit.
[34] S. 130(1), Ibid.
[35]*Chartsworth Properties Ltd vs.Effiom.*(1971) 1.W.L.R. 144.
[36]Dadem, p. 144.
[37]Oniekoro, op. cit. p. 270.

Thus, the effect of the above definitions thatalign with Section 78 (4) of the Kaduna State Mortgage and Foreclosure law[38] and Section 111(2) and 112 (2) of the Property and Conveyancing Law[39] is that in the case of mortgagor's default to pay any money due under the mortgage, the mortgagee has the power to foreclose, doing which automatically and permanently "vest in the mortgagee all the interest of the mortgagor in the mortgaged property".

However, this is subject to any mortgage having priority over that of the applicant. Thus in *Nigerian Housing Development Society Ltd vs.Mumini*[40], the Supreme Court held that the applicant mortgagee (i.e., who applied for the foreclosure) was entitled to the order absolute based on the fact that the respondent (mortgagor) failed to redeem the mortgaged property on the legal due date of redemption. An action for foreclosure must be brought to court within twelve years after the date of redemption. Usually, foreclosure is granted upon two states; the first is nisi which is for six months if he (mortgagor) fails to redeem then would move to a second stage, which is the absolute order of foreclosure.[41] The problem of foreclosure is that it lacks finality even where the foreclosure is absolute because the Court Can always open the foreclosure in the proper circumstances.

2.2.7. Legal Mortgage

A legal mortgage involves execution under seal and the transfer of the legal title from the mortgagor to the mortgagee, subject to the mortgagor's right of redemption, which is a right to a reconveyance on payment of the mortgage monies inaccordance with the covenants in the mortgage.[42]Therefore, a legal mortgage of personal property is a

[38]KDMFL, 2017, op. cit.
[39]PCL, op .cit.
[40](1977), LPELR-SC.440-/1975.
[41] S. 78 (3), KDMFL, op.cit.
[42] Adebayo, M. (2012), "Problem of Housing Finance Through the Primary Mortgage Institutions in Lagos", *International business management, 4*(1), p.132.

conditional assignment to the mortgagee of the mortgagor's legal interest in it.[43] In this sense, a legal mortgage is also called a mortgage by legal charge.

It also follows that in a mortgage by legal charge or technically "a charge by deed expressed to be by way of legal mortgage", the debtor remains the property's legal owner. Still,a creditor gains sufficient rights over it to enable him/her to enforce his/her security, such as a right to lake possession of the property or sell it[44]. In essence, a legal mortgage is one that transfers all or some quantum of legal interest or title of the mortgagor in the property to the mortgagee or otherwise creates a legal interest in the mortgagor's property in favour of the mortgagee, as security for a loan subject to redemption upon repayment of the loan by the mortgagor.

2.2.8. Equitable Mortgages

An equitable mortgage is a contract, which creates a charge on the real property but does not convey any legal estate or interest to the creditor. Such a charge amountsto an equitable interest. In *F.B.N Plc. vs.Songonuga*[45], the Court of Appeal defined equitable mortgage as a specific lien or charge upon a real property to secure the payment of money or the performance of some other obligation which the court will recogniseand enforce or both, which lacks the essential feature of a legal mortgage because it grows out of a transaction of the parties without any deed.

The operation of an equitable mortgage is that of an executor assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance and is enforceable under the court's equitable jurisdiction. Generally, all property, whether real or personal that may be the subject of a legal mortgage, can equally be charged in equity. The essence of an equitable mortgage is an agreement to enter

[43] Dorothy, E. N., and Enefiok, E. E., (2013), "Mortgage of Land as Security under the Land Use Act 1978", *The Nigerian Juridical Review*, Vol. 11.
[44]Hannigan A.S.J. (2014) The Imposition of Western Law Forms upon Primitive Studies in Society and History, p. 34
[45](2007), 3, NWLR, (pt 1021) p. 230 at 280.

into a legal mortgage. Anything that can be construed as such an agreement will constitute an equitable mortgage. Hence, a mere deposit of title deed or a mortgage executed only under hand will be an equitable mortgage. It is possible for a memorandum of deposit of title deeds as security for a mortgage advance to be underseal, and this would be an equitable mortgage.

2.2.9. Mortgage Financing

Mortgage finance is a long-term loan at market interest rates extended by formal sector financial institutions, typicallyspecialisedin housing such as a building society, that qualifies mortgagers based on underwriting criteria.[46] The characteristics include a fixed monthly payment at a fixed interest rate varying with the inflation rate and using a lien on the property to which mortgager must have full legal title[47]. Mortgage financing is structured financing, provided by approved financial institutions that accept real estate security for loans. The aim of mortgage finance is typically centered around two specific objectives. First, the financing seeks to create revenue for the lender. Second, the extension of mortgages allows qualified individual and business entities to secure properties that can be repaid in terms that are within the liability of the recipient of the loan to pay off in a timely manner.[48] Althoughthe primary consideration for every credit transaction is the creditworthiness of the debtor, security gives assurance of having a property to fall back on upon a mortgagor's default.[49]

Basic to any development is finance. Of all the problems of housing development in Nigeria, finance is critical and decisive. No matter how viable in scope and content, the

[46]Eni, D. and Danson, P. (2014), "Private Sector Participation in Urban Housing Supply in Calabar, Nigeria", *American International Journal of Contemporary Research, 3*(6), p.77.
[47]Chikezie, O.I. (2012). How Mortgage Finance will enhance Home Ownership, available @ *www, thenationonlineng.net*, accessed on 18th October, 2015. 7:21pm.
[48]Onyike, J.A. (2007). An Assessment of the Affordability of Housing by Public Servants in Owerri, Nigeria, *Journal of Land Useand Development Studies,* 3(1), p.21, Wise Geek 'What is Mortgage Financing?' available @ *https://www.wisegeek.net/what-is-mortgage-financing.htm,* accessed on 15th November, 2014. 3:01pm.
[49]Pedrazzini and Sampson. (1999) "The Legal framework for secured credit: a suitable ease for treatment" *B.I.I,* Issue I, p. 127.

best housing plans or programmes of any government will remain unsuccessful, unless sufficient capital exists to achieve them. Generally, there are different ways through which housing projects are financed. One is what may be described as owner financing. This system comprises two ways of financing, to wit, home buyer and seller financing. The home buyer provides the finance directly to the seller through his/her personal savings.[50] In essence, the seller accepts payment for the sale of the house in a stretched-out schedule, thereby extending an implicit loan to the buyer. The seller originates the loan, funds it and services it. The residential unit being financed will almost always serve as the collateral for the loan, which in this form would be described as a mortgage.[51]A major disadvantage of this financing method is that it is mostly for a very short period[52], while preferably housing loan should be advanced on a long-term basis.

Another method of housing financing is third-party finance. This system involves athird-party mortgage originator who works with a lender to originate a mortgage loan.[53] In third-party mortgage finance, the loan can be sourced from family or friends or a bank or other depositories. Generally, any person or company involved with any aspect of the mortgage origination process may also be considered a third-party mortgage originator.[54]A family member or friend extends the loan (mortgage) to the owner and thus originates funds and services it.[55] In a bank or other depository, the bank or depository extends the loan (mortgage) to the owner and thus originates, funds and services it. In turn, the bank or depository receives most of its financing from depositors.The depositors' claims for

[50]Lea, M. (2001), "*Global Trends in Mortgage Finance: A Comparative Analysis", Normadic Mortgage Banking Comference*, Findland, p.12.
[51]Adekunle, op. cit. p.20.
[52]Folger, J., (2019), Owner Financing:Advantages and Disadvantages,available *@https://www.investopedia.com/articles/personal-finance/082815/pros-and-cons-ownwer-financing.asp,*acessed on 8th December, 2019.
[53]Kagan, J., (2018). Third-Party Mortgage Originator Defined, available *@https://www.investopedia.com/terms/t/thirdparty_mortgage_originator.asp,* acessed on 8th December, 2019
[54]Ibid.
[55]Adekunle, op. cit. p.20.

repayment of their funds are directed toward the bank, not towards the borrowers to whom the bank has extended mortgages.[56]

Housing finance can also be secured through insurance companies. However, most insurance companies holding mortgages do not originate them. Accordingly, origination would be by a mortgage banker (an origination specialist), who would sell the mortgage to the insurance company. The latter funds and services it. The insurance company, in turn, obtains its funding from the premiums paid by its insurers and from any additional borrowing that it may undertake.[57]In addition, the governmentcould provide finance for housing with either direct origination through taxpayers or borrowing.[58] Another strategy for housing financing is through**a** Mortgage-BackedSecurit**y** (MBS)**.** Under this system, the originator either packages the mortgage into a security or sells the mortgage to another entity which does the packaging. The "pass-through" security (so-called because the borrower's interest and principal payments are passed through to the buyer) is then sold to a party that wishes to hold the security and receive the interest and repaid principal and is thus the funder. That party may be a private investor, a mutual fund, a pension fund, a bank, an insurance company, or any other entity attracted to an MBS as an investment. The servicing can be carried out by the originator or may be sold to a specialist service provider. Because the MBS are securities, they may be readily sold to other investors in a secondary market.[59]

2.2.10. Mortgage Institutions

A mortgage institution is a body established to provide mortgage finance or engage in mortgage financial transactions to the public. A mortgage institution can be a mortgage bank or any other financial organisationor outfit directly involved in mortgage financing

[56] Ibid.
[57] Ibid.
[58]Adekunle, p. 21.
[59]Ibid., p. 24.

transactions.[60] The Federal Mortgage Bank of Nigeria (FMBN) and the numerous Primary Mortgage Institutions (PMIs) in Nigeria are examples of mortgage financial institutions.[61] In Nigeria, the present structure of housing Finance can be classified into the formal sector and informal sector.Informal examples include the Asusui.e. Traditional Co-operative System, Credit Cooperatives, family savings and Non-Governmental Association.[62] The informal sector is usually local and is organisedbased on trust, love and friendship.

The operation of this sector is difficult to quantify as it operates on the transfer of cash and kind. These include donations of land, building materials, cash assistance or sometimes any of these could be in the form of a loan. The informal sector operation also involves direct labour assistance. It is interesting to note that this sector constitutes a larger proportion of housing providers in Nigeria.[63]

The operation of the formal sector can be classified into non-specialisedhousing funding institutions and the specialisedhousing funding institutions. The non-specialisedhousing funding institutions include the Employees Housing Schemes, Commercial, Merchant Banks and Insurance Companies[64]. These institutions are structured financing bodies established by law to provide finance as housing loans in the country.

2.2.11. Primary Mortgage institutions

Primary Mortgage Institution (PMI) is a company licensed to carry out mortgage business in Nigeria. Such businesses include granting loans or advances to any person to build,

[60]Oyalawo, B. (2012), "*Housing Market Contraints in West African Region", Mediterranean Journal of Social Sciences*, 8(3), p. 241.
[61] Fidelis, I.E. and Chinedu, C.N., (2011), Critical issues in real estate finance as an index in building construction project management success in Nigeria, *American Journal of Social and Management Sciences*, 2(1), p.76.
[62]Udoekanem, N. B., (2012), ".Achieving Poverty Alleviation in Nigeria through Mortgage Financing: Constraints and way forward", *Ghana Journal of Development Studies*, Vol. 9(1), p. 58.
[63]Funmilayo, I.A. (2013), "Housing Delivery in Nigeria: Repackaging for Sustainable Development", *International Journal of African and Asian Studies - An Open Access International Journal* Vol.1. p. 82., and also Nubi, O.T. (2008), Need for Re-engineering Ideal Habital Cooperative Housing Initiative, *The South African foundation International Conference and Exhibition*, Cape Town, October, p. l.
[64]Funmilayo.I.A. (2013) op. cit. p. 83.

improve or extend a dwelling and commercial house, and purchase a dwelling or commercial house[65]. A PMI is also defined as an institution that is usually a bank, either commercial or savings and loans, which could be locally, privately or corporately owned. This institution is a lender of money to potential homeowners who use such loans to purchase a house, paying back the loan in monthly instalments to the mortgage institution.[66] Simply put, it is a market where borrowers and mortgage originators come together to negotiate terms and effectuate mortgage transactions. Mortgage brokers, mortgage bankers, credit unions and banks are all part of the primary mortgage market. As distinguished from the secondary mortgage market, the latter is a situation whereby most mortgages are sold into the secondary mortgage market after being originated in the primary mortgage market.[67] An example of PMI is the AG Mortgage Bank Plc.

2.2.12. Leasehold

A lease contract by which one conveys property for a specified time and for a specified rent. In other word it is a transaction in which possession and use of property is given for a definite time.

A leasehold on the other hand is a relationship that exist between two or more parties consideration for payment of rent. In a leasehold, the agreement is only for the use and occupation of the property for a specified period which reverts back to the lessor at the expiration of the time. The title to the property is not conveyed, this feature of certainty of time distinguish a lease from a freehold which is characterize by on certainty of time.

[65]Anthonia U.U. and Uduak, B.U. (2014), The Contributions of Primary Mortgage Institutions (PMIs) to Real Estate Development in Nigeria, *International Journal of Finance and Accounting*, 3(3), p. 157.
[66] Ibid.
[67]Olumide, S.A., et al (2013), "Options for Sustainable Mortgage Finance in Nigeria", *British Journal of Economics, Finance and Management Sciences*, Vol. 8(2), p .9.

A leasehold can be by words of mouth (parol) or in writing. An oral lease must not be from more than three years are required to be by deed. It must confer exclusive position.[68]

2.2.13. Property and Possessory Lien

A properly lien is a legal claim on a tract of real estate granting the holder a specified amount of money upon the sale of the property. Such liens are often used to ensure the payment of a debt, with the property acting as collateral against the amount owed. A mortgage is the best example of a property lien.[69]On the other hand, a possessory lien is property that is in the hands of or is possessed by the individual who grants the lien. A lien is a claim that one person has over the property of another as security for the payment of a debt. In a possessory lien, the creditor has a right to remain in possession of the property under the lien until the debtor has satisfied his or her debt. For example, if an individual buys something on credit, the item will not be in his or her possession until the debt to the creditor has been paid.

2.2.13 The Title and the Lien theory

Two principal theories of mortgage financing are used in the United States and by extension, most nations with little or no modification, including Nigeria. The theories are as follows.One is the title theory. The basic concept of the title theory is that upon making the mortgage, the mortgagor passes title of the property, the subject of the mortgage, to the mortgagee, subject to a condition subsequent. This condition subsequent is the payment of the debt. Upon fulfilment of the condition, title to property divests (reverts to) the mortgagor. For example, a (mortgagor) mortgages real properly to B (the mortgagee) in a title state. Under the terms of the instrument, title passes on to B. However, the instrument will state that if A complies with the condition (makes payment), then the instrument will be void at the time of the mortgage, by virtue of a provision in the mortgage. A is generally

[68] Section 79 PCL

[69]Adevamowo, et al (2012), "Problems Militating Housing Development Through Primary Mortgage Institutions in Lagos", *International Business and Management*, Vol. 4. No. 1, p. 126.

entitled to remain in possession of the property even though he passed title to his mortgagee.[70]

The second theory is the lien theory. Lien theory, which the majority of the countries have adopted, allows the title to remain with the mortgagor, and the mortgage that is placed on the property is a charge (debt or liability) on the title. The mortgage instrument says nothing about the title but states: "The mortgagor does hereby mortgage to after the recording of the instrument, it becomes a lien on the property described in the mortgage.[71] The rule regarding the priority of mortgages whether in title or lien states is substantially the same rule as that regarding the priority of deeds the instrument recorded first, in the absence of fraud, is the operative one. To avoid such circumstances, mortgages should be recorded immediately; it is from the idea of having the first lien against the property that the term "first mortgage" was derived.

2.3 EVOLUTION AND DEVELOPMENT OF NIGERIAN MORTGAGE MARKET

Before going into the substantive issues of this research, examining the evolution and the development of the mortgage industry in Nigeria is imperative. For clarity and easy comprehension of the reader, the evolution and development of the Nigerian Mortgage Industry are discussed in three distinct but related stages. The first stage is the pre-colonial period. The second is the colonial period, and last is the post-colonial period.

2.3.1 Pre-Colonial

During the pre-colonial period(before 1900)**,** the system of housing finance in most communities that later became Nigeria was either incash or kind.Because of the communal setting and poverty level, a premium was often placed on the in-kind type of housingfinance, which involved the pooling of labour for building a new house. Among the Yorubas, there are two types of this labour poolingapproach called *Aaro* and *Owe*. The

[70] Gilbert, N.W. (1968), *The History, Principles and Practice of Banking*, New York Greenwood Press. p. 15.
[71]Hester, D.P. (1995), *Bank Management and Portfolio Behaviour*. New York, Yale University Press, p. 19.

*Aaro*system pools the labour of two or more people, usually friends or members of the same age-group to build or provide the material necessary for building a house or any kind of work.To initiate the process, members of the groups would come together on the appointed day to assist the builders in whatever way they could.In return, the builder would provide meals and refreshments as long as the task of building lasted. This gesture or communal labour had to be repaid to other pool members when the need arose.[72]*Aaro*is the same as *owe* except that the latter involves more people. In relation to both, cash compensation is not used at all.[73]

There were many other methods of housing finance adopted in different parts of the country. Amongst these are village development scheme, men's revolving loan associations, loans from traditional moneylenders, and social club contributions.[74] The most common examples of these types of informal housing finance scheme is*Esusu* which among the Yorubas is also known as *ajo.* Among the Igbos, it is called *otutu,*and the Edos refer to it as *osiitii,* while the Hausas called it *Adashi.* Among the Nupes, it is known as *dashi,*and the Ibibios called it *efe,* while the Kalahari Ijaws refer to it as *oku*.[75]Borrowers often pledged their economictrees such as cocoa, kola nut, rubber, and oil palm, and even their entire farms ascollateral for money borrowed from moneylenders. Such loans are repaid usually in kind by deploying family labour to work on the lender's farm or by selling farmproducts to the lender equivalent to the loan amount as agreed by both parties.[76]

In effect, it was relatively easier to own a house during the pre-colonial era because a person who desired to own a house only needed to invite his same-aged mates to come

[72]Ebehikhalu, O. N., and Dawam, D. P., (2015), "A Review of Governmental Intervention on Sustainable Housing Provision for Urban Poor in Nigeria", *International Journal of Social Science Studies,* Vol. 3, No. 6, published by Redfame Publishing, p. 41.
[73]Ibid.
[74]Funmilayo, L. A., and Oluronke, O. O., (2014), "Housing Finance in Nigeria", *Journal of Economics and Sustainable Development,* Vol.5, No.27, p. 102.
[75]Udry, Christopher (1990). "Credit Markets in Northern Nigeria: Credit as Insurance in a Rural Economy", *World Bank Economic Review,* 4(2), p. 256.
[76] Ibid.

and assist him in gathering the building materials to construct his new abode. However, houses built during that period using such labour were structurally unsound because of inferior building materials, poor building technology and methodology. Nonetheless, this system served the housing needs of the people. However, the belief that moneylenders were exploitative and that *esusu*collectors were also limited, unorganisedand uncoordinated in their operationsprovided the rationale for developing a formal housing finance scheme compatible with the colonial economic policies.[77]

2.3.2 Colonial Period

The Colonial Period (1900-1960)marked the beginning of the direct British government involvement in the provision of housing units in the country. During the colonial period, finance for housing was provided and limited to the expatriate staff and few selected indigenous senior civil servants working with the colonial masters. Government intervention and involvement were centered basically on providing planned residential quarters for expatriate staff and selected indigenous staff of specialized occupations without conscious efforts to construct houses for the general public or build houses either for sale or rent to the general public.[78]

This period gave rise to the Government Reservation Areas (GRAs) that had basic infrastructural facilities. In the early 1900s, the colonial policy on housing contained guidelines for laying out townships, constructing houses, and maintaining specified housing standards in the "European Reservation" and the "Native quarters."[79]A further contribution was made in the 1920s following the outbreak of bubonic plague in Lagos in 1928. This necessitated establishing the Lagos Executive Development Board (LEDB) in

[77]Okorie, F. A. and L. F. Miller (1976) *Esusu Clubs and their Performance in Mobilizing Rural Savings and Extending Credit,* Technical Report AFTR/76.1, Department of Agricultural Economics, University of Ibadan, p. 22.
[78]Tochi, C. O., (2004) Mortgage Banking in Nigeria,*https://articlesng.com/mortgage-banking-nigeria-/.* Accessed on 7th April, 2019.
[79]Adenuga, O.A. (2013), "Factors affecting Quality in the Delivery of Public Housing Projects in Lagos State, Nigeria", *International Journal of Engineering and Technology,* 3(3), p. 332.

the same year, which served as the main organ for town planning and housing development with particular attention to GRA.[80]In essence, LEDB was meant to plan and develop Lagos effectively. Hence, it was empowered to carry out slum clearance, land reclamation, and developpresidential and industrial estates.[81] The implementation of the mandate of LEDB led to establishing housing schemes such as Workers Housing and Re-housing Estate, Surulere; Akinsemonyi and Moore Housing Estate, Surule; Workers Housing Scheme; and Sites and Services Estate at Surulere, Apapa, Ikoyi, Ilupeju and Isolo.[82]

The basic idea in the GRA policy was to provide habitable housing and housing environment for those expatriate administrators comparable to the best in their respective countries. Thus, their housing quarters were well planned, with all possible comfort, services and amenities; including water, closed sewers, electricity, and abundance of open space and recreational areas. The idea of housing policy was thus initiated and implemented in Lagos and regional and provincial capitals throughout the country.[83]The Nigeria Building Society (NBS) was established to implement the housing policy effectively. The NBS was a replica of what was obtainable in the British system where a mortgage bank was known as a building society after the Second World War. The primary objective of the NBS was to provide mortgage loans to deserving Nigerians to enable them to build their shelters. This was to allow for housing opportunities within both the public and private sectors. Nonetheless, their mortgage operations did not achieve much because of limited financial resources and the poor responses of the public to saving scheme

[80] Ibid.
[81]Ademiluyi, I.A., (2010). Public Strategies in Nigeria: a Historical Perspective of Policies and Programmes. In *Journal of sustainable Development in Africa*.Clarion University of Pennsylvanta.Vol.12. pp. 153-161.
[82]Tochi, op. cit.
[83]Ukwayi, K. U. et al (2012), "An Assessment of Housing Delivery in Nigeria: Federal Mortgage Bank Scenario", *Canadian Social Science*, 8 (6), p.68.UN Habitat, (2012).

operators. The NBS remained solely dependent on government funding and could not stand the test of time.[84]

The workers strike of 1945 gave rise to a further government commitment to housing. The period of the Second World War and the Nigeria contribution to the war made Nigerian nationalists more restive and undoubtedly affected the Nigerian situation. In the year of the end of the Second World War, the workers' strike occurred, and the problem of housing shortage featured prominently. Around 1946, a land reclamation programme was pursued by the government in Lagos; thus swamp areas in Yaba, OkoAwo and Apapa were reclaimed. An area of nearly 1000 acres was reclaimed in Lagos.[85]

After the Second World Warand a series of agitations, it became apparent that independence would soon be granted to the country following the internal self-government of 1956. The question then arose as to Lagos's fitness, because of the squalid appearance of its central area, for the celebration that would be inevitable at the attainment of independence by the country. Something had to be done to facelift Lagos. As a result, the Lagos central planning scheme law of 1955 was enacted that brought the Central Lagos Slum Clearance Scheme into effect. This law provided for the slum clearance of the centre of Lagos and the resettlement of the residents of the area to be cleared. These residents were to be housed temporarily in Surulere, and this was the genesis of the famous Surulere Re-Housing Scheme and housing development in the country.[86]

Towards the end of colonial rule, a regional government system was adopted, and each region formulated its housing policy. The agency responsible for administering housing was the Regional Housing Corporation (RHC) founded in 1958. The RHC's duties included laying out housing estates with infrastructure, allocating the plots to those who

[84]Waziri G. A., &Roosli, R. (2013), "Housing Policies and Programmes in Nigeria: A Review of the Concept and Implementation", *Business Management Dynamics*, *3*(2), p. 60.
[85]Fadahunsi, S. O. (1985), "Fifty Years of Housing in Nigeria", in: Onibokun 'Poju (Ed.), *Housing in Nigeria,* Nigerian Institute of Social and Economic Research (NISER), Ibadan, p. 130.
[86] Ibid.

could afford to build, constructing model houses with modern amenities for sale or rent, and providing loans to individuals to build. Only some middle- and high-income groups benefited from these initiatives.[87] In effect, just like the NBS, the regional housing corporations had impacts only in the cities. One such was the Bodija Estate in Ibadan developed by the now-defunct Western Regional Government.[88]

One response to housing for the poor in Lagos was the 1955 slum clearance in the central Lagos. About 1,300 low income one or two-bedroom units were provided for low-income families in Surulere, but many slum dwellers refused to move to the apartments due to high housing prices.[89] In this period, the African Housing Fund was initiated to encourage civil servants to own their shelter. Through funds from the Common Wealth Development, housing estates witnessed a rapid development for civil servants of African origin within the low-income class.[90]Even though houses built under the colonial housing policy mainly benefited colonial government officials and city dwellers, it nonetheless laid the bedrock of the Nigerian mortgage financing.

2.3.3. Post-Colonial Period

The failure of the colonial housing policy and the ever-increasing housing needs led to several government interventions, resulting in relative progress in mortgage financing during the post-colonial era. For instance, from 1962 to 1968, there was a national development plan aimed at providing housing. However, in practice, housing was given a very low priority in the development plan.[91] Housing was grouped with town and country planning, but funds allocated for this sector were minimal. In addition, government activities on housing were confined to regional capitals like Enugu, Kaduna Ibadan and

[87] A bimbola, A. (2010), "Sustainable Strategies for Housing the Urban Poor: A Case Study of Lagos, Nigeria", *Policy and the Environment,* p.92.
[88]Ebehikhalu, O. N., and Dawam, D. P., op. cit. p. 33.
[89]Abimbola, A., op. cit. p. 94.
[90]Tochi, op. cit.
[91]Ademiluyi, A. (2010), "Public Housing Delivery Strategies in Nigeria: A Historical Perspective of Policy and Programmes", *Journal of Sustainable Development in Science*, 12(6), p. 467.

Benin City where staff quarters for senior officials were built. The State Housing Corporation was established in the then regions. Consequently, the achievements of the housing corporation during this period did not have much overall impact due to lack of funds and technical personnel.[92]

Fromthe1970s, the housing needs of Nigerians increased because of the civil war.Thus**,** in 1971, the National Council on Housing was established and in 1972 embarked upon the National Housing Programmeto provide affordable housing for all income groups and to achieve a housing situation in which an average worker would not have to pay more than 12% of his/her monthly income on rent.[93] However, this policy did not yield the desired results due to high cost of building materials, inappropriate technology, unavailability of mortgage funds and housing loans, the land tenure system, and rural to urban migration.[94]Thisfailure resultedinestablishingthe Federal Housing Authority (FHA) in 1973 that began its operations in 1976. Part of its responsibility was making proposals to the federal government on housing and ancillary infrastructural services and implementing those approved by the government. Since its inception, FHA has been the primary public organ in the provision of housing in Nigeria. It marked the first major federal government effort in providing affordable housing to Nigerian citizens on long term mortgage repayment arrangement.[95]

[92]Ibid.
[93]Baridoma, M.B. and Ekenta, C. (2013), "Impact of mortgage finance on real estate property development, a case study of Federal Mortgage Bank of Nigeria", *Journal of the Nigerian Institution of Estate Surveyors and Valuers,* 38(1), p. 131.
[94]Atilola, M.I., et al (2015), "Factors responsible for mortgage default in Nigeria: a comparative study of commercial banks and primary mortgage institutions", in: Laryea, S. And Leiringer, R. (Eds) Proceedings of 6th West Africa Built Environment Research (WABER) Conference , hels at Accra, Ghana, from 10th-12th August, 2015, p. 545.
[95]Ikpeazu, F. O., (2018). "Mortgage Financing for Housing Delivery in Nigeria: The Governmental Role in Development of an effective Mortgage Market" *in PM World Journal* Vol. VII (Iss.1) published at https://www.pmworldjournal.net accessed on 7th April, 2019.

From1985-2000, an ambitious housing policy was launched with the slogan" housing for allby 2000." According to Udoekanem,[96]the entire mortgage industry in Nigeria was almost restructured in this period. Before 1986 when the Structural Adjustment Programme (SAP) was adopted, the federal government fixed the level and structure of interest rates. The major reasons for regulating interest rates were the desire to obtain a social optimum in resource flow to the preferred sectors of the economy, promote orderly growth of the financial markets; combat inflation and lessen government debt burden. Financial sector reform relied mostly on the market forces, resulting in the liberalization of the sector and consequently the deregulation of the interest.[97]

At the launch of the policy, the country's housing needs stood at about 8 million units, including projections to meet policy targets in rural and urban centres in response to United Nations Advocacy, which called for housing for all by 2000. The policy restructured access to financing housing loans by creating a two-tiered financing structure,with the Federal Mortgage Bank of Nigeria (FMBN) as the apex and supervisory institution and Primary Mortgage Institutions (PMIs) as primary lenders. The capital base of Primary Mortgage Institutions (PMIs), which were charged with disbursing loans funded by the NTHF to the borrowers, was also increased to N100 million.[98]The Federal Mortgage Bank of Nigeria was empowered to collect, manage and administer contributions to the National Housing Fund (NHF) from registered individuals and companies. The NHF was to operate under a situation that inter alia included the provision that all Nigerian workers earning an annual income of N3,000 and above should contribute 2.5% of their salaries to the fund.

[96]Udoekanem, Op. Cit. p. 58.
[97] Ibid.
[98] Peter O. A, et al (2014) Achieving the Housing Objective of Millennium Development goals (MDGS).*The Promise of Co-opertive Housing, Civil and Environmental Research,* Vol. 6, No. 3, p. 4.

Despite these measures, the above national housing policy could not meet its set goals and objectives, and this resulted in the housing and urban development policy of 2002, which was revised in 2004.[99] The major thrust of the housing and urban development policy was to meet the quantitative housing needs of Nigerians through mortgage finance. This was followed by the introduction of the "Own a House with your Rent" programme in 2013, where the Federal Government proposed building houses to be acquired by public and private sectors workers resident especially in Abuja. The policy gave a 15-20 year period for repayment. But the challenge was that most average public servants could not afford the houses from their meagresalaries. The prices of houses were too high given the salary package of the average Nigerian public servant.[100]

Another housing policy introduced was the Public-Private Partnership (PPP) in year 1990s. This policy Public-Private ceded the majority of housing delivery to the private sector. The government's rolewas to provide an enabling environment for the private sector to invest and operate in a free market. The programme was tailored to attract private capital to include innovations like Build. Operate and Transfer (BOT) and Repair, Operate and Transfer (ROT). The fundamental problem with this initiative was the conceptualization of housing as an economic good because when housing is included among the production of goods, housing becomes a product of investment and a means of income generation. Thus, a private developer is a profit-driven builder who utilizes a product to make a profit. This profit motive is evident in the prices that different developers charge for different categories of houses in cities such as Abuja. The interest rate charged by these developers ranges from 0% - 10%, while the down payment lies between 10% and 15%. In most cases,

[99]Iyaiya, M. et al (2012), "Microfinance and Mortgage Financing in Nigeria: A Rural Experience", *International Journal of Economics and Management Sciences,* 1(10), p. 39.
[100] Ibid.

the amortization period is 15years[101].

Another recent development in the mortgage sub-sector in Nigeria is the establishment of Nigerian Mortgage Re-financing Company (NMRC) to support mortgages originators such as primary mortgage banks and commercial banks to increase mortgage lending by refinancing their mortgage loan portfolios. The establishment of NMRC is primarily aimed at increasing the liquidity within the mortgage sub-sector and ensuring the availability of mortgage credit, reducing mortgage and related costs, and making residential housing more affordable.[102] The NMRC is specifically empowered to engage in the refinancing of fully secured mortgage loans and investment in debt obligations issued or guaranteed by the Federal Government or any of its agencies, which should not be less than 50% of the NMRC's total investments.[103]

From the preceding, it is obvious that several efforts have been put in place in Nigeria to enhance the capacity of mortgage institutions in the country for effective housing delivery for all. Unfortunately, however, many Nigerians have been unable to access the loans. The fact is that there is still a lot that needs to be done in this area as the number of people who have accessed mortgage facilities for home ownership is far less than what it should be. At a meeting on mortgage financing in 2012, the Minister of Lands, Housing and Urban Development put the country's debt to mortgage ratio at just 4%. This was the lowest in the African continent than South Africa, whichhas 30%, Namibia 20%, Morocco 15%, and Tunisia 13%[104]. Therefore, it is imperative to examine the current housing policy to identify the factors responsible for the low performance and prescribe

[101]Kolawole T. O., et al (2014) Millennium Development Goals (MDGs) in Nigeria Issues and problems, Global Journal of *Human Social Science: C Sociology & Culture,*Vol.14 Issue 5.p. 6.
[102]The Citizen on line, January 31st, 2014, available@ *https://thecitizen.com/business/cbn-onlines-operating-framework-for-mortgage-refinancing-company/*accessed on 18th November, 2014.
[103]ObinnaChima(2014) 'CBN Unveil Framework for Mortgage Refinance Company' THIS DAY LIVE,on 31st January, 2014.
[104] National Population Commission, "*Strategic Plan of Action on National Policy on Population. For sustainable development*" Unpublished report of stakeholders workshop in Kaduna, January, 2007.

strategies suitable for mass housing production and slum development prevention.

CHAPTER THREE
LEGAL FRAMEWORK FOR MORTGAGE FINANCING

3.1. Introduction

Funding is one of the most important factors in real estate development. However, accessing funds to meet the housing needs of the majority of Nigerians remains a herculean task. To address this challenge, the government has enacted several laws to achieve a more comprehensive measure of social justice by tackling the challenges associated with assessing funds for adequate housing delivery in the country. Therefore, this chapter examines the legal framework for mortgage creation in Nigeria to determine whether there are comprehensive provisions that could guarantee and enhance the creation of mortgages that can promote property development in the country.

3.2 LEGAL FRAMEWORK FOR CREATION OF MORTGAGES IN NIGERIA

Various legislation deal with the creation of mortgages in Nigeria. This invariablymakes the legal framework of mortgages in the country a little complex. For this reason, it is essential to point out at onset that due to the absence of uniform laws that regulate mortgages, the creation of mortgage in Nigeria largely depends on which state the property is located. While some states of the federation have enacted their mortgage laws, others still reference the legal framework applicable during the colonial period. Therefore, this chapter seeks to analyze these laws, focusing on key provisions relating to mortgage creation in Nigeria.

3.2.1. THE COMMON LAW

By virtue of Section 32 (1) Interpretation Act[1] the Common Law, the Statute of General Application and Doctrines of Equity which was in force in England on the 1st day of January 1900, are also applicable in Nigeria. Hence, common law has been made applicable to Nigeria and has remained in existence in some parts of Nigeria. In common

[1] Interpretation Act, Cap.123, LFN, 2004.

law, a legal mortgage is created in one of the following ways, depending on whether it is a leasehold or freehold estate.

3.2.1.1 Freehold Estate

The legal mortgage of freehold land was created by a conveyance of the fee simple estate (freehold simply means that, the whole of the mortgagor's interest is in the land) to the mortgagee, with a proviso for a recovery to the mortgagor on redemption.[2] The mortgage was fee simple in the sense that there was no term of years as in the case of a mortgage of leasehold. The fact that by the conveyance the legal mortgagee had the whole fee meant that at law the mortgagor had no estate or interest with which he could afterwards deal.[3]In its earliest form, a mortgage was created by the mortgagor by putting the mortgagee into possession of the mortgaged property in return for the loan and permitting him/her to take the rent and profits in the discharge of both principal and interest of the loan. This was called a 'living pledge'. The transaction was called a death pledge where the profits from the mortgaged property were used to discharge the interest only.[4]

However, by the 15th century, a mortgage transaction took a different shape. The land was conveyed in fee simple to the mortgagee on the condition that if the loan were repaid upon the day fixed by the agreement; the conveyance was defeated and the mortgagor was freed to re-enter possession. On the other hand, if payment were not made on that fixed date, the interest of the mortgagee became absolute.[5] In other words, the mortgagee becomes the owner of the property because the mortgagor failed to pay at the agreed date. Therefore, a mortgage looked more like an absolute conveyance than a security. Apart from the creditor taking actual and immediate possession, the chance of

[2]Dadem Y.Y., (2012), *Property Law Practice in Nigeria*, (2nd Edition), Jos, Jos University Press Limited, p. 20.
[3] Ibid.
[4]Oniekoro F.J., (2007), *Mortgages in Nigeria-Law and Practice*, Enugu, Chengo Limited, p. 27.
[5]Theodore, B. F. Ruoff, (2008), *Property and Conveyancing Library*, London, Sweet and Maxwell Stevens & Sons, p. 43.

the debtor/mortgagor could not get back or redeem the land (mortgaged property) was very high. While the mortgage lasted, the mortgagor had no proprietary right to the land, but merely a personal right to have the property returned on repayment on the due date. And even the personal right was extinguished forever if he defaulted in timely payment.[6]

However, equity intervened to transform the law of mortgage, both concerning the mortgagor's right to redeem the property and the mortgagee's right to take possession and both steps led to the recognition of the mortgagor as having an equitable proprietary interest (rather than a personal right to have the property returned), the existence of which restricted the exercise of ownership-type rights by the mortgagee.[7] No longer was redemption dependent upon strict compliance with the contract. Equity looked at a mortgage as a purely security transaction, and therefore, the institution provided no justification for the expropriation or exploitation of the mortgagor's property.[8] Thus, even after the lapse of the date fixed for redemption or repayment of the loan, a court of equity will permit the mortgagor to redeem the property. It is usual for equity to concede to the mortgagor for a period of six months after the appointed day for repayment during which he may redeem. (Equity looks at the intent rather than the form). The attitude of equity is explained by the fact that the mortgagor retains an interest in a mortgaged property expressed by his equity of redemption, which of course, arises after the expiration of the fixed period agreed, for redemption.[9]

Hence, equity of redemption encompassed the mortgagor's equitable right to redeem after the contractual redemption date. The mortgagor's equity of redemption must not be encumbered in any way. There must be no collateral advantage reserved in the mortgage deed, making it impossible for the mortgagor to redeem his/her land on

[6] Ibid.
[7] Jegede, M.I., (1981), *Principles of Equity* (1st Edition), Benin, Ethiope Publishing Corporation, p. 19.
[8] Ibid, p. 21.
[9] Jesse, D. and James, E. K., (1979), *Property* (3rd Edition) (London: Little Brown and Company, p. 27.

payment of loan, interest and costs. The court of equity regarded the right to redeem as a special term in a security contract that could not be altered or contracted out of. Equity thus made the right to redeem a larger consideration than was usually given to the mortgagor by contract.[10]

However, the equity of redemption is distinguishable from the right of redemption, which is the right of a mortgagor to redeem a mortgaged property upon the discharge of the mortgage liabilities. The former constitutes the reversionary estate of the mortgagor attached to the property upon a mortgage, and this reversionary estate is devisable and disposable. In fact, it is a mortgageable and transferable interest in land.[11]In *Western Region Traders Syndicate vs.Fashugbe*[12], the court held that the first mortgage vested the legal estate (interest) in the syndicate and the second mortgage by the mortgagor was of the equity of redemption. Similarly, in *Allivs. Allen*[13] "A" who borrowed money from "B" and the loan was unsecured. He later borrowed a further sum of money from "C", from which he gave his land as security. "A" defaulted in repaying "B", whereupon "B" sued and obtained a judgment for the debt. "A" was unable to satisfy 'B's judgment debt in full and so "B" attached and sold the land which "A" had given to "C" as security. The court per Brett JSC held that the purchaser of the land from "B" purchased only the equity of redemption- which was the only right left in "A" after the security – as the legal title to the property is still vested in C. Lastly, in equity, a mortgagee who took possession was required to derive no personal profit therefrom because the mortgagor, while still retaining the right to redeem, was recognized as the real owner of the property so that all the profits must be credited to his account.[14]

[10]David, A. Leipziper, (1976), "The Mortgagee's Remedies for Waste",*California Law Review,* Vol. 64 Issue 5, p.16.
[11]*Kreglingervs. New Patagonia Meat and Gold Storage Ltd*, (1914) AC 25.
[12](1960), WNLR 51.
[13](1966) NCLR 14; (1966) All NLR 98.
[14]Heath vs. Pugh (1881) 6 QBD 345; (1882) 7 AC 235.

3.2.1.2 Leasehold

A legal mortgage of a leasehold interest is usually by "term of years". Two methods are involved in common law for the mortgage of a leasehold interest. A legal mortgage of a leasehold was either by sub-demise or sublease for a period slightly lessor shorter than the residue of the mortgagor's term or by assignment of the residue of the term of the lease, with a proviso for a re-assignment of the residue to the mortgagor on redemption. The two methods are examined hereunder.

3.2.1.3. Sublease or Sub-demise

Here the mortgagor conveys a sub-lease or sub-demise of his interest to the mortgagee for a period slightly less than his own term. In other words, the mortgagor may grant a sublease of his term for a period shorter than the term he holds with a provision for redemption upon the repayment of the loan. Mortgage by way of demise at common law implies that the mortgagor has some semblance of unlimited title in the land.[15] The advantage of this method is that it does not subject the mortgagee to the burden of any onerous covenant that may be contained in the head lease or original lease because there is no privity of estate between the mortgagee or sub-lessee and the head-lessor.[16]

The creation of mortgage through this method also can enable the mortgagor to create subsequent legal mortgages with other mortgagees using the same property. Where this happens, and there is a dispute about which interests have a priority, the emphasis is often placed on who had the interest first and what type of interest it is. While legal interest ranks above equitable interest, the general rule for equitable interests is that if the interests are equal, the one which was made first will take priority.[17] This is fairly straightforward. The basic rule is the same as equitable ones; the first one created takes

[15]Grant, N. and Dale, W., (2000), *Real Estate Finance Law* (5th Ed.) Hornbooks Series, p. 33.
[16]Badaki A.D., (1995) "Mode of Mortgaging Land in Nigeria", *Edo State University Law Journal* Vol. 4 No.1, p .11.
[17]Emudainohwo, T.E., (2006), "Leasehold Interest in Property Law", *Property and Commercial Law Journal, Delta State University,* Vol. 1 No. 1, p. 6.

priority. However, the disadvantage is that the mortgagee cannot sell the reversionary interest of the mortgagor upon default except this defect is cured by the two remedial devices of a power of attorney or a declaration of trust.

3.2.1.4. By Assignment

Alternatively, the lessor may assign the remainder of his/her term to the mortgage with a provision for cesser upon the discharge of the mortgage debt. In other words, the whole term of the mortgagor is transferred to the mortgagee, leaving the mortgagor with only the legal right to redeem the property. The advantage of this method is that the mortgagee retains the title deeds, and the mortgagee has a right to transfer the interest assigned to him/her to a subsequent purchaser.[18]

This method is not attractive because it renders the mortgagee liable for onerous covenants contained in the original lease because of the existence of the privity of estate. Furthermore, the assignment of a lease as a mode of creatinga legal mortgage has many challenges. First, it automatically brings the mortgagee into direct contact with the headlessor (the Governor) by virtue of the principle of privity of estate.[19] This imposes liability on the mortgagee for payment of rent to the head lessor and the observance of other covenants in the head lease.[20] Also, a mortgagor who has assigned his/her leasehold interest to the mortgagee may not be capable of creating any successive legal mortgage favouring subsequent mortgagees. He may only be capable of creating an equitable mortgage for subsequent mortgagees based on his equity of redemption.[21]

In addition, its mode of discharge is cumbersome as the mortgagee must execute a deed of re-conveyance, release, discharge or surrender for the mortgage to be validly discharged. It is quite different from other mortgages which may be discharged by means

[18]Olukon, Y. A., (1998), "Lending & Security-Bull in the China Shop: A Commonwealth Charge & the Common Law", *Modern Practice Journal of Finance & Investment Law,* Vol. 2 No. 1, p. 12.
[19]Megarry, R., (2002), *Megarry's Manual of Law of Real Property* (8th ed), Sweet & Maxwell, p. 381.
[20]Ibid.
[21]Dadem Y.Y., op. cit., p.21.

of statutory receipts.[22]Both the assignment and sub-demise are also had to be by deed. An assignment is similar in form to a conveyance of freehold land, subject to such alterations as were dictated by the difference in the tenure of the land transferred. Creation of mortgage by sub-demise necessarily required a certainty of term for it was a sublease.[23]

3.2.2 THE DOCTRINE OF EQUITY

An equitable mortgage only transfers a beneficial interest in the asset to the lender (mortgagee) with full legal ownership remaining with the mortgagor. It should be pointed out that the modes of creating equitable mortgages in Nigeria are uniform. Hence, a distinction between CA State and PCL State is not necessary here. The following are ways an equitable mortgage can be created:

3.2.2.1. **Deposit of Title Deed with an intention to create a mortgage**

Equity will also protect an individual where it was clear that the property owner intended to charge their property in relation to a loan. One primary example of this is where the estate owner deposits his/her title deeds with the lender in return for a loan.[24] Thus, going by this principle, the mere deposit of title deeds with a bank with a clear intention that the deeds should be retained as security for a loan is one of the methods of creating an equitable mortgage.

The origin of the doctrine of an equitable mortgage by deposit of title deeds is generally attributed to the early English decision of *Russelvs.Russel*.[25] In that case, a lease having been pledged with the plaintiff (E) by a person (R) who afterwards became bankrupt, and the pledgee filed his bill for a sale of the leasehold estate. The plaintiff's claim was opposed by the assignees of the bankrupt, who argued that the effect would be to charge the land without writing, in violation of the fourth clause of the Statute of

[22]Shuaribu, R. G. and Aliyu, O., (2018), "Mortgage financing in Nigeria: issues and challenges", *International Journal of Business and Financial Studies*, 45(8), p. 373.
[23] Ibid.
[24]Rollison, W.D., (1931), "English Doctrine of Equitable Mortgages by Deposit of Title Deeds or Other Muniments of Title", *Notre Dame Law Review*, Vol.6, Issue 3, p. 342.
[25](1783) 1 Bro CC 269.

Frauds and Perjuries. Lord Loughborough said that the delivery of the lease was a delivery of the title to the plaintiff for a valuable consideration and that the Court had nothing to do but to supply the legal formalities; and that, in such cases, the contract was not *to be* performed but was *executed.* Ashurst, Lord Commissioner, observed that it was open to explanation upon what terms the lease was delivered; and "an issue was directed to try whether the lease was deposited as security for the sum advanced by the plaintiff." The jury found that it was deposited as security. The case afterwards came on before Lord Thurlow on the equity reserved, "when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

The legal consequence of the deposit of title deeds as security for a loan is that it amounts to part performance. Furthermore, there is an implied agreement by the mortgagor to execute a legal mortgage in favour of the mortgage. The merepossession of the deeds by the creditor raises apresumptionthat they were deposited with him as security for the debt, and the burden of proof lies on the debtor to rebut this presumption. The delivery of title deeds by the debtorto the creditoris sufficient to constitute an equitable mortgage. But the authorities require that the circumstances of the deposit must be such as to justify a presumption of an intention to create an equitable mortgage. Certainly, the deposit by a debtor with his creditor would be sufficient to give rise to the operation of such presumption, if there were no qualifying circumstances. However, in *Wardle vs. Oakley*[26], the court observed that if the mortgagor has executed a legal mortgage, he may still deposit title deeds with the mortgagee as security. Still, the mortgage deed would presumably show the extent of the contract between the parties. The burden would be on the mortgagee to show that the title deeds were deposited with him as additional security.

[26]3 6 Beavs.27 (1864).

Second, the depositee was given a direct power over the estate itself, *i.e.*, he was allowed to foreclose. Before the decision of Lord Thurlow in *Russelvs.Russel*[27], the position of the court as expressed in the case of *Keys vs. Williams*[28] was that a party with whom deeds were deposited was only entitled *to hold* the title deeds so as to enforce payment by embarrassing the debtor, but unaccompanied by any *charge* upon the estate. The significance and effect of the decision in *Russelvs.Russel*are that for the first time, the depositor's interest in the property was subjected to an enforceable charge. By this decision, the court not only gave or created a *lien* on the title deeds, but also sanctioned what it considered to be the intention of the parties and commercial necessities when it ruled that the deposit of the title deeds with the creditor was sufficient evidence not only that the deeds were to operate as a security, but also such security was to be effectuated by a mortgage.

In line with this principle, it was also held In *Daily Times Nigeria PLC. vs. Skye Bank PLC*[29] that it is trite that deposit of title deeds with a bank as security for a loan creates an equitable mortgage as against a legal mortgage. However, judicial positions are not uniform on this form of creation of an equitable mortgage. Some seem to construe the deposit of deeds with a creditor as evidence of an agreement by the debtor to execute a legal mortgage with all its remedial incidents. For proponents of such a view, the deposit of title deeds as security will only be treated as an agreement to execute a legal mortgage, which would carry with it the entire remedies incident to such a mortgage. In *Carter vs.Wake*[30], the court noted that: "when there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, andtherefore as carrying with it all the

[27]Supra.
[28]3 Y. &C. 55, 60 (1838).
[29] (2017) LPELR-43539(CA)

[30] L. R. 4 Ch: D. 605, 606 (1875).

remedies incident to such a mortgage." Similarly, in *Birch vs.Ellames,*[31]the Chief Baron of the Exchequer said: "The deposit of title-deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and that agreement is to be carried into execution bythe Court, against the mortgagor, or any who claim under him with notice, actual or constructive, of such deposit having been made." This, therefore, means that mere deposit of title deed with a bank without the requisite intention makes the deposit equivocal, and so is not enough. There must be proof that the deposit is intended as security for a loan.[32]

3.2.2.2.**Deposit of Title Deed with an agreement toexecute a legal mortgage**

This is an agreement to create a legal mortgage. The owner of a legal estate may agree in writing in addition to depositing title deeds to create a legal mortgage in favour of a creditor. In such a case, once the lender advances the money, whether or not the agreement is under seal, an equitable mortgage is created. The equitable mortgagee can enforce the agreement by an action in equity for specific performance, on the principle in*Ogundainivs.Araba****33*** that equity regards as done that which ought to be done. This principle also operates where there has been a contract to create a legal mortgage, but it has not yet been executed as a deed. This will give rise to an equitable mortgage from the date the contract is formed.[34]

This form creation of mortgage was equally confirmed in *United Bank of Kuwait plcvs. Sahib*[35] , meaning the simple deposit of deeds with the lender is not enough; a written agreement must accompany this. In practice, this would include the mortgagor executing a memorandum of deposit that contains the terms of the loan (that is, the

[31]2 Anst.427, 431 (1814).
[32]*British And French Bank Ltd. vs. S. O. Akande* (1961) ALL NLR849.
[33](1978),1 LRN 280; (1978), NSCC 334).
[34]*Walsh v Lonsdale,* (1882) 21 ChD 9.
[35](1997), Ch 107.

amount, interest, date of repayment, nature of the security, etc.). The memorandum of deposit can be given under hand or as a deed. Still, a deed is better because it has the advantage of conferring on the lender (the bank) the statutory power of sale of the mortgaged property notwithstanding that the bank is an equitable mortgagee provided the memorandum contains either the power of attorney clause or the trust device or both.[36]

3.2.2.3. Equitable Charge of the Mortgagor's Property

This is a mere equitable charge of themortgagor's property. This does not create an estate (proprietary right), which may rest in the mortgagee by way of specific performance, but merely gives a right to repayment of the debt or other discharge of other obligation/burden in respect of which the property stand charged. In effect, this is a mere charge over the mortgagor's property. The security in this instance can only be realized through sale or appointment of a receiver under court order. This is because an equitable chargee cannot himself exercise a power of sale or appoint a receiver in the absence of a deed.[37]

3.2.2.4. Equitable mortgage of an equitable interest

In common law, a mortgage was for all intent and purposes a conveyance of the legal estate, subject to defeasance only if the mortgagor repaid the debt on a prescribed day; failure to comply on that date vested absolute title in the mortgagee. To relieve against grievous hardships resulting to mortgagors in many instances, equity developed a distinct theory of mortgagesbased on the ancient maxim that equity regards the substance rather than the formand will relieve against forfeitures whenever an award of money can fairly compensate the party. The mortgagor was given a right in equity to redeem the property even after his default; it is this right to which the abbreviated term "equity of redemption" refers. Gradually, the concept arose in equity that certain security transactions, wherein the debtor pledged his property to the repayment of an obligation, could be effectuated, although title to the property did not pass to the creditor. No legal right existed in the

[36]Olubukola, S. O. and Oluwamayowa, D. (2020), "Taking Security: A Review of Mortgage Creation Under Nigerian Law", *SeftonFross*, p .9.
[37]*Ogundainivs.Araba,* (supra).

creditor; merely an equitable right, in personam, to compel the debtor to apply the subject of security to the debt. This form of security transaction has come to be known as an equitable mortgage.

3.2.3 STATUTES OF GENERAL APPLICATION

Just like the Common Law and Doctrine of Equity, Statutes of General Applications are part of the received English Laws that are in force in England on 1st January 1900 which have been imported into the Nigerian legal system. Nigeria having got independence in 1960, the received English laws by virtue of Section 32 (2) of the interpretation Act[38] only apply to the extent of local jurisdictions and local circumstances.[39] For mortgage transactions, in particular, two major Statutes of General Application that remain relevant are the Property and ConveyancingLaw[40] and the Conveyance Act (CA).[41]The creation of a mortgage under these statutes is examined below.

3.2.3.1. Property and Conveyancing Law

The Property and Conveyancing Law (PCL) was the primary law regulating the creation of a mortgage in the old Western Region of Nigeria before independence. These states, which are also known as PCL States, are Oyo, Ogun, Osun, Ondo, Ekiti, Edo and Delta. While some of these states have their local legislation regulating mortgage transactions, the PCL is still applicable in some States. Section 108 (1) of the PCL[42] provides that a mortgage of an estate in fee simple shall only be capable of being affected at law either by a demise for a term of years absolute, subject to a provision for cesser on redemption or by a charge by deed expressed to be by way of legal mortgage. Section 109 of the Law further provides that a mortgage for a term of years absolute shall only be capable of being affected at law either by a sub-lease for a term of years absolute less by one day at least the term vested in the mortgagor and subject to a provision for cesser on redemption

[38] Interpretation Act, Cap.123, LFN, op. cit.
[39] *Idehenvs.idehen,* (1991), 6 NWLR (Pt.198), 22.
[40] PCL, 1959.
[41] CA, 1882.
[42] PCL, op. cit.

or by a charge by deed expressed to be by way of a legal mortgage. It follows that legal mortgage under the PCL States can be created through demise, sub-demise or legal charge.[43] These are examined hereunder in some detail.

3.2.3.1.1. Demise

Section 108 (1) of the PCL[44] provides that a mortgage of an estate in fee simple shall only be capable of being affected at law either by a demise for a term of years absolute, subject to a provision for cesser on redemption. Today, the implementation of Section 108 (1) of the PCL[45] is legally impossible because Section 1 of the Land Use Act (LUA)[46] vests the ownership of all land in the country to the State Government and the governor holds that power. Under the Act, the nature of interests in real property is leasehold for terms not exceeding 99 years as against the freehold interest demise for a term of years absolute provided under Section 108 (1) of the PCL.

3.2.3.1.2. Sub-Demise or Sub-Lease

Another mode of creating legal mortgage under Section 109 (1) of the PCL[47] is sub-demise or sub-lease. Under this, legal mortgages are created on a freehold interest by granting a lease by the mortgagor to the mortgagee because the outright conveyance of the whole legal estate in a mortgage is disallowed. However, by the provision of Section 19 of the PCL[48], mortgages on leasehold interest under this PCL regime is by way of creating a sublease in favour of the mortgagee and must be at least one day shorter than the term of the lease which is being mortgaged. Otherwise, it will operate as an assignment or waste but is subject to cesser on redemption.[49]

[43]Dadem, op. cit., 130
[44]PCL, op. cit.
[45]PCL, op. cit.
[46] LUA, Cap. L5, LFN, 2004.
[47]Ibid.
[48]Ibid.
[49]S. 108(2), Ibid.

The advantage of the sub-demise is that it allows for second and subsequent mortgages to be created on the lease. Furthermore, where a mortgage is created by sub-demise under the PCL, the two remedial devices, that is, power of attorney and declaration of trust are unnecessary because section 112 of the PCL grants the mortgagee the right to sell the property with the reversionary interest of the mortgagor where he/she defaults to pay the principal with interest.

Generally, however, whether the mortgagor has a freehold or leasehold interest in the property, he/she may create a charge by deed expressed to be by way of legal mortgage. Further, Section 108 (2) of the Property Conveyancing Law converted pre-1959 mortgages which were by conveyance of the fee simple into demise for 3000 years was also adopted as the normal mortgage term because Section 108(1) did not specify the number of years for which a demise of freehold should run. Under the Property and Conveyancing Law, subsequent mortgages could be legal because the mortgagor did not transfer his entire legal interest in the land to the mortgagee. This provision of section 108 (2) seems to be conflict with provisions of the Land Use Act, which only recognized 99 years as the maximum for which a person can hold an interest in land.[50]

3.2.3.1.3. Legal Charge

Legal mortgage can also be created in the PCL Statesby way of a legal charge. The second part of Section 108 (1) of the PCL[51] provides that a mortgage of an estate in fee simple shall only be capable of being affected at law by a charge by deed expressed to be by way of legal mortgage. Generally, however, whether the mortgagor has a freehold or leasehold interest in the property, he/she may create a charge by deed expressed to be by way of a legal mortgage[52]. One advantage of creating legal by way of legal charge as

[50]Owoeye, op. cit, pp.218-253
[51]PCL, op.cit.
[52] S. 110, Ibid.

provided by Section 110 of the PCL[53] is that the mortgagee shall have the same protections, powers and remedies.

However, this is subject to the condition that the charge must be made by deed and not by writing; otherwise, it has no legal effect. It must also be expressed by way of a legal mortgage. In law, the chargee has as many rights as the mortgagee. The charge gives the chargee similar rights as a mortgagee in the enforcement of payment of money loaned. This combined the simplicity of the charge with the advantages of a legal mortgage. A mortgage of this nature embodies the same powers and remedies as a legal mortgage. The deed should state that the charge is by way of legal mortgage. The legal charge does not convey any propriety rights to the charge. The mortgagor retains full title rather than a nominal reversion as in demise, whereas a mortgage conveys proprietary interest to the mortgagee. A charge creates such rights in the chargee. Sub-demising a term less than the mortgagor's term enables him/her to retain his reversion and creates successive legal mortgages.

Another advantage of legal charge is that it does not amount to a breach of covenant in a lease against the assignment and subletting because the charge creates no actual sub-lease in favour of the mortgagee, but only gives him rights if he had a sublease. In addition, the charge can be discharged by a simple statutory receipt and not by a deed of release. Most importantly, it is a convenient way of mortgaging freeholds (where permitted) and leasehold together because the mortgage terms are not stated, but the properties are listed in the schedule with a statement that they are charged by way of a legal charge.

Thoughthe disadvantage of the legal charge is that unlike the deed that creates it and is required to be registered, the receipt by which it is discharged is not registrable.

[53]Ibid.

The charge may then continue to appear against the property in the register as an encumbrance. Also, it does not carry any proviso for redemption because no interest is conveyed in the first place. Another disadvantage of legal charge is that it is of limited application. Section 109 of the Law further provides that a mortgage for a term of years absolute shall only be capable of being affected at law either by a sub-lease for a term of years absolute less by one day at least the term vested in the mortgagor and subject to a provision for cesser on redemption or by a charge by deed expressed to be by way of a legal mortgage.

3.2.3.2. Creation of Equitable Mortgage under the PCL

Under the PCL, any form of an agreement involving the transfer of an equitable interest in land as security for a loan is essentially equitable mortgage. For instance, Section 6 (1) of the PCL[54] provides that interests in land validity created which are not capable of subsisting as legal interestshall take effect as equitable interest. The section provides further that an equitable interest in land shall only be capable of being validly created in any case in which an equitable interest in a property can be validly created before the commencement of the Statutes. This implies that Section 6(1) of the PCL has adopted all the traditional methods of creating equitable mortgage available under equity doctrine. In *AdaranOgundianavs.VS.A.L Araba and Anor*,[55]it was held that an equitable mortgage is created in any of three ways. These are when an agreement exists to create a legal mortgage by delivery of title deeds with the requisite intention to create a mortgage, or a mere deposit of title deeds should be taken or retained as security for a loan or lastly, or mere equitable charge of the mortgagor's property. So also where there is an imperfect legal mortgage, it will amount to an equitable mortgage. Therefore, in light of the above

[54]PCL, op. cit.
[55]*(1978) LPELR-SC.470/57.*

provision, it is clear that a holder of an equitable interest can only create an equitable mortgage that is on the interest he holds.

3.2.3.3. Conveyancing Act

Conveyancing Act (C.A)[56] was enforced in Nigeria by way of received English law under the Statute of General Application. Before the advent of the PCL in the Western region, the CA enjoyed uniform application in the country. After the enactment of the PCL, the States that used CA, such as Kano, are referred to as the Conveyancing Act States. In these states, there is no statutory provision governing the mode of creating a legal mortgage; therefore, the applicable law is still the common law subject to modifications introduced by the Land Use Act. Because no freehold interest in land can be acquired in Nigeria, the relevant law is applicable to creating a legal mortgage of a leasehold interest. Broadly, three major modes of creation of legal mortgage have been identified by many authors in jurisdictions applying the Conveyancing Act and common law in Nigeria. These methods include assignment, sub-demise, and deed expressed to be by way of statutory mortgage.

3.2.3.3.1. Assignment

Under this system, a legal mortgage can be created by assigning the entire and unexpired residue of the mortgagor's leasehold interest to the mortgagee with a proviso for cesser upon redemption.[57] In other words, a mortgage is created here by way of assignment of the mortgagor's interest in the land with a covenant for reassignment or re-conveyance of the mortgage. Thus, to qualify as a legal mortgage under this method, the assignment of the mortgagor's interest in the land must go with the covenant for reassignment or re-conveyance of the mortgaged property back to the mortgagor upon the satisfaction of the debt.

[56]CA, op.cit.
[57]*Tulk vs. Moxhay,* 41 E. R 1143.

One majornoticeable feature of this mode of mortgage creation is that the mortgagor transfers the entire unexpired residue of his/her leasehold interest to the mortgagee and there is no reversionary interest in the mortgagor. Hence, in the event of default, the mortgagee can pass the mortgagor's entire interest to a purchaser without any problem. The disadvantage of creating a legal mortgage through this method is that the mortgagee becomes responsible to the Governor for the covenants in the right of occupancy granted to the mortgagor as the assignment creates a privity of estate between the mortgagee and the Governor/Head-lessor.

Although there is no privity of contract between the Governor/Head-lessor and the mortgagee, there is a privity of estate. This makes the mortgagee liable for all the covenants and conditions in the head-lease. The mortgagee is bound to observe and perform the restrictive covenant that runs with the land in equity; this makes the method unattractive because it makes the mortgagee carry an unavoidable burden[58], being bound by onerous covenants to which he/she was not privy.[59] For instance, where the land is granted by statutory Right of Occupancy, the mortgagee is liable to the Governor for the payment of rates and other charges applicable to the property. However, in practice, the mortgagee calculates such financial burdens and adds them to the charges applicable to the mortgage against the mortgagor.[60] So also where there is a covenant between the mortgagor and another party, for example, from whom he bought the land, the mortgagee, must observe the covenant and breaching of that covenant is actionable even though there is no privity.

Thus, the conclusion can be reached that an assignment of a lease as a mode of creatinga legal mortgage has many challenges. First, it automatically brings the

[58]Dadem, op. cit. p.128
[59]Wingrass, op. cit, at http://wingrass.blogspot.com/2013/02/creation-of-legal-mortgages-under_343.html
[60]Sanny, op. cit. pp. 1-19.

mortgagee into direct contact with the head-lessor (the Governor) by virtue of the principle of privity of estate. Second, it also imposes liability on the mortgagee for payment of rent to the head lessor and the observance of other covenants in the head lease. Also, a mortgagor who has assigned his/her leasehold interest to the mortgagee may not be capable of creating any successive legal mortgage in favour of subsequent mortgagees. Last, its discharge mode is cumbersome as the mortgagee must execute a deed of re-conveyance, release, discharge or surrender for the mortgage to be validly discharged. It is quite different from other mortgages that may be discharged by means of statutory receipts.

3.2.3.3.2. Sub-Demise

Another method of creating a mortgage is through sub-demise at least one day shorter than the original lease term with a proviso for re-conveyance on the redemption of the mortgage.[61] The major advantages of this mode are that there is no privity of contract or estate between the mortgagee and the headlessor, and there is no uniformity because it is also an applicable mode under the PCL which makes it attractive to banks. Thus, unlike the transaction involving the assignment of the term of years, the mortgagee is not obligated to the government in respect of the land. This is based on the simple principle that no privity of contract or estate exists between the mortgagee (for instance a bank that lent money to the mortgagor) and the head-lessor (for example Governor of a state as the grantor of C of O).[62] The Mortgagor, therefore, would be liable directly to the government for rates and such other charges.[63]

One advantage of this mode is that it preserves the mortgagor's right to reversion.[64] Under this method, the title in the mortgaged property is vested in the

[61] *White Rose Cottage*, (1965) CH. D 940.
[62]Dadem, op. cit. p.128
[63]Sanny, op. cit. p.19.
[64]Wingrass, op. cit.

mortgagor. Hence, the mortgagee cannot give the purchaser a perfect title in the event of default by the mortgagor. This is based upon the fact that the title in the mortgaged property is vested in the mortgagor, and, therefore, the mortgagee cannot give a perfect title to the purchaser in the event of default by the mortgagor.[65] In other words, the mortgagee would not have the right to sell or alienate the property in any way to recoup the loan. In practice, however, this challenge can be avoided through either a power of attorney clause or a trust declaration or both, which may be inserted to vest the mortgagor's reversionary title in the mortgagee.

A power of attorney clause operates to vest authority irrevocably over the mortgaged property on the mortgagee or his/her attorney until the loan is repaid. All that is required to achieve this is for the mortgagor to appoint the mortgagee as donee with the power to sell the property, including the reversionary interest to realise his money.[66] Such Power of Attorney Clause is irrevocable because it is given on a valuable consideration. In *Osakwevs.Nwokedi&Anor,*[67] the court observed that before a power of attorney could be irrevocable, it must be given in financial and not filial consideration. Mere filial or moral obligation to donate an irrevocable power of attorney cannot amount to valuable consideration. It follows that once an irrevocable power of attorney coupled with an interest (valuable consideration) favouring the donor is given, it is irrevocable to the extent that the consideration given is unrealized. Thus, where the consideration is realized a power of attorney becomes revocable. Where a mortgagor delegates a power of attorney, he/she cannot revoke because the mortgagee has an interest in the title. The implication of including a power of attorney clause is that, in case of a default, the

[65] Ibid.
[66]Dadem, op. cit., p.129.
[67](2018) LPELR-45054(CA).

mortgagee can sell off the property to recover his/her money. This was also established in the authorities of *Labededivs.Odunlana&Anor*[68] and *Chime vs. Chime*[69].

One the other hand,a trust declaration clause makes the mortgagor a trustee of the mortgaged property favouring the mortgagee, with additional powers to remove the mortgagor as trustee and appoint new trustees in the management of the mortgaged property.[70] In *Ihekwoaba v A.C.B Ltd,* the court observed that a power of attorney for the mortgagee to convey the property in the mortgagor's name may be included in the memorandum of deposit as an alternative or in addition to the declaration of trust. The mortgagor irrevocably appoints the mortgagee and the persons deriving title under his or their names and on his or their behalf to vest the legal estate in the mortgaged property in any purchaser or other persons in the exercise of the statutory powers conferred on mortgagee free and discharged from the mortgagor's right of redemption.[71] This implies that where the parties to the mortgage have inserted these clauses, the mortgagee's right is deemed to have been protected.

3.2.3.3.3. Deed expressed to be by way of statutory mortgage.

A mortgage may also be created expressed to be through deed by way of a statutory mortgage. Section 26 of the CA[72] provides specifically that "A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage. This method provides a much simpler way of creating a mortgage. The parties simply adopt the said form and adapt it to the peculiarity of their transaction. Such a mortgage transaction may be registered with the Land Bureau, and this generatesa problem with this kind of mortgage creation. The form in the schedule may be modified as circumstances require. Another advantage of this is that it may be discharged by a

[68](1973) 4 CCHCJ.
[69](2001), 3 NWLR (Pt. 527).
[70]Wingrass, op. cit.
[71]Sanny, op. cit. pp.1-19
[72]CA, op.cit.

simple receipt; which turns out to be one of its disadvantages because the receipt is not registerable and the mortgage may continue to be reflected in the register.[73]This is because of the absence of a Deed of Release, which is applicable to the other forms of mortgage creation under the Conveyancing Act.[74]

3.2.4. LOCAL LEGISLATIONS

Apart from Common Law, Doctrine of Equity, Conveyance Act applicable in some states of old Northern and Eastern regions, and the Property and Conveyancing Law, applicable in some states of the old Western and Midwestern regions, some indigenous or local legislationregulate the creation of mortgages in Nigeria. This segment examines some of these legislations.

3.2.4.1. Legal Mortgage under the Land Use Act

The Land Use Act (LUA),[75]which the major Act regulating mortgage transactions in Nigeria, has not expressly prescribed modes of creation of mortgages in the country. Instead, the Act maintained the existing methods of creation of mortgages. Notably, Section 48 of LUA preserves the pre-Act conveyancing laws subject to such additions, alterations or omissions as will bring them into conformity with this Act or its general intendment. Thus, it follows that mortgages under LUA mortgage may also be created by the assignment of the unexpired term of the right of occupancy as evidenced by the certificate of occupancy subject to re-assignment on redemption, by a sub-demise of a term shorter than the mortgagor's whole term to the mortgagee subject to cesser on redemption, or by a charge by deed expressed to be by way of legal mortgage.

Furthermore, there are provisions under the Act in which references are made to mortgages that suggests that the Act is cognizance of existing mortgages and allows for the creation of mortgages after the commencement of the Act. For instance, Section 34

[73]Wingras, op. cit.
[74]Sanny, op..cit. p.19.
[75] LUA, Cap. L5, LFN, op.cit.

provides that where land under that section was subject to a mortgage before the commencement of the Act, such land shall continue to be so subject, provided that the continued operation of the mortgage is not in the opinion of the Governor inconsistent with the provisions, or general intendment of the Act.

As noted earlier, the intention of Section 48 of LUA[76] to preserve the pre-LUA conveyancing laws subject to such alterations as will bring them into conformity with the general intendment of the Act, further implies that demise of a freehold for a term of years absolute subject to cesser on redemption although sanctioned under the PCL, is no longer possible because of the spirit of the Land Use Act which provides that the greatest interest a person can have is a specified term of not more than 99 years. In other words, the demise of a freehold for a term of years absolute as a creation of a legal mortgage even though sanctioned under the PCL is no longer possible because of the Land Use Act which does not only provide for leasehold interest but also limits the highest interest a person can have is a specified term to ninety years (99 years).

In *Way vs.Oresanya,*[77] the Court held that with the coming into force of the Land Use Act in 1978, the maximum term of years a person can hold a plot of land is 99 years. Ownership of land is therefore circumscribed to the term of years allocated to the nature of tenure under the Land Use Act. The said term of years is, however, potentially renewable upon expiry thereof. There is thus no absolute ownership of land under the Land Use Act. The piece of land is either occupied for a term of years absolute or a number of years stated in the certificate of occupancy. Therefore, this means that only sub-demise or legal charge is recognized and used to createa legal mortgage in the PCL States.

3.2.4.2. Legal Mortgage under Mortgage and Property Law of Lagos State

[76] Ibid.
[77](2016) LPELR-40992(CA).

The law regulating all mortgage transactions in Lagos State is the Mortgage and Property Law (M&PL)[78] of Lagos State. In effect, this law abolished the Property and Conveyancing Law. Section 15 of the M&PL[79]and provides that:

> A mortgage of a right of occupancy in land shall be created at Law either by a demise for a term of years absolute, subject to a provision for censer on redemption, or by a charge by deed expressed to be by way of legal mortgage, or by a charge by deed expressed to be by of statutory mortgage in the forms provided under this law: Provided that a first mortgage shall have the same right to possession of documents as if his security included a right of occupancy.

From the above provision, it follows that legal mortgage under M&PL of Lagos State can only be created by demise for a term of years absolute subject to censer on redemption; Charge by deed is expressed to be by way of legal mortgage or by deed expressed to be by way of statutory mortgage. By virtue of Section 15 of the M&PL[80], for any demise to constitute a legal mortgage, a legal mortgage must be of a term of years absolute, subject to a cesser on redemption. To cover mortgage transaction executed before the enactment of M&PL, the section allows any assignment by mortgage made after the commencement of the M&PL to equally have the effect of a demise of the land to the mortgagee for a term of year absolute, but subject to redemption. It follows that in case of creation of a legal mortgage through a charge by deed expressed to be by way of legal mortgage, the mortgagee does not take an interest in the land at all but is still protected under the law as though he has a legal estate because the charge is drafted to have the effect of a legal mortgage.

Section 15 and 16 of M&PL appear to have identical provision. In other words, section 15 above has a similar effect with the provision of section 16 of the law. The latter, for instance, provides that:

[78]M&PL, 2010.
[79]Ibid.
[80] Ibid.

> A mortgage of a term of years absolute shall be created at Law either by a sub-demise for a term of years absolute, less by one day at least than the term vested in the mortgagor, and subject to a provision for redemption, or by a charge by deed expressed to be by way of legal mortgage, or by a charge by deed expressed to be by way of statutory mortgage in the forms provided under this law: and where a license to sub-demise by way of mortgage is required, such license shall not be unreasonably refused: Provided that a first mortgage shall have the same right to the possession of documents as if his security has been effected by assignment.

A closer look would reveal however that the only difference is that section 16 is meant to cover the case of leasehold and whereas section 15 is meant to cover the interest covers by way of a C of O. However the word "demise" in section 15 has created a problem. This problem is based upon the fact that Sections 21 and 22 of the LUA only recognized sub-demise (i.e., sub-lease) as a proper way of alienation but did not allow the holder of an R of O to demise (lease) his land to a third party.[81] Thus provision has brought itself to a conflict with the Land Use Act and, therefore, by doctrine of covering the field, this provision of the law is inchoate. Furthermore, the law has also allowed the creation of successive legal mortgages. Sections 15 (2) and 16 (2) invalidate any transaction made by way of assignment of mortgage interest in the mortgaged property right from the commencement of the law. This provision implies thatthe mortgage does not vest the entire interest in the property in the mortgagee and thus allowing the mortgagor to create multiple mortgages over the same property.[82] The problem with creating multiple mortgages over the same property could be seen where a mortgagor created multiple mortgages that exceed the value of his/her property, and default to pay. Thus, if the court orders the selling of the property, the mortgagees who accepted the property as security cannot recover their loan *in toto*. Consequently, mortgagees may end up crushing their knees on the ground.

[81]Owoeye, op. cit, p.218.
[82] Ibid.

3.2.4.2.1. Equitable Mortgage under Mortgage and Property Law of Lagos State

The Mortgage and Property Law Lagos State has provided elaborate measures for the creation of an equitable mortgage. For instance, Section 18 of M&PL[83] provides that an equitable mortgage of a right of occupancy shall not be created by a mere deposit of title or charge on a property except it is accompanied by an agreement to create a legal mortgage in favour of the mortgagee or in case of mortgage of an equitable interest in a property by an assignment of an equitable interest in favour of the mortgagee with a provision for cesser on redemption.

However, the creation of an equitable mortgage under this circumstance is subject to a condition. Section 18 (2) of M&PLrequires that in the creation of equitable mortgage by deposit of title, a mortgagee may within thirty (30) days by an Originating Summons bring an action in court requiring the mortgagor to execute a legal mortgage in his favour and thereafter exercise the powers of a legal mortgagee under this law.This condition is commendable as it would guard against the mortgagor creating a subsequent legal mortgage with the same property favouring another person that may take priority over the earlier equitable mortgage.

From the above provision, it is clear that the mere deposit of title documents does not automatically create an equitable mortgage in Lagos State. To create an equitable mortgage under the M&PL, the mortgagor must not only deposit the title deeds but must also agree to create a legal mortgage. Even when there is an agreement to create a legal mortgage, and the mortgagor refuses to honour this agreement, the mortgagee cannot unilaterally create a legal mortgage over the mortgaged property. The mortgagee must bring an action in court requiring the mortgagor to execute a legal mortgage in his/herfavour by way of an originating summons and thereafter exercise the powers of a legal mortgagee under the M&PL. It also goes to show that contrary to the rule

[83]M&PL, op.cit.

in *Russelvs. Russel*(supra) an equitable mortgage cannot be created under M&PL by a mere deposit of a title deed without more.

3.2.4.3. Legal Mortgage under Mortgage and Foreclosure Law of Kaduna State

Section 30 (1) of the Kaduna State Law on Mortgage and Foreclosure[84] has provided for the creation of a legal mortgage by demise subject to a provision for cesser on redemption; by sub-demise subject to a provision for cesser on redemption; by a charge expressed to be by way of a legal mortgage; and by way of mortgage created by execution of form MR 02 annexed to this Law Schedule I. The above modes of mortgage creation have departed from that of Lagos State. Firstly, the Lagos State law has differentiated between the mode of creations of mortgages under Certificate of Occupation or leasehold. To that law, under R of O mortgage is to be created by way demise while in case of Leasehold, mortgages are created by sub-demise. However, the Kaduna State's law did not enjoy such a distinction. By the provision of Section 30 (1) whoever has a registerable interest in Land can create mortgage through the above-mentioned modes.

Consequently, it can be concluded that mortgages can be created by a demise or sub-demise in Kaduna state irrespective of the type of interest held in land. Having previously established that a mortgage cannot be created by way of demise in the face of Land Use Act, the provision of sub demise under this has createdan alternative by the provision of sub-demise under the section 30 (1) (b). Second, Section 30 (1) of the Kaduna State Law on Mortgage and Foreclosure[85] introduced another mode of creation which is a statutory mortgage. This form of mortgage is to be created by execution of form MR 02 annexed to the Law as Schedule I. Section 31 (2) outlawed any transaction made by way of assignment of mortgage interest in the mortgage property right from the

[84]Kaduna State Law on Mortgage and Foreclosure, op. cit.
[85] Ibid.

commencement of the law. This is a regrettable development as it allows subsequent or multiple creations of mortgages over the same property.

3.2.4.3.1. Equitable Mortgage under Mortgage and Property Law Lagos State, and Kaduna State Mortgage and Foreclosure Law.

Section 18 (1) of the Mortgage and Property Law Lagos State[86]provides that an equitable of a right of occupancy shall not be created by a mere deposit of title or charge on a property except it is accompanied by an agreement to create legal mortgage in favour of the mortgagee or in case of mortgage of an equitable interest in a property by an assignment of an equitable interest in favour of the mortgagee with a provision for ceaser on redemption. The above section seemed to have outlawed creatinga mortgage by mere deposit of title document. The provision provides that such deposit or a mere charge on a property must be now be accompanied by written agreement expressing the intention to create a legal mortgage. This provision could be seen to be *imparimateria* with provisions of section 2 of the Law of Property (Miscellaneous) Act of England, 1989. This development is very welcome as it promotes the efficiency of the administration of justice by saving both court and the parties from a problem associated with the ascertainment of the intention as could be seen under the previously discussed law. Additionally, section 18 (2) further provided that equitable mortgagee is at liberty to file an originating summons, within thirty days, to court, "requiring the mortgagor to execute a legal mortgage in his favour and thereafter exercise the powers of legal mortgagee under this Law." This provision ensures the safety of the property as itprovides an assurance to the equitable mortgagee.

Kaduna State on the other hand under Section 31 of the Kaduna State Mortgage and Foreclosure Law[87] “an equitable mortgage may be created by deposit of a certificate

[86]Mortgage and Property Law Lagos State, op.cit.
[87]Kaduna State Mortgage and Foreclosure Law, op.cit.

of title or any instrument creating a registerable interest or any document evidencing or constituting propriety interest in land." This provision is to the effect that an equitable mortgage can be created by mere deposit of a valuable instrument that shows an interest in Land. Unlike that of Lagos, Kaduna is silence on whether the mere deposit of title sufficed as an equitable mortgage or not. What is apparent from the provision is that mere deposit of title is sufficient to createa mortgage without further accompanying it with memorandum expressing the parties' intention to create mortgages. This would create a considerable contention as it left court helpless without any instrument or yardstick to measure the intention of the parties while depositing the deeds.

3.2.4.4. Registration of Titles Law

Section 18 of the Registration of Titles Law (RTL)[88] provides that the registered owner of land may in the prescribed manner charge the land or lease with the payment of money to the like extent as if the land was not registered land. The charge is completed by an entry in the register of the particulars of the mortgagee and the registration of the charge in *Form 5 of the Land Registry*. Thus, the only way a legal mortgage can be created under this law is by a charge using Form 5. The advantage is that it is simpler, speeder, and cheaper. The chargee has similar rights as a mortgagee under the C. A. States.

As for an equitablemortgage**,** Sections 58 (2) and (4) of the Registration of Titles Law[89] provides thatequitable mortgages could be created by the mortgagor depositing the certificate of title with the intention of mortgaging his land or charge. The deposit has to be registered as an encumbrance on the land within two months of the deposit. By virtue of the above section, where someone fails to register a charge, an equitable mortgage arises because the conveyance of the legal estate thereby fails. Thus, where title deeds are deposited by a borrower with the intention that they are held as security for the loan, the

[88]RTL, 2010.
[89] Ibid.

courts will hold that there was an equitable mortgage. The deposit of title documents is construed as part-performance, thereby taking the transaction outside the ambit of the Statute of Frauds and rendering evidencing the transaction by writing unnecessary. If title deeds are deposited without disclosure of intention, the courts lean towards an equitable lien instead of an equitable mortgage. The issue of intention has always been problematic as courts often find it difficult to determine the intention of the parties in the delivery of the title document.

3.2.4.3.5. Company and Allied Matters Act

Section 191 of the Company and Allied Matters Act[90] (CAMA) allows a company to mortgage or charge its property and uncalled capital, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company. However, for debentures to qualify as adequate and enforceable security for mortgage or loan advanced, Section 192 and 193 of the Act[91] requires that the company shall, within 60 days, deliver to the registered holder thereof, the debenture or a certificate of the debenture stock under the common seal of the company (if the company has a common seal) or alternatively, execute the debenture as a deed by the company. This is in addition to the requirement that every debenture shall include a statement on the exact principal amount borrowed; the rate of and the dates on which interest on the debentures issued shall be paid and the manner in which payment shall be made; as well as the date on which the principal amount shall be repaid or the manner in which redemption shall be effected, whether by the payment of installments of principal or otherwise.

In most secured debenture arrangements, a legal mortgage will occur where the mortgagor transfers the share to the mortgagee, and the name of the mortgagee is entered

[90] CAMA, 2019.
[91] Ibid.

in the register as the holder of the securities. The trustee usually holds the legal interest in the mortgaged property on behalf of the debenture holders. Hence as between the debenture holder and the company, only an equitable interest exists. An equitable mortgage is established by transferring ownership to the mortgagee or pursuant to an agreement to transfer ownership.An equitable mortgage or an assignment of same to a third party is a vulnerable form of security as the company is not under an obligation to register the mortgagee or the assignee and an equitable mortgage will usually be subjected to a prior equitable mortgage.

While legal rules apply strictly to the binding nature of the loan contract envisaged under a debenture arrangement, it is doubtful that the principles of equity apply strictly. For instance, unlike the traditional case in a legal mortgage under conventional loan contracts, the equitable rule, which invalidates restrictions on a mortgagor's right to redeem, does not apply to debentures. The Court followed this line of thought in *Knightsbridge Estates Ltd vs. Byrne*. The case concerned an ordinary mortgage on houses, shops and a block of flats by a company to secure a loan of 310,000 pounds from an insurance company. The loan was to be repayable by 80% half-yearly instalments spread over 40 years but became immediately repayable if the mortgagor should sell the equity of redemption. The company was forbidden from selling any of the properties free from the mortgage or granting leases for more than three years without the mortgagee's consent. Five years later, the company wished to pay off the mortgage in full and argued that the term making the mortgage irredeemable for 40 years was void as a clog in the equity of redemption. The question was whether the mortgage was a debenture under the relevant statute at the time. The House of Lords held that it was, and further that a debenture was not subject to the rule against the clogging of the equity of

redemption. The possibility of excluding the application of the equity of redemption for debentures allows companies to issue perpetual and irredeemable debentures.

Another critical point to noteis, while Section 191 of the Company and Allied Matters Act[92] identified the possibility of a debenture being issued without security; in reality, this seldom happens. The predominant practice is for debenture issued by companies to be secured with an asset belonging to the company. The legal right over asset pledged as security enables a secured creditor to enforce his security without going through the sometimes tumultuous journey of a court action. Even where the secured creditor requires the court's intervention to enforce his/her security, the procedure is cheaper and less time consuming as he/she can proceed against the property directly in court. This is unlike an unsecured creditor who has no property right in the assets of the debtor and who can only enforce his claim by obtaining a judgment for a debt before proceeding to levy execution. The right of preference or priority is a secured creditor's right to appropriate a specific property, which is the subject matter of the security interest, in satisfaction of his claim in the face of competing claims of third parties. This right is available whether or not a debtor is in liquidation because a secured creditor may exercise his/her right to dispose of a property in satisfaction of the outstanding debt.

Section 191 of CAMA[93] also allows a company to charge its property and issue debentures as security for any loan, including mortgage loan advanced. Generally, a charge could be floating or fixed charge. While a fixed charge is a legal charge on the company's immovable assets, under Section 203 of the Act[94], a floating charge means an equitable charge over the company's assets, including cash and uncalled capital of the company. These are simply the movable assets of the company. Usually, a floating

[92]CAMA, op.cit.
[93] Ibid.
[94] Ibid.

charge does not preclude a company from dealing with such assets until the security becomes enforceable and the holder thereof or the court appoints a receiver or manager or enters into possession of such assets.[95] At this point, the charge is deemed to crystallise and become a fixed equitable charge on such of the company's assets as are subject to the charge. Under Section 204 of the Act, a fixed charge on any property has priority over a floating charge affecting that property, unless the terms on which the floating charge was granted prohibits a company from granting any later charge having priority over the floating charge and the person in whose favour such later charge was granted had noticed that prohibition at the time when the charge was granted to him/her.

[95] Ibid.

CHAPTER FOUR
INSTITUTIONAL FRAMEWORK

4.1 Introduction

The provision of adequate housing has engaged the attention of most countries for a very long time. This attention isassociated with several reasons. First, housing is one of the most important basic necessities of humankind.[1] Second, a government must be willing and capable of promoting adequate and affordable housing and a suitable living environment to achieve greatness. Third, housing is a yardstick for measuring the standard of living of the people inhabiting a particular territory.[2] Therefore, governments have to be proactive in ensuring that their citizens can access adequate and affordable housing. Adequate shelter means more than a roof over one's head. According to the United Nations Centre for Human Settlements;

> Adequate shelter means more than a roof over one's head. It also means adequate privacy; adequate space; physical accessibility; adequate security; security of tenure; structural stability and durability; adequate lighting, heating and ventilation; adequate basic infrastructure, such as water supply, sanitation and health related factors; and adequate and accessible location with regard to work and basic facilities; all of which should be available at an affordable cost.[3]

A deduction from the above can be made that housing does not mean roofed building alone. Instead, whatever is called houseshould be provided with adequate privacy; adequate space; physical accessibility; adequate security; security of tenure; structural stability and durability; adequate lighting, heating and ventilation; adequate basic infrastructure. Thus, by this definition, a lack of potable water, lack of decent toilets

[1]Sanusi, J.O., (2003). Mortgage Financing in Nigeria: Issues and Challenges. Paper presented at the 9th *John Wood Ekpenyong Memorial Lecture*. pp. 1-21.
[2] Ibid.
[3]Jimoh, R.A., Odeniyi, VS.A., and Jibrin, I.A.M., (2014) Housing Sustainability in Nigeria: A Mirage or Reality. *Covenant Journal of Research in the Built Enviroment* Vol. 1 No. 1 pp. 30-41, p. 31.

and environment condition, and situation where houses are protected with sags are all examples of inadequate housing.[4]

Nigeria is facing an overwhelming housing problem that could be ascribed to two things. The first is the high rate of population growth thatis deteriorating housing conditions. Second, the high level of poverty remains a factor that has "posed a major challenge in meeting the housing needs of Nigerians by lowering their demand for housing.[5]Third, housing finance and the escalating costs of building materials have been identified as significant obstacles to achieving the dream of housing.[6]

Many financial luminaries have offered a plethora of solutions to confront this problem. The strongest of such solutions is the establishment of a virile mortgage market[7]. The more developed a financial and mortgage market, the greater the efficiency of market is. The greater the transmission efficiency of funding, the higher the rate of capital formation and consequently, the higher the growth rate of the country's economy.[8]

Even though Nigerian mortgage market has been in existence for more than four decades, it is still in a rudimentary stage. The market involves few active actors who are often banks subsidiaries and a collection of smaller inadequate mortgage institutions.[9] The market's major players comprise the Federal Mortgage Bank of Nigeria, which is at the apex of the market, primary mortgage institutions, commercial banks, and private estate developers and cooperative societies. Against this background, the thrust of this chapter, therefore, is to examine the structure of the mortgage industry or institutions in Nigeria.

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[4]Ugochukwu, N. M., (1991). Mortgage Market In Nigeria: A Critical Appraisal. Nsukka: University of Nigeria Research Publication, p.26.
[5] Ibid.
[6]Ugochukwu, op. cit., p. 26
[7]Ibid.
[8] Ibid.
[9] (2016) The Assesment of the Contribution of Primary Mortgage Institutions to Housing Finance in Nigeria: A case Study of Union Homes Savings and Loans Plc. In Asian Journal of Information Technology. Vol. 15 (13), pp. 2094-2100, p. 2094.

4.2. The Nigerian Mortgage Markets

The mortgage market is a phrase describing a vast array of institutions and individuals involved with mortgage finance in one way or the other.[10] It is the market for financing real estate assets[11] or market for trading long-term debt instruments secured with real property (land and building with associated permanent futures). Finance is the most critical factor influencing the housing provisions in most developing countries and a key component of a shelter strategy. Mortgage finance is a provision of finance or capital for housing. The term housing finance may mean three things: First, it means capital required for the construction of housing or housing projects; second, resources required for the construction of housing or housing projects; last, resources required for acquiring or accessing a building by households or credit supplied by housing finance institutions.[12]Mortgage finance is characterized by a fixed monthly repayment at a fixed interest rate that varies with the rate of inflation.

In practice, a landowner borrows money from an institutional lender, and the land owner's real property (land and or building) is the security for the repayment of the loan advanced. From that transaction, a series of other mortgage market transactions follow.[13]Thus, the mortgage market exists to bridge the barriers between the man and his housing dream. This barrier is nothing but finance. In emerged economies like the United States, the United Kingdom, and Canada, the common means of owning a house is through their well-structured mortgage markets. If a mortgage market is effectively and

[10]Kama, U., Yakubu, J., Bewaji, P., Adigun, M.A., Adegbe, O. and Elisha, J.D (2013).*Mortgage Financing in Nigeria.* Research Department: Central Bank of Nigeria, p. 14.
[11]Mirie, N., Owuori, N. D., and Githli, W. (2018)."The Relationship Between Macroeconomic Factors and Mortgage Market growth in Kenya". *In European Scientific Journal*. Vol. 14, pp. 68-82, p. 63 available at http://dx.doi.org/10.19044/esj.2018.v14n10p68
[12]Olubunmi, A. (2009). *The Role of Secondary Market in Expanding the availability of funds for Mortgage Finance in Nigeria*. A Masters of Science Thesis No. 483 Submitted to the University of Stockholm, Sweden. p. 26.
[13]Ogochukwu, op. cit, p.2.

efficiently managed, the procedure for accessing mortgage loans will be easy and faster.[14] In view of this, the Nigerian mortgage market emerged. The purpose of the mortgage market is to allocate savings efficiently to the ultimate users such as individual or private investors; trustee investors; corporate or institutional investors, and public investors.[15] Generally, the mortgage market in Nigeria includes the following.

4.2.1. Primary Mortgage Institutions

Private entrepreneurs operate primary mortgage institutions. The promulgation of the Mortgage Institutions Act[16] provided the regulatory framework for the establishment and operation of Primary Mortgage Institutions (PMI) by private entrepreneurs as second-tier housing finance institutions. Some of the major PMIs in Nigeria include the following:

LIST OF PRIMARY MORTGAGE INSTITUTIONS AS OF 2019

S/N	NAME OF PMM	ADDRESS	STATE
1	Abbey Mortgage Bank	23A & B KarimuKotun Street, Victoria Island.	Lagos
2	AG Homes	96, Opebi Road, Ikeja.	Lagos
3	Akwa Savings	42, Oron Rd. Uyo.	AkwaIbom
4	ASO Savings & Loans	Plot 266, FMBN Building, Cadastral Zone, CBD.	Abuja
5	Brent (Skyfield) Savings	192 A, Jide Oki Street, off LigaliAyorindest. VI	Lagos
6	Centage Savings & Loans	Plot 1, Unit 2, ImmamAbibuAdetoro, STR VI.	Lagos
7	City Code	21/25 Broad Street.	Lagos
8	Coop Savings & Loans	11, University Crescent, Beside Access Bank, Bodija, Ibadan.	Oyo
9	Delta Mortgage Finance	126, Nnebisi Road, Asaba.	Delta
10	FBN Mortgages	76, Awolowo Road, Ikoyi.	Lagos
11	FHA Homes Ltd	Plot 2087, Herbert Macaulay Way, Zone 5 Wuse.	Abuja
12	First Generation Homes	Syndicate Plaza, Plot 404, Ahmadu Bello Way, Garki.	Abuja
13	Gateway Savings	Plots 10 & 11, AderupokoDrive, Ibara	Ogun

[14]Udoka, C.O. and Owor, M.K., (2017), "Mortgage Financing and Housing Development in Nigeria. International Journal of Research–Granthalaya", Vol.5, p. 183.
[15]*Khoury, S.J. (1983) Investment Management: Theory and Practice*, New York: Macmilan Publishing Co.
[16] Cap. M19, LFN, 2004 (formally Decree No. 53 of 1989).

		Housing estate, Abeokuta.	
14	Global Trust	Plot 740, Adeola Hopewell Street, Victoria Island.	Lagos
15	Haggai Mortgage Bank	119, Bode Thomas Street SL Lagos.	Lagos
16	Home-Base Mortgage	Plot 639, AdeyemoAlakija Street, VI.	Lagos
17	Imperial Homes	28, SakaTinubu, VI.	Lagos
18	Infinity Trust	11, Kaura-Namoda St. Off Faskari Crescent, Area 3, Garki.	Abuja
19	Jigawa Savings & Loans	Maigatari EPZ Complex, PMB 1022 Gumel.	Jigawa
20	Jubilee-Life Mortgage Bank	51, Marina, Lagos.	Lagos
21	Kebbi State Homes	40, Ahmadu Bello way, Birnim-Kebbi	Kebbi
22	Lagos Building & Investment	LBIC House, Assibifi Road, CBD Alausa, Ikeja.	Lagos
23	Mayfresh Mortgage Bank	83, Aba-Owerri Rd, Aba, Abia State	Abia
24	MGSL Mortgage Bank	2nd Floor Ap Plaza, AdetokunboAdemola Crescent, Wuse.	Abuja
25	Mutual Alliance	209, Oron Rd. Uyo.	AkwaIbom
26	New Prudential	7, Apongbon Street, Lagos Island.	Lagos
27	Nigeria Police Mortgage Bank	Plot 11, Port Said Street, WUSE Zone 4.	Abuja
28	Omoluabi (Livingspring)	Old Governor's Office, Gbogan Rd. Oshogbo.	Osun
29	Platinum Mortgage Bank	61, YakubuGowanCresent, Asokoro.	Abuja
30	Refuge Homes	66, Opebi Rd, Ikeja.	Lagos
31	Resort Savings & Loans	5th floor, St Nicholas House	Lagos
32	Safetrust Savings & Loans	18, Keffi St. Ikoyi. Branch; 6, AdetokunboademolaCrescent, Wuse2.	Abuja
33	STB Building Society	1, First Avenue, Bourdilon Court Estate, Chevron Drive, Lekki.	Lagos
34	Trust bond Mortgage Bank	Plot 1607, Adeola Hopewell, VI.	Lagos
35	United Mortgage limited	Plot 54 AdetokunboAdemola Street, victoria island 101241	Lagos

Source: Central Bank of Nigeria

4.2.1.1. Functions of Primary Mortgage Institutions

Section 5 (1) (a) (b) of the Act[17] empowers PMIs to grant loan and advance to anindividual for purchase or construction of a dwelling house and to grant loan and advance to any person for the improvement or extension of a dwelling house. Furthermore, by sub-paragraph (c) of the said section, PMIs can also accept savings and deposits from the public. Furthermore, the CBN revised the guidelines for PMIs in Nigeria[18], stating that the permissible activities for PMIs could include mobilizing deposit and savings. These deposits constitute a large proportion of funds used for financing housing loans investment.[19] The largest proposition of deposit of PMIs is usually in the form of savings deposits. This aligns with loanable theory.

The theory brings together three players in the economy that provides funds. The first are the savers, while the second are the borrowers who utilize these funds, and third players are the institutions that pool together all the funds saved, and lend it to borrowers. The savers supply funds for lending through diverse actions such as buying bonds, opening fixed accounts in commercial banks and depositing funds in financial institutions for later use. The borrowers then consume these funds that have been deposited in terms of loans.[20] Thus from this analysis, the conclusion can be reached that the higher the amount savings mobilized, the higher the amounts of funds available to these institutions for granting loans and investments in the mortgage markets.

PMIs also encourage prospective owners to open an account with them and deposit for their home acquisition projectsto mobilize deposit and savings effectively. Upon the receipt and approval of application from qualified customers, they should pay the full value of houses to developers on behalf of their subscribers and retain the tittles

[17] Ibid.
[18]Kama, *et al*, op. cit.
[19]Agbada, A.O. and Sunny, E.E. (2016).Emprical Analysis of the Primary Mortgage Bank Institution Fundamentals and Gross Domestic Product Increase in Nigeria.In *Applied finance and accounting* Vol.2 No. 1. p. 89.p.90.
[20]Granthalaya, op. cit.

as collateral until subscribers fully repay the cost through installmentrepayment of loans along with the interest charge.[21] Other functions of PMIs includefinancial advisory services for mortgage customers and other activities that the CBN may approve from time to time, real estate construction finance within the permitted limits.

In an attempt to enhance the efficacy of PMIs regarding their original mandates, the CBN phased recapitalization of the PMIs between January 2007 and December 2010 with an emphasis on the actual injection of fresh funds to provide the liquidity for the sub-sector. The apex bank also encourages mobilizing requisite resources suitable for commitment into mortgages such as pension fund management, with the view to repositioning PMIs to helping their clients to assess estate development loan from the FMBN easily. The apex bank also restructured the FMBN to improve its credit appraisal and disbursement mechanism and procedures to achieve this. In addition, it overhauled the administration of the National Housing Fund in registration, mobilization and disbursement, and transformed it into a trust.[22]

Consequent to this innovation, PMIs in Nigeria are relatively stronger than what obtains previously. For instance, in 2019[23], the outstanding total domestic loans/leases issued out at the end of the accounting period were ₦89.76 billon. And the total domestic deposits received at the end of the accounting period was ₦91.28 billion, while total National Housing Funds (NHF) contributions received was ₦34.43 billion.[24] The total assets/liabilities of the PMBs decreased, marginally, to ₦315.48 billion, compared with ₦383.67 billion in 2016. This reflected the 0.13% increase in the shareholders' fund, which stood at ₦132.35 billion in 2017, compared with ₦132.20 billion in 2016.

[21]Olubunmi, op. cit, p.12.
[22]Mogaji, P.K., (2011), "The Nigerian Mortgage Banking Sub-Sector Reforms: The Expectations", Available@*https://Kenny-morgans.blogpost.com/2011/09/Nigerian-mortgage-banking-sub-sector.html?m=1* accessed on 2nd April, 2019.
[23]
[24]National Bureau of Statistics, 2016.

Similarly, loans and advances, short-term investment and non-current assets held for sale increased to ₦117.8[25] billion, ₦10.42 billion and ₦70.54 billion, respectively, compared with ₦154.46 billion, ₦8.84 billion and ₦35.94 billion in 2016.[26]

However, these institutions are still confronted with many problems such as paucity of funds, regulatory policy rigidity, bureaucratic bottlenecks in administration, and poor savings.[27]They have weak capitalization and only a limited ability to collect deposits. In fact, many of the PMIs have no mortgage loans on their balance sheets, and most of the largest PMIs are either directly subsidiaries of banks or have a connection with a bank. This aside, these firms have diverted their operational focus and scope from the provision of facilities for house development to other ventures or building houses that only few can afford. These have impeded their smooth operations, performance and their contributions to real estate development in the country.[28]Often residential accommodation serves as bait, especially for the young jobless female graduates who move into towns. In some cases, houses are found in environments with very high security risks, are unkempt, and are located in very untidy places with no basic infrastructural facilities such as roads, electricity and potable water, among others. This is why housing provision deserves special attention. Housing is one of the most essential basic needs of humanity, and exerts serious impacts on productivity, as decent houses significantly increase worker's health, wellbeing, growth and dignity.[29]

[25] Central Bank Nigeria (2017), Annual Report p. 148.
[26]Andabai, P.W., and Eze, G. P. (2018), "Impact of Primary Mortgage Institutions' Investments on Economic Growth in Nigeria (1995-2017)", *International Journal of Business and Management Review*, Vol.6, No.10, European Centre for Research Training and Development UK, p. 48.
[27]Ibid.
[28] Aliyu, F. H. and Bakere, G. (2018), "The Determinants of other financial institution in economic development in real estate business in Nigeria", *International Journal of Business Management,* 18(4), p.146.
[29]Oyewole, D. L. and Gbaburi, S. E. (2018), "The Challenges of Housing Finance by Primary Mortgage Institutions in Nigeria, *Journal of Economic and Development Studies,* 6(3), p .84.

4.2.2. Commercial Banks/ Deposit Money Banks

Depository-based Mortgage Financing is a system whereby deposit money banks enter into mortgage lending. This system became popular in Nigeria after recapitalization of the depository institution in 2005. Banks with excess liquidity began to consider setting-up a mortgage market desk in their branches. Others want to further diversify by adding mortgage banking to their investment portfolios.[30]

According to the Central Bank of Nigeria[31], Deposit Money Banks are financial institutions licensed by the regulatory authority to mobilize deposits from the surplus unit and channel the funds through loans to the deficit unit and performs other financial services activities. Examples of such banks include First Banks, United Banks for Africa, and Guarantee Trust Banks. These banks are also active key players in the promotion and development of mortgage markets. These are required to accept both retail and large-term deposits and carry out lending functions with different maturities to cater to the needs of the economic sector.[32]Retail banks only lend on a short-term basis because they are to meet demand requests.

Generally, commercial banks give loans to any person who has approached them for one and not just for a mortgage. The borrower would be required to deposit his title deeds with the bank as security.[33] The participation of these banks in the mortgage market has largely been in response to CBN guidelines and extant laws.[34]For instance, Section 5 of the NHF Act[35] made it mandatory for Commercial Banks to contribute to the National Housing Fund by investing in 10% of its loans and advances at an interest rate of 1% above the interest rate payable on current accounts in the fund. This

[30]Ibid, pp .5-6.
[31]Central Bank of Nigeria (2019), @ *https://cbn.govs.ng/Supervision/AllFinInstitutions*, accessed on 8th April, 2019.
[32]Ibid, p. 19.
[33]Dadem, op. cit., p.122.
[34] Ibid.
[35] Cap. N45, LFN, 2004.

contribution is subsequently transferred to Federal Mortgage Bank of Nigeria for the housing sector through a properly devised system, thereby liberating deposit money banks from the mortgage loans.[36]

4.2.3. Merchant and Development Banks

Merchant banks also contribute to the development of the mortgage industry by contributing to the National Housing Fund scheme or by mortgage lending directly to the individual Nigerians. In the same vein, some specialized development banks have also been playing a role in the mortgage market. Nigerian Industrial Development Bank (NIDO), Urban Development Banks are examples of this type of banks. These are established to provide long term finance for up to 25 years for industrial, commercial, agricultural and housing development.

4.2.4. Federal Mortgage Finance Limited

The National Housing Fund Act[37]tiered the Federal Mortgage Bank of Nigeria into two, one of which is a Federal Mortgage Finance Limited. The Federal Mortgage Finance Limited is expected to provide facilities to mortgage institutions in Nigeria to enable them to grant comparable facilities to individuals desiring to acquire houses of their own; encourage and promote the emergence and growth of primary mortgage Institutions to serve the need of housing delivery in all parts of Nigeria; and collect, manage and administer contributions to the National Housing Fund in accordance with the provisions of the National House Fund Act.[38]

4.2.5. State Government Financing

State Governments have also been known to play an important role in mortgage financing, although, on a limited scale. It sources funds usually through budgetary allocation, complemented with facilities from development institutions. Such funds are

[36]Sanusi, op. cit, p.11.
[37] Cap. N45, LFN, op.cit.
[38] Ibid.

often channelled through the state development finance institutions such as Lagos State Property and Development Corporation, Plateau State Investment and Property Company Limited. Properties by these corporations may be sold to the public by way of a mortgage arrangement whereby payments in instalments are made to the corporation and title document released when the payments are completed[39]. They may play various roles in providing shelter and developing mortgage industry where the laws that established them provided. These roles include:

1. Formulating its own housing policy and programmes within the overall framework and in the spirit of the National Housing Policy. For example, Lagos state has formulated many housing policies.
2. Establishing appropriate agencies and utilising State Housing Corporations to execute, develop and manage housing programmes, such as creating ministries for housing, Mortgage Boards.
3. Developing a Data Bank for housing needs and co-operate by forwarding the same to the National Data Bank for purposes of coordination;
4. Encouraging the adoption of the National Building Code and for effective housing delivery and safety in collaboration with relevant professional bodies;
5. Reviewing all existing legislation, regulations and ordinances in the housing sector to achieve the goal of adequate housing for all, for instance, Kaduna State and Lagos State have amended their laws for mortgage creations.
6. Supporting and encouraging indigenous construction companies, building materials, producers, manufacturers to participate actively in the provision of housing; and
7. Developing and sustaining the determination and political will to succeed in the provision of houses for its people.[40]

[39]Dadem, op.cit, p.122.
[40]Alufohai, A.J., (2013) The Lagos State 2010 Mortgage Law and Supply of Housing. A Paper delivered at *International Federation of Surveyors FIG Working Week- Enviroment for Sustainability* held at International Conference Centre and Nicon Luxury Hotel, Abuja, Nigeria.

4.2.6. Mortgage Associations

Mortgage Associations are also important players on the stage of the Mortgage Market. They play a vital role in promoting the mortgage market and the evolution of the secondary market. One example in this respect is the Real Estate Developers Association of Nigeria (REDAN) which was founded to complement and facilitate the provision of real estate properties at the lowest available cost.[41]The Building Materials Producers Association of Nigeria (BUMLAND) is also an important actor established for availability, adequacy and affordability of building materials to enhance mass housing production at an affordable cost.[42]

4.2.7. Insurance Companies

Insurance Companies are established and governed by the Insurance Act[43]. An example of this is NICON Insurance. Section 5 (2) of the NHF Act[44] mandated every insurance company to invest a minimum of 25% of its non-life funds and 40% of its life funds in real property development of which not less than 50% shall be paid into the fund through the Federal Mortgage Bank of Nigeria at the interest rate not exceeding 4%. Furthermore, Section 25(2) (c) of the Insurance Act[45] provided that insurance companies can give loan to building societies and sub-paragraph c of this section allowed the companies to invest in real property.

The Importance of this could be seen in insurance companies being financial intermediaries. They are suited and well-positioned to provide housing financing due to their stable sources of income and long-term nature of their liabilities.[46]Their long-term funding sources enable life assurance companies to invest in long-term capital assets like real estate investments and get involved in loans for real estate.

[41] Kama, *et al*, op. cit, p. 20.
[42]Kabir, op. cit.
[43] Cap. I17 LFN, 2004
[44]Cap.N45, LFN, op.cit.
[45] Cap. I17 LFN, op.cit.
[46]Isiwele, A.J. (N.d), "An Assessment of Mortgage Bank in Housing Development", (Unpublsihed) p. 8.

Loans for real estate development are based on the capital value of the policies, investment in mortgage and debentures. Although opportunities for insurance's mortgage financing are yet to be explored fully in the country, these companies have a vital role to play in the capital market.[47] They serve as a source of capital fund for the housing sector and the economy at large.[48]

Though insurance companies are established to provide clients with compensation for any damage to an insurable interest, such companies could also provide loans to a life insurance policyholder to purchase a house. Moreover, they may also serve as a guarantor to a holder to borrow from a commercial bank.[49] Thus, insurance companies are also actors in the capital and the primary mortgage market to the extent allowed under the enabling law. For instance, Section 25 (3) (a) of the Insurance Act[50] has limited the asset investment of the Insurance Companies in respect of the general business of insurance to 25% while in paragraph (b) in case of life insurance, the company is prohibited from investing more than 35 per cent of its asset in real property development.

There are two problems with this provision. This provisions should not have limited the companies from business, which may yield fruits in their investments for they were incorporated for the purpose of businesses. Therefore, such restrictions ought not to have been laid. Second, paragraph (b) of the said section contradicted the provision of section 5 of the NHF Act, which provided that insurance companies should invest a minimum of 20% of its non-life funds and a minimumof 40%of its life funds in real property development. Still, the Insurance Act limited this to a maximum of 35% from its Life Fund. However, this provision cannot stand as provided by section 5(3) of the

[47]Kabir, op. cit.
[48]Iwisiwele, op. cit. p. 8.
[49]Ddaem, op. cit., p. 123,
[50] Cap. I17 LFN, op.cit.

NHF Act that nothing in the Insurance Act will contradict the provisions of the NHF Act. It is obvious that the drafters of these laws intend to make the provision of the NHF Act the touchstone of the Insurance Act and, in case of a conflict between the two, the former should prevail. Practically speaking, despite this provision, insurance companies are yet to start paying their contributions.

4.3. Secondary Mortgage Market

The development of a secondary mortgage market (SMM) is becoming an increasingly important objective of the global economies.[51]The SMM provides a platform where mortgage originators can sell their receivables from the loans before maturity, in return for capital. Owning to the shortfall of PMIs, the introduction of Secondary Mortgage Market (SMM) was intended to solve the problems that have impeded the operational functions of PMIs. For housing finance to be successful, a continuous flow of funds must be guaranteed. SMMs are a means to this end. The end is to increase the flow of funds for housing. Therefore, a secondary market provides the means to accomplish this end by bringing together the originators of mortgage loans with the ultimate investors. It does this by developing new instruments and institutions that can lower mortgage lending risks for originators and provide them with new funding outlets.[52]

The secondary market is the mortgage segment where existing mortgages are resold, not where they originate[53]. The secondary market exists when the primary lenders and permanent investors buy and sell existing mortgages from each other. This activity could occur as part of the normal course of business for the mortgage lender or be utilized only during a period of credit restraints.[54] Mortgage loans may be sold

[51] Ayere, S., (2015) Developing Nigeria's Secondary Mortgage Market published at https://www.financialnigeria.com/developing-nigeria-s-secondary-mortgage-market-sustainable-46htmlaccessed on 1oth April, 2019.
[52]Olubunmip.op. cit,, p 14.
[53]Kama, op. cit, p. 58.
[54]Olubunmi, op. cit., p. 11.

individually on the SMM or packaged into pools before being sold to increase investors' participation by offering a group investment options. The capital raised from these sales is used to originate more loans and create immediate liquidity in the Primary Mortgage Market.[55] Thus, the benefits of the well-established secondary mortgage market are that it provides and maintains liquidity through a ready market, increasing the rate of mortgage origination in the PMM and consequently access to housing finance.[56] SMM began to exist in Nigeria in the early period of deregulation. Following the opening of the PMIs, the FMBN acted inan exclusive role of providing a secondary mortgage market while managing the National Housing Fund.[57] However, SMMs remain few until recently when the market started to witness rapid development.

4.4. Actors in the Secondary Mortgage Market

In Nigeria, several actors tradeon the SMM platform. These actors include the Nigerian Mortgage Refinance Company, Federal Mortgage Bank of Nigeria, and the National Housing Fund. The discussion of these institutions follows under different sub-headings.

4.4.1. Nigerian Mortgage Refinancing Company

One prominent example of SMM is the Nigerian Mortgage Refinance Company (NMRC). By its very nature, NMRC is a financial institution established to provide short-term liquidity and/or mediumto long-term funding or guarantees to mortgage loan originators.[58] In 2014, the Federal Government inaugurated the NMRC. As SMM, the NMRC is primarily aimed at increasing the liquidity within the mortgage sub-sector and availability of mortgage credit in Nigeria, reduce mortgage and related costs and make residential housing more affordable.[59]

[55] Ayere, op. cit
[56] Ibid.
[57] Kama, *et al* op. cit, p. 34.
[58] S. 2.1 of Regulatory and Supervisory Framework for the Operations of a Mortgage Refinance Company (MRC) 2013. Available at www.cbn.govs.ng
[59] Ibid, preamble to the rules.

Basically, NMRC is a public-private partnership arrangement between the Federal Government of Nigeria and the private sector. It was set up to bridge the funding cost of residential mortgages and promote the availability and affordability of good housing to Nigerians by providing increased liquidity in the mortgage market through the mortgage and commercial banks. NMRC was empowered, as part of its objectives, to govern the servicing of a mortgage loans by mortgage originators and have the right to audit records of all mortgage loans refinanced by NMRC to ensure high-quality mortgages that meet the uniform underwriting guidelines.[60]

The Nigerian Mortgage Refinance company 2019 annual report showed that total assets of NMRC stood at N92.867,307 Million at end-December 2019, compared to N69,291,882 Million at the end December 2018. Similarly , refinanced mortgages increased by 1,315,270 Million to N18,339,488 million in 2019, above N17,024,218 million in 2018, reflecting the creation of additional mortgage.[61]

This institutional framework has increased the opportunities for Nigerians to 'own homes at affordable prices' through mass housing. Though there is rapid emergence of housing development by the NMRC, however, majority are neither affordable nor accessible to the low-income families because of their exorbitant prices. Nonetheless, the urban rich, who could afford more than needed for their families purchase many of these housing units and in turn sublet them to the lower income group at high cost and those who cannot afford the rent have no other option but to go to the slums or remain homeless. This takes us back to the cycle of the negative impacts of urbanization within the country. It is evidently clear that it would end up like the others if nothing is done to ensure fairness in its implementation. For urbanization to deliver a socio-economic and

[60]Central Bank of Nigeria (N.d).Overview of the Nigerian Mortgage Refinance Company (NMRC).Published at www.cbn.govs.ng (PDF).Accessed on 11th April, 2019.
[61]Nigerian Mortage Refinance Company Plc. (2019) Annual Report.

environmental development in Nigeria, then the government and all stakeholders must see the provision of affordable housing as a very critical and crucial subject of concern and make it their utmost priority.

4.4.2. Federal Mortgage Bank of Nigeria

The establishment of the Federal Mortgage Bank of Nigeria (FMBN) could be traced to the non-performance of the Nigerian Building Society (NBS) in 1956. The vehicle used to establish the NBS was the Common Wealth Development Corporation with an advanced share capital of 81,625,000 GB pounds[62]. Following the inability of the society to perform its statutory functions, the Federal Government of Nigeria created the FMBN to assume the responsibility and inherit the liabilities of the NBS. The government injected the sum of ₦20 Million into it.[63]

Section 5 of the FMBN Act[64] empowers the bank to provide long-term credit facilities to mortgage institutions in Nigeria at such rates and such terms to enable the mortgage institutions to grant comparable facilities to Nigerian individuals desiring to acquire houses of their own. In addition, the section empowers the bank to encourage the emergence and growth of the required number of viable secondary mortgage institutions to service the need of housing delivery in all parts of Nigeria and encourage and promote the development of mortgage institutions at rural, local, state and federal levels; supervise and control the activities of mortgage institutions in Nigeria; and collect, manage and administer the National Housing Fund in accordance with the provisions of the National Housing Fund Act.

[62]Oduwaye, L., Oduwaye, O.S., and Adebamowo, M.E. (N.d) Mortgages in Nigeria.Department of Urban and Regional Planning, University of Lagos, Lagos, p..5.
[63] Ibid.
[64] Cap. F16, LFN, 2004.

Notwithstanding the above provision, the FMBN is allowed under Section of the Act[65]tooffer retail banking services such as accepting deposits and savings from mortgage institutions and other institutional depositors. This is in additionto other powers such as those relating to issuing its own securities, including debentures and bonds under Federal Government guarantees and issuing promissory notes and other bills of exchange to raise funds from financial institutions; and establishing a sinking fund for the redemption of securities by the Mortgage Bank and provide for contributions by it to the sinking fund. Broadly speaking, FMBN is statutorily required to provide long-term loans to mortgage institutions; accept deposits and savings from such institutions; promote financial stability and efficiency of the PMIs by setting guidelines and control measure to administer the system of regulation of PMIs; develop a secondary mortgage market for housing finance to improve the liquidity of the system; and manage the National Housing Fund.

Affirming the above objective, in *Federal Mortgage Bank of Nigeria vs.Olloh*,[66]the court held that the Federal Mortgage Bank was incorporated with the sole aim 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 facilities to mortgage institutions with a view to enabling those institutions to grant comparable facilities to Nigerian individuals. Obviously, this holding is in consonant with the provision of section 5 of the FMBN Act.[67]

However, one major problem with Section 5 of the Federal Mortgage Bank Act is its failure to set up an independent mechanism to ensure compliance, particularly with long-term credit facilities to mortgage institutions in Nigeria. This is because the

[65] Cap. F16, LFN, 2004.
[66] (2002) FWLR pt. 107, p. 1244.
[67] Cap. F16, LFN, op.cit.

Structure of Bank Deposit Liabilities in Nigeria is preponderantly short term. Thus, the deposit money banks tend to avoid fund mismatch,i.e.m borrowing short but lending long term, which is required in mortgage financing.

Furthermore, the FMBN is also charged with the responsibility of linking mortgage markets with the capital market. Capital market is a critical pillar for a long term fund mobilization needed in generating necessary capital to facilitate increased mortgage financing and home ownership in the country.[68] To ensure this task, the Federal Mortgage Bank created Capital Market Unit which strives to raise funds to carry out more transactions to increase the country's housing stock and grow homeownership amongst the citizens; deepen capital market participation by critical economic sector and grow the market index in line with the global standards; invest in government developmental and capital projects/infrastructure like roads, electricity, etc. to generate income opportunities and still maintain sufficient liquidity to meet financial obligations of the bank by matching investments maturities with the expected timing of the obligations; and link the Primary Mortgage Market with the refinancing platform that the Capital Market offers. The Bank also established and operates a viable secondary market. The organized secondary market enables a wider variety of institutions to participate in the mortgage market. At the same time, it leaves the origination and servicing of loans in the hands of specialists. Most importantly, the FMBNcollects and administers the NHF.[69]

Because the world is moving to a global village, the FMBN introduced innovations in performing its functions to meet the demands of a modern society and contribute more positively to the Presidential Transformation Agenda. These include introducingan E-collection platform where NHFs contributors could pay their monthly

[68] Federal Mortgage Bank of Nigeria.(N.d) Capital Market Window.Published on https://www.fmbn.govs.ng/Products%20&%20Services/products.html accessed on 10th April, 2019.
[69] Ibid.

NHF contributions in banks, and their payments will be captured automatically electronically. NHFs contributors could also check their NHF Account balances and know if their[70] employers were remitting their contributions as and when due. It is expected that the E-collection platform will boost the income from the NHF scheme and increase transparency in NHF collection and make the building of more residential houses at a faster pace possible.[71] There is also the opportunity for Nigerians in Diaspora to join the NHF scheme and loan offers. The strategy is to provide an avenue for Nigerians outside the country to make their monthly contributions to the NHF scheme. In the same vein, the programme will allow overseas contributors to take mortgage loans through the PMIs to finance houses of their choice.[72] In addition, the NHF Informal Sector Cooperative Housing Loan Schemethat FMBN introduced to extend access to NHF loans to operators in the informal sector of the Nigerian economy. This scheme is designed to enable people like motor mechanics, Akara sellers, and hairdressers, among others, to access NHF loans for residential houses. The loan scheme, which operates under the NHF, is expected to capture the larger economic population as operators in the informal sector are estimated to constitute 85% to 90% of the active economic population.[73]

4.4.2.1 Is Federal Mortgage Bank of Nigeria a Federal Government Agency?

The word "Federal" in its name may give the impression that the intendment of the drafters of the FMBN Act was to make it "Federal Government Agency" and therefore, subject to the jurisdiction of the Federal High Court as provided by section 251 of the Constitution.[74] This question was raised in the authority of the *Federal Mortgage Bank*

[70]Ikpeazu, op. cit, p. 15.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74]Constitution of Federal Republic of Nigeria, Cap.C23, LFN, 2004 (as amended).

of Nigeria vs.Olloh.[75]In that case, the respondent got a loan from the appellant's Benin City Branch in 1979 upon a mortgage deed in which he used his property at No.23 (now No.63) Okumagba Avenue, Warri as collateral. In September1992, he liquidated the principal loan together with accrued interest. He then asked that a deed of release be prepared for him to have his property back unencumbered. The appellant failed to do so but merely handed back to him his document of title. The respondent alleged that he could not raise another loan to develop his country home because, without the deed of release, the property remained apparently encumbered.

On 16th March 1994, the respondent filed a writ of summons in the High Court of Delta State at Warri against the appellant claiming damages of ₦5,000,000.00 and an order directing the appellant to release his property from encumbrance. Pleadings were exchanged. In a considered ruling given on 25 April 1995, the trial judge found no merit in the application and dismissed it. He based his decision on the fact that the dispute between the parties was that of a bank and its customer, and that by virtue of the proviso to section 230(1) (d)[76] of the said Constitution, a State High Court had jurisdiction to entertain it. The appellant took the matter to the Court of Appeal, Benin Division. On 25 April 1997, the court upheld the trial court's decision and held that the argument of appellant's counsel that the appellant bank was an agency of the Federal Government was untenable. The appeal was dismissed. The appellant further appealed to the Supreme Court but lost. Dismissing the appeal, Court per S. O. Uwaifo, J.S.C (As he then was) held:

> There is nothing whatever 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

[75]Supra.
[76] Now section 251 (1)(d).

> with the sole aim 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 Nigerian individuals" as per the preamble of the Act. The Bank is no more than a business establishment given functions to perform; but neither of those functions nor does the Bank itself has any connection with the affairs or the running of the Federal Government.

From the above decision, nothing in its Act or any Act of the nation or the fact that the government established it, made the bank a Federal Government Agency, the name of Federal Mortgage Bank of Nigeria notwithstanding. Rather itwasa business established by the federal government, and, therefore,subject to any jurisdiction that entertains disputes between banks and customers. Thus, because FMBN is not a Federal Government Agency but a bank, by virtue of Section 251 (1) (d) of the Constitution[77], the Federal High Court and State have concurrent jurisdiction in matters between an individual customer and his bank concerning transactions between an individual customer and the bank.[78]

Ecobank Nigeria Limited vs. Anchorage Leisures Limited &Ors[79]concerned a bank-customer relationship. In this case,the respondent sought a declaration that the plaintiffs (as customers), by the agreement reached at the meetings of July 22, 2013, and December 12, 2013, the defendant (as banker to the plaintiffs) were not indebted to the defendant in any amount apart from the agreed sum of ₦3, 500, 000, 000.00 (Three Billion, Five Hundred Million Naira) as full and final settlement/liquidation of their indebtedness. The court held this was a customer/bank relationship, and, therefore, the High court is competent to entertain such matters.

[77]Constitution of Federal Republic of Nigeria, Cap.C23, LFN, op.cit.
[78]*Nigeria Deposit Insurance Corporation vs. Okem Enterprise Ltd. &Anor*.(2004) LPELR-SC.92/2003.
[79](2018) LPELR-SC.406/2016.

4.4.3. National Housing Fund Act

The Federal Mortgage Bank of Nigeria (FMBN) was found to perform less than expected, failing to provide houses to most Nigerians. Consequently, the government wanted to create an institution to providehousing funds to the public at reasonable interest rates through primary mortgage institutions (PMIs) and private estate developers (PEDs). The government believed that this would provide safe and affordable housing if individuals source mortgage funds through PMIs and PEDs.[80] This mission led to the promulgation of the National Housing Fund Act (NHF Act).[81] Section 1 of the Act[82] establishes the National Housing Fund (the Fund). The National Housing Fund Act is an instrument formulated to give leverage to housing delivery in Nigeria. It was set basically as a legal re-affirmation of vital aspects of the National Housing Policy with the primary purpose of supporting the policy to achieve the ultimate goal of ensuring that all Nigerian own or have access to decent housing accommodation at an affordable cost[83].

The idea is to ensure a continuous flow of long-term housing development funds and provide affordable loan for income housing. Hence, Section 2 of the National Housing Fund (NHF) Act[84], has given the National Housing Funds the mandate to facilitate the mobilization of funds for the provision of houses for Nigerians and ensure the constant supply of loans to Nigerians for building, purchasing and improving residential houses. In effect, Section 2 is expected to insulate the housing finance system from the fluctuations that had characterized its past reliance on government intervention.

Generally, one strategy for mobilising funds for housing finance in Nigeria evolved around mandatory contributions by workers, commercial institutions and the

[80]Oloyede, op. cit.
[81] Cap. N45, LFN, op.cit. (Formally Decree No. 3).
[82] Ibid.
[83]Oduwaye, et al, cp. cit, p. 4.
[84] Cap. N45, LFN, op.cit.

government. To this end, Section 4 (1) (2) of the NHF Act[85] requires a Nigerian worker earning an income of ₦3,000 and above per annum in the public and the private sectors of the economy to contribute 2.5% of his/her basic monthly salary to the fund. The section provides for an interest rate of 4% payable on such contributions. Section 9 of the Act[86] mandates employers to deduct this money from the source and remit it to the bank within one month of the making of the deduction. When a self-employed person wishes to participate in the fund, he also deducts from his monthly incomes and contributes 2.5% of incomes to the fund. An interest rate of 4% is payable on the contributions made.

As for contribution by commercial institutions in the NHF, section 5 (1) and (2) of the NHF Act[87], requires every commercial or merchant bank to invest 10% of its loans and advances in the fund at an interest rate of 1% above the interest rate payable on current account by banks. In addition, every registered insurance company is obliged to invest a minimum of 20% of its non-life funds and 40% of its life funds in real property development of which not less than 50%is paid into the fund through the FMBN at an interest rate not exceeding 4%. Generally, all these investments are subsequently transferred to the FMBN for the housing sector, thereby liberating deposit money banks from the burden of mortgage loans.

Section 5 of the Act[88] makes it mandatory for the federal government to make adequate financial contributions to the fund to grant long-term loans and advances for housing development in Nigeria. The federal government may also make available such other sums either in Naira or foreign currency to the fund as it may deem necessary. Under this scheme, a budgetary allocation is made at all government levels to the housing

[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.

sector to finance low-income housing schemes. The federal, state and local governments make a direct budgetary allocation of a sum not less than 2.5% of their revenue to the housing scheme. The federal government also expanded the Infrastructure Development Fund (IDF) from which the state and local governments can borrow to provide basic infrastructural facilities.

There is, however, a challenge.Section 17 of the NHF Act[89] allows the refund to a contributor of funds after he/she attains the age of 60 years or is retired from his/her employment and becomes incapable of continuing the contribution to the Fund as specified in this Act. However, it is unclear whether such a refund is automatic upon reaching the above conditions or subject to application by a contributor. If related to the latter, the section is not sufficiently comprehensive as it did not provide the procedure for such an application. Furthermore, Section 20 of the Act[90] provides a fine of ₦50,000 (in case of a corporate entity) or imprisonment for a term of five years or to both against an employer who fails to make a deduction from the basic salaries of his/her employees or remit the money so deducted to a bank. In practice, some employers only deduct but do not remit the contributions to the appropriate accounts as required by law; and the regulatory agency has not shown a manifest willingness to sanction such employers. Even where the remittance is done appropriately, some retirees do not get a refund at the time of retirement. Yet, no punishment is prescribed for a bank that fails to make funds available to a contributor having met all the necessary conditions.

4.4.3.1. National House Fund Disbursement

Section 14 of the NHF Act[91] provides that duly licensed mortgage institutions shall qualifyloans on the terms and conditions the minister charged with responsibility for housing lay down. The purpose of lending the loan to mortgage institutions is for the

[89] Ibid.
[90] Ibid.
[91] Ibid.

institution to make it available to contributors wishing to build, purchase or renovate houses.[92] Under Section 14, the eligibility for granting a loan hinges on being a contributory member for a minimum of six consecutive months before the loan request.

Applications for loans are made through the PMIs. The PMI checks that the application is in order and forwards all the documentation to the FMBN, which duly checks it. The processing time is between four and nine months. If the application is accepted, then the necessary funds are paid by the FMBN to the PMI at a rate of 4%, giving the PMI a spread of 2%. The PMI may make an additional loan at a market rate of interest if the borrower requires more than ₦5 million ($43,000).[93]

The FMBN uses money from the National Housing Trust Fund (NHTF) to make estate development loans to private developers and state housing corporations at a rate of 10% over 24 months. Usually, these loans are made to finance the construction of properties which are then sold to buyers with 6% loans. The land is often provided free. The properties must be sold for no more than ₦5 million ($43,000). At first sight, this is an attractive scheme for potential home buyers. After saving just 2.5% of their income for six months, they can borrow ₦5 million ($43,000) at an interest rate of 6%, which compares with an open market rate of 17%, to buy a house significantly below market value. In addition, the house purchase is exempted from some taxes.[94]

However, the scheme does not always work, as stated above. The amount raised through contributions is not sufficient to fund loans for more than a tiny proportion of those eligible for loans. The scheme is in effect a compulsory regressive tax in that most

[92] S. 14(2), Ibid.
[93] Asabere P. K., McGowanJr C. B., & Sang M. L. (2016), "A study into the links between mortgage financing and economic development in Africa", *International Journal of Housing Markets and Analysis*, 9(1), p .9.
[94] Clement O. Folorunso, Tareef H. K., and Olowoyo, S. A. (2012), "Trends, Realities and Prospect of Housing Delivery through Mortgage Financing in Nigeria", *British Journal of Arts and Social Sciences*, 7(2), p. 138.

workers could never earn sufficient to afford to buy a house.[95] They are being forced to contribute part of their income to a scheme, receiving a return well below the inflation rate, to finance cheap loans for the better off, most of whom are probably civil servants. The regressive nature of the scheme has recently worsened as the loan terms have been considerably improved–the rate of interest has been cut from 9% to 6%, the loan ceiling increased from ₦1.5 million ($13,000) to ₦5 million ($43,000), the maximum term increased from 25 to 30 years and minimum borrower contribution reduced from 20% to 10%.[96]

The scheme has also faced practical difficulties. A loan can be obtained only if the borrower can produce a clear title to the property he/she is buying. This is impossible in most states, and accordingly, no loans have been made in those states. Loans can be made only through PMIs, which are not in every state of the federation. In such cases, a potential borrower can apply to a PMI in another state. Many PMIs do not qualify to distribute loans. The FMBN will not disburse fund to any PMI more than 25% of the PMI's capital, and it requires a bank guarantee for the loans it does disburse. The trades unions have long objected to the scheme and asked workers to stop contributing. This happened in all but three states, although the situation has now changed and contributions are being made in 27states. The government and financial institutions have also failed to make the contributions as the law required.[97]

Private Estate Developers could also access to the National Housing Fund loan. They started to access the National Housing Fund in2000.[98] Through the National

[95]Elumah, L., Bamidele, I., and Olumuyiwa, Y., (2017), "Mortgage Financing and Housing Development in Nigeria", *Osogbo Journal of Management (OJM),* 2(1), p. 61.
[96] Ibid.
[97]Popoola O. O. and Alamu O. I. (2016), "Financing Housing Services Delivery and Its Challenges in Nigeria", *Journal of Economics and Sustainable Development,* 7(4), p.123.
[98]Abdullahi B. C., and Azriyati A. (2011), "The role of private sector participation in achieving anticipated outcomes for low-income group: A comparative analysis of housing sector between Malaysia and Nigeria", *African Journal of Business Management*, 5(16), p.6859.

Housing Fund, the Federal Mortgage Bank has been creating various modes to make home ownership more accessible and affordable for Nigerian workers through, for example, the introduction of "rent to own" scheme in late 2018. This scheme is an innovative, affordable housing product that provides an easy and convenient payment plan for Nigerian workers' home ownership. In this scheme, the workers would move into FMBN homes as tenants, pay for and own the properties through monthly or yearly rent payments spread over periods of up to 30 years. The innovation of this scheme is you do not need to have any equity contribution, and, second, you enter into a house as a tenant. Over the years, it becomes your own just like owner-occupier basis.[99] The Fund is not only lending the money for construction but also renovation. On 17th April 2018, the director-general of the FBMN said that 13, 000 workers would benefit from Federal Mortgage Bank's House Renovation Loan as it disbursed N6.5 billion in 2017 to 6,000 contributors for home renovation loans.[100]

4.5. INSTRUMENT USE IN THE SECONDARY MORTGAGE MARKET

Various instrumentsare used to promote the Secondary Mortgage Market in Nigeria. These instruments include standardization, documentation and underwriting. These instruments are examined hereunder in some detail.

4.5.1. Standardization

Standardization of the mortgage instrument is a key factor in secondary market development. Mortgages should be pooled with similar characteristics to facilitate larger pool size and more liquidity and reduce the due diligence costs of investors and rating agencies. There can be many types of mortgages present in the housing finance system, but only those with sufficient volume are candidates for sale and securitization. Investors

[99] Daily Trust News Paper (Online) published at https://www.dailytrust.com.ng.fmbns-rent-to-own-scheme-is-good-but.html accessed on 12th April, 2019.
[100] Sahara Repoters at https://saharareporters.com/2018/04/17/13000-workers-benefit-federal-mortgage-banks-house-renovation-loan accessed on 12th April, 2019.

and rating agencies must be able to do due diligence with reasonable costs. The more heterogeneous the terms and documentation of the loans, the greater the cost of due diligence and the less competitive is sale through securitization. To reduce the transactions costs of evaluating mortgage loans and processing costs of issuing and administering mortgaged-backed securities (MBS), the characteristic (e.g., rate adjustment, amortization schedule, term) of the mortgages should be uniform.[101]

According to some researchers[102], the Nigerian Mortgage Refinance Company is pioneering the development of the secondary mortgage market by standardization of the primary mortgage market. Standardization of the primary mortgage market plays a critical role in achieving the key aspects of the secondary mortgage market. By setting a firm foundation for originating loans, the quality of mortgages originated is enhanced, reducing the likelihood of delinquent and non-performing loans being created.[103]

4.5.2. Documentation

Documents governing the relationship of all participants in the SMM are an essential part of standardization. Standardized documentation must be available on all loans. Typical documentation includes the mortgage note (a document describing the mortgage obligation) and deed (document conveying ownership to a lender as security for the mortgage repayment). A key legal prerequisite is the timely and cost-effective registration of title and lien. A barrier in many developing [104]countries is the imposition of transfer taxes or stamp duties on title and lien registration or transfer. Long delays in the registration process can also increase the risk of both primary and secondary market transactions.[105]

[101]Olubunmi, op. cit, p. 14.
[102]Tochi, op. cit.
[103] Ibid.
[104]Olubunmi, op. cit., p.14
[105] Ibid.

The final major document requirement is the title report or title insurance policy. A title search verifies that the mortgagor owns the property being pledged as security for the lien. The title insurance policy insures against the risk that the mortgage may not have a clear title or may have encumbered the property with other liens (which could exceed the value of the property or have a priority to the loan being applied for). Lenders also require property and casualty insurance.[106]In Nigeria, the development of documentation spans across all parts of the mortgage securitization process and includes standardizing the Mortgage Lending Documentation and Refinancing Documentation.[107]

4.5.3. Underwriting

Mortgage underwriting is the process a lender uses to determine if the risk of offering a mortgage loan to a particular borrower under certain parameters is acceptable.[108] To help the underwriter assess the loan quality, banks and lenders create guidelines and even computer models that analyze the various aspects of the mortgage and provide recommendations regarding the risks involved. Solid and consistent underwriting is significant to secondary mortgage market development. Investors must have confidence that lenders are correctly judging risk and using a consistent set of criteria in evaluating loans. A degree of standardization is necessary to lower due diligence costs and allow investors, rating agencies, and guarantors to quantify credit risk.

The objective of home mortgage underwriting is to control the probability and cost of default losses. It is also to ensure that all legal and financial requirements are completed satisfactorily on the property that serves as collateral for the mortgages so that the interests of the mortgage holder are protected and meet the requirement of third parties who have an interest in the safety of the mortgage.

[106] Ibid, p.15
[107]Tochi, op. cit.
[108] Ibid.

Nigerian Mortgage Refinancing Company became the institution that ensures liquidity in Mortgage Market issued Uniform Underwriting Standard (UUS) for the country in 2018. The UUS provides standards for granting loans to the borrowers who qualify for mortgage refinancing. This has brought an enormous development of the Nigerian Mortgage Industry. The UUS comprised three segments. The first is a mortgage loan. This may be used for financing an existing home or refinancing an existing mortgage. However, there are some restrictions to this financing. Artificial persons are ineligible for this loan while natural persons most be 21 years of age or above before he/she could get a mortgage loan using UUS. This seems to have created a problem because globally, 18 years is considered the age of majority. Thus excluding him/her from accessing mortgage loans denies him/her the right to sustainable housing.

The second segment centered on lender eligibility criteria. For a mortgage loan provider to be eligible for NMRC refinancing, the provider must be licensed by the Central Bank of Nigeria as a Primary Mortgage Bank or Deposit Money Bank (Lender) and must be a licensed subscriber of the NMRC having a minimum equity investment of N100 million. Additionally, the lender must execute NMRC's Master Refinance, Purchase and Servicing Agreement on an annual basis as applicable and have an investment-grade rating.

The last segment set the refinancing criteria. In consideration of NMRC's refinancing of a mortgage loan, a lender must assign all its beneficial interests in the mortgage loan to the NMRC. The mortgage loans are secured by way of a specific debenture charge in favour of NMRC according to the terms of the security deed, the value of which shall be no less than 125% of the value, at the time of refinancing. The

NMRC will, from time to time,be subject to the prevailing market conditions and applicable development in the mortgage industry update the UUS.[109]

Generally, however, it may be too early to assess the introduction of the UUS, but, its introduction is laudable and hopefully that its introduction will promote efficiency and mitigate the legal and operational risks inherent in mortgage lending and also assist in providing liquidity in housing finance in Nigeria as it has done found in advanced economies like the USA, Germany, France and Italy.

4.6 CAPITAL MARKET

The Nigerian capital market is being positioned to play a more significant role in infrastructural development, with far-reaching reforms in the financial sector. Capital market refers to a market where financial institutions mobilize the people's savings and lend them for a long-term period to raise new capital in an economy. It links the mortgage market with the capital market, thereby creating proper finance machinery. Resolving the liquidity problem of real estate through capital market instruments is one of the remarkable achievements of the 21st Century.

As part of its mandate and as a player in the mortgage markets, the capital market offers access to various financial instruments that enable the economic agent to pool, price and exchange. Through assets with attractive yields, liquidity and risk characteristic, it encourages savings in financial forms. It also plays an essential role in mobilizing funds and resources needed for development and offers the forum for implementing its policies relating to stabilization; monetary controls, and the banking system regulation.Through the stock exchange, the market also allows long term lenders to convert their holding into cash. It also offers companies, which have securities, the opportunity to obtain cash

[109]Mayokan, I. A, "Uniform Underwriting Standard", *.http://www.odujinrinadefulu.com/content/highlights-uniform-underwriting-standards-issued-nigerian-mortgage-refinance-company*, accessed on 15th December, 2019.

without reducing their liquidity.[110]While on the other hand, the core and the trite principle of a virile mortgage market is a long term lending. This is what linked it with the capital market.

For a mortgage market to be active, a long-term loan is needed for short-term funding to make it unsuitable for the infrastructure investment. Linking the mortgage market to capital is an alternative. Capital market is the only institution known to an economic man who can pool vast long term financial resources together from fund suppliers and distributing, same to continuously competing uses and users of such resources.[111] In the parlance of the Nigerian capital market, the Nigerian Security Exchange Commission (SEC) occupied the heart as it serves as the apex regulatory body.[112] SEC provides a mechanism for mobilizing private and public to pool funds for productive purposes. It also provides a means for trading the existing security.[113] The Security and Exchange Commission with the depth of capital market has been exploring mechanisms which draw the Mortgage Market to a capital state such as issuing securities and introducing Unit Trusts Scheme like Real Estate Investment Trust, and Mortgage-Backed Securities.

The FMBN also raises funds through the capital market by issuing/floating mortgage debt securities, sometimes backed by a 100% Federal Government guarantee. These funds often serve two purposes: on-lending on a wholesale basis at market rate and refinancing. In 2007, the FMBN received approval to issue an N100 Billion mortgage-backed bond. Bond series 1 was issued to assist civil servants to purchase houses during the implementation of the monetization policy of series 2 of the FMBN residential-backed

[110] Ibid.
[111]Keke, O., Emoh, F., (2015). Real Estate Investment Trust (REITs) and Mortgage Backed Securities (MBs) as Emerging Trends for Financing Real Estate Development in the Nigerian Capital Market. *In international Journal of Civil engineering, construction and Estate Management.* Vol.3 No. 2, pp.1-7 published by European centre for research Training and Development UK at www.eajournal.org
[112]Ibid, p.1.
[113] Ibid.

mortgage security was issued and fully subscribed on April 4, 2012, with a maturity of five years.[114]In practice though, the capital markets can best be described as being in an embryonic stage; partly because of high issuing costs, including compulsory underwriting which carries a fee of 3% to 9% of the issue's proceeds, there are no corporate bonds. Other than government securities, the market has mainly been in capital raising issues by the retail deposit banks.

4.6.1 MORTGAGE ACTORS IN THE CAPITAL MARKET

Several actors exist in the mortgage capital market, such as FMBN, Insurance Companies, Security and Exchange Commission, Real Estate Development, among others. The FMBN was mandated to link the mortgage industry with the capital market. Under this heading, the Security and Exchange Commission and Real Estate Development Association would be discussed.

4.6.1.1. Security and Exchange Commission

Security and Exchange Commission (SEC) was formerly called the Capital Issues Commission. The SEC was established on the 27thof September 1979 as the apex regulatory organ of the capital Market. The SEC later was strengthened with the Investment and Security Act[115] which was later amended in 2007. The Commission is mandated to regulate and develop the capital market, serve as an essential player in the Nigerian Mortgage Market that links the market (i.e., Nigerian mortgage market) with the capital market. The commission set guidelines for the operation of mortgage markets in the capital market. In 2007, the Commission set a guideline for the registration and issuance requirements for the operation of Real Estate Investment and Trusts Scheme (REITs) in the country.

[114] Kama, *et al*, op. cit, p.16.
[115]ISA, 1999 (now ISA, 2007).

4.6.1.2. Real Estate Investment Scheme

Real Estate Investment Scheme **(**REIs) was first introduced in Nigeria with the enactment of Investment and Securities Act (ISA).[116] By Section 508 of the Security and Exchange Commission (SEC) Rules[117]**,** real estate means income-generating property consisting of land and buildings. It also includes a special purpose vehicle (SPV) holding income-generating lands and buildings. Real estate-related assets includebut are not limited to shares of real estate companies and higher-rated real estate investment schemes. The Section stated further that real estate investment scheme qualifies as an asset-backed security (ABS) or mortgage-backed security (MBS) in the case of a mortgage and hybrid real estate investment scheme.

The introduction of REIs gives investors long-term value-based investment options and provides the needed cheaper and long-term funding to the real estate sector, leading to the development of good quality work.[118] REITs are of three kinds; Equity REITs, Mortgage REITs or hybrid REITs. Through the equity REITs, the REITs invest in and own properties and become responsible for the equity or value of their real estate asset,the revenue of which is derived principally from the rental incomes generated by the properties.[119]At the same time, REITs mortgages deal in investment and ownership of property mortgages and loan for a mortgage to real estate owners or purchase existing mortgage or mortgage-backed securities and derive revenues primarily earned on a mortgage loan. Finally, hybrid REITs combine the first two strategies through investment in both properties and mortgages with individuals by either purchasing their shares

[116]ISA, 2007.
[117] SEC Rules, 2013.
[118]Adekunle, M.O., (2012) *An assessment of acces to finance for Housing Development in Zaria Urban Area* (Unpublished). A Masters thesis submitted to the Urban and Regional Planning, Ahmadu Bello University, Zaria.
[119]Ibid, p.2.

directly on an open exchange or investing in mutual fund specialising in public real estate.[120]

REIT offers several benefits over actually owning properties. First, they are highly liquid, unlike traditional real estate. Second, REIT enables sharing in non-residential properties, such as hotels, malls, and other commercial or industrial properties. Third, there is no minimum investment with a REIT. A REIT does not necessarily increase and decrease in value along with the broader market. However, a REIT pay yields in the form of dividends no matter how the shares perform. REIT can be valued based upon fundamental measures, similar to the valuation of stocks, but different numbers tend to be important for REIT than for stocks.[121]

In 2007, Skye Shelter Fund launched the first REIT in Nigeria withl N2 Billion (USD 13.3) in funds, followed by Union Homes Hybrid in 2008. This REIT was better structured than the first. However, its N50 Billion (USD 333 Million) public offer was grossly undersubscribed.[122] Presently, there are three Registered REITs in the country; Skye Shelter Fund, Union Homes and UACN Property Development Corporation (UPDC). During their Initial Public Offering (IPO), investors bought shares from them, which provided the financial capital base for operation in the Nigerian Real Estate Investment Trust (N-REIT) industry. The financial structure of N-REIT was further strengthened by sales of shares in a subsequent transaction on Stock Market through the agency of stock brokers.[123] The N-REITs industry pools together the resources of the various investors through the sale of the said shares and injects same into the direct real

[120] Ibid.
[121]Keke, op. cit, p.3.
[122]Adekunle, op. cit.
[123]Dabara D.I., Tinufa, A.A. and Soladoye, J.O. (2018), *In Research Journal of Finance and accounting*. Vol. 9 (16), p.31.

estate through the acquisition and development of income-producing properties in prime locations of particularly Abuja, Port Harcourt and Lagos.[124]

4.6.1.3. Central Bank of Nigeria

The Central Bank of Nigeria (CBN) is not a direct actor in the mortgage market. Rather, it serves the apex regulatory body of Nigerian financial institutions, by extension, including Primary Mortgage Institutions. CBN was first established with the enactment of the Central Bank Act in 1953 and commence operation on July 1st, 1959.[125] The CBN assumed the apex regulatory control of all Nigerian financial institutions. It promotes monetary stability and a sound financial system; it is a banker bank and a financial adviser to the Federal Government; it is a banker of the last resort that approves the license to financial institutions, which include deposit money banks, microfinance banks, finance banks, Bureau de Change, development finance institutions and also include Primary Mortgage Institutions.

The CBN supervises the activities of the primary mortgage institutions and was empowered to license and accredit the PMIs. The CBN also issues guidelines for the operation of the primary mortgage market. The recent guidelines for Primary Mortgage institutions were released in 2011[126]. As the apex regulatory body of the financial institutions, in the early 1990s, CBN had directed banks to allocate a stipulated minimum proportion of their total credit to the housing sector.[127] The CBN also sets the stages for the promotion of the secondary market through its operational guidelines.[128] In summary, as the apex regulatory body in the mortgage money in Nigeria, CBN performs many activities to develop and promote the Nigerian Mortgage Market, making it among the

[124]Ibid, p. 30.
[125]1958 (now CBN Act Cap C4 L.F.N, 2004).
[126] Central Bank of Nigeria, (2011) Revised Guidelines for Primary Mortgage Banks in Nigeria. Central Bank of Nigeria, Abuja.Availalable at www.cbn.govs.ng (PDF)
[127]Kama, op. cit, p.18.
[128] Ibid, p. 20

most essential players in the market. It also collaborates with the federal government and other financial institutions to create strategies for developing the Nigerian financial system.

In 2005, the Federal Government, in conjunction with the CBN,created financial system strategies 2020 (FSS 2020)[129]. Under this initiative, the CBN set four objectives to develop the mortgage industry. These objectives include establishing a safe and profitable mortgage by setting up appropriate infrastructure/institutions/processes and re-modelling existing ones. This is in addition to introducing a new framework to strength property/security rights, with the view to ensuring that mortgage market makes affordable long-term finance available to all classes of Nigerians to own their own homes and build wealth. Unfortunately, as set out in the financial system strategies, these objectiveswere far from being achieved in 2020.

4.6.1.4. Mortgage Guarantee Companies

Mortgage guarantee companies as institutions have yet to come into existence.[130]In a letter dated October 7, 2018,[131] addressed to the Banks, Federal Mortgage Bank of Nigeria, Nigerian Mortgage Refinance Company and Mortgage Banking Association, the Central Bank of Nigeria declared its intention to introduce the mortgage guarantee companies into the housing sector. The CBN drafted the draft rules and regulation to govern the existence of such companies. That drafted rule was published on the CBN website, and it was exposed to the public for comments and observation.

Mortgage guarantee companies are designated to deepen the mortgage market through increased access to mortgage finance and enhancing credit risk with mortgage lending institutions. This increased access is in furtherance of the CBN objective of promoting affordable financing and a safe and sound financial system. Thus, the main

[129] Financial System Strategy (FSS) 2020 at www.cbn.govs.ng.
[130] That is at the time of this research (December 15th , 2019).
[131]Published at www.cbn.govs.ng.

aim of the companies is to provide guarantees or partial guarantee to lenders against losses resulting from borrower default on residential mortgage loans.[132] This aim is intended to be achieved by supporting mortgage originators such as primary mortgage banks (PMBs) and commercial banks to increase mortgage lending by guaranteeing against losses resulting from borrowers defaulting in their residential mortgages or on their mortgage loans portfolios.[133] The CBN, as the regulatory and supervisory body of financial institutions in the country, mentioned the permissible activities of the MGC[134];

i. Full or partial guaranteeing of residual mortgage loans;

ii. Invest in government securities and other investments defined in S. 8.6;

iii. Assume ownership of residential property in the event that a lender is unable to dispose or foreclose. Provided that such holding shall not exceed 70% of its shareholders fund unimpaired by losses without the Bank's prior written approval;

iv. Issue bonds and notes to fund its operations;

v. Provide technical assistance to lenders on credit and business development related activities to increase the pool of development expertise; and

vi. Other activities as may be prescribed by the CBN from time to time.

4.7. PROMOTION OF MORTGAGES IN CAPITAL MARKET

There are various instruments or mechanisms that are used to finance mortgage from the capital market. These strong forces are pulling the Mortgage Market in our economy into a more progressive place. These mechanisms include bonds, securitization, unitization, mortgage-backed securities, global depository receipts, and exchange-traded funds. These are discussed in the following sub-headings.

[132] S.1.2.
[133] S.1.3.
[134] Ibid.

4.7.1. Bonds

Bonds are important for private sector housing development. One reason is that they can attract foreign savings when open to international participation. Estate developers can issue well-structured bonds to construct houses with funds from the sale for the houses directed at meeting debt obligations. The Nigerian capital market has been a viable source of financing state and local government infrastructural projects through bond issuance. The first state to use the capital market was the defunct Bendel State, which issued a "ten-year N20 million 7% Bendel State of Nigeria Loan Stock in 1978. Since then other state governments have issued bonds for developmental projects, for instance, Edo State issued Edo State Revenue Bond to fund the Ogba River Housing Estate in 2000, and the federal government issued Mortgage-Backed-Bonds in 2012.[135]

4.7.2. Mortgage-Backed Securities and Securitization

Mortgage-Backed Securities (MBS) are usually obtained from mortgaged assets and serve as debt obligations representing claims to the cash flows from pools of mortgage loans, most commonly on residential property.[136] In practice, mortgage loans are purchased from banks, mortgage companies, and other originators and then assembled into pools by a government, quasi-governmental, or private entities.[137]An entity then issues securities that represent claims on the principal and interest payments made by borrowers on the loans in the pool; this process known as securitization.[138]

Securitization is a process of converting real estate into a tradeable instrument with the underlying asset as security.[139] As a tradeable paper interest in underlying assets

[135]Oteh, A. (2010). Capital Market as a Long Term option for Financing Infrastructure Development. A paper delivered at the "*Central Bank of Nigeria Infrastructure Finance Conference*" Held at the Sheraton Hotel and Towers, Abuja. p. 8.
[136]Keke, et al., Ibid, p. 3.
[137] Ibid.
[138] Ibid.
[139]Olawande, O.A., EMOI, F.I and Ijasan, K,C (N.d). The Impact of money market indicators on Real Estate Finance in Nigeria.*Sri Lankan Journal of Real Estate*. ISN:1800-3524 Issue 06, pp.16-37 p.18. https://www.journals.sjp.ac.lk

like property or an alternative to direct ownership of the asset, the introduction of securitization in Nigeria could bridge the country's mortgage financing gap as it has already worked in so many jurisdictions. For instance, in the United States, MBS has become a main tool for securitizing all different types of mortgage instruments available to home buyers.[140] Securitization may either be equity or debt securitization. The former involves single or multiple properties being turned into note securities that are traded based on their values while the latter arises where mortgages as a form of debt and are traded based on their values.[141] However, the problem encountered in this regard is that most investors are unwilling to invest in mortgage-backed securities for fear of uncertainty to the title of the property.

[140]Ibid.
[141]Olawande, op. cit., p.18.

CHAPTER FIVE
CHALLENGES TO MORTGAGE FINANCING IN NIGERIA

5.1 Introduction

Despite the different mechanisms provided by the government and different stakeholders in housing finance, housing has remained the most acuteproblem for most citizens in Nigeria. The housing provision has seriously been at far with the demand and prevailing realities. Less than 1% of Nigerians have access to a mortgage to finance their homes, and the mortgage rate could be up to 30%. The ratio of mortgage to the Gross Domestic Product (GDP) is one of the lowest in Africa at 0.58%, whereas, in South Africa, Namibia, and Morocco is 22.04%, 18.21% and 13.85%, respectively. In fact, housing, in general, is self-financed by accumulating equity over a long time or financed by friends and relatives in Nigeria.[1]

Moreover, the housing deficit in the country has also worsened over the last three decades. The housing deficit was 7 million in 1991, 12 million in 2007, 14 million in 2010 and between 17 and 22 million in 2019.[2] Based on the CAHF (Centre for Affordable Housing Finance in Africa) report for 2018, to keep up with growing population in the next 20 years, the country needs 1, 000,000 additional units of housing production annually, but the construction is now only about 100,000 units per year.[3] This deficiency signifies that the housing deficit in the country is increasing rather than decreasing.

The government also has not been proactive in the formulations of her policies on housing development. For example, between 2007 and 2011, the housing industry's

[1] World Bank and International Bank for Reconstruction and Development (2016) *Nigeria: Developing Housing Finance.* Washington: World Bank Publications, p. 10.
[2]Delmendo, C. L., (2019) Nigeria's Housing Market Stabilizing, Amidst Improving Economic Conditions. Available at https://www.globalpropertyguide.com/Africa/Nigeria/Price-History accessed on 20th August, 2019.
[3] CAHF (Centre for Affordable Housing Finance in Africa, 2018). *Housing Finance in Africa: A review of Africa's Housing Finance Market.* South Africa: Centre For Affordable Housing Finance in Africa, p. 215.

expenditure remained very low at around 2% of the total capital expenditure due largely to deregulation[4]. In 2014, of the ₦18.5 billion allocated to the Ministry of Lands, Housing and Urban Development, only N13.5 billion was allocated for capital expenditure on housing and urban development. If this amount were wholly committed to providing more homes, at ₦7 million per homes, only less than 3000 two-bedroom bungalows could be provided in urban centres. This excludes the cost of land, transactions cost and other government charges. However, the household incomes of more than 62% of Nigerians in the cities isabout ₦30,000, with an average rental value of about ₦70, 000 annually.

This statistic means that more than 80% of Nigerians are unable to own a home. Under the National Housing Programme of 1993, homebuyers were expected to deposit 40% of the total building costs. Yet, as of 1995, only 18,500 units of the promised 121,000 units were constructed while house prices had increased by 350% from ₦70,000 to ₦350,000.[5] Obviously, one question that might be askedis why, despite all these huge mechanism and government's efforts, a lack of housing remains one of the most significant and most acute problems in the country? The answer may not be unconnected with many problems that have clogged the mortgage industry's wheel and limited its effectiveness. Thus, the fulcrum of this chapter is to study some challenges that hinder the development of the mortgage industry in Nigeria.

5.2 THE CHALLENGES AFFECTING MORTGAGE FINANCING

Despite its importance to the national economy and human wellbeing, the housing sector remains underdeveloped in Nigeria. In particular, the housing subsector is encountering numerous constraints in the development of the mortgage industry. Various challenges have undeniably turned housing financing and mortgage creation into nightmares

[4]Oleranwaju, A., Anavhe, P, Hai, T. K., (2016), "A framework for Affordable Housing Governance for the Nigerian Property Market", p. 309, available @ *http://creativecommons.org//license/by-nc-nd/4.0/)*, accessed on 22nd August, 2019.
[5]Oleranwaju , op. cit., p. 309.

forvarious natural and artificial persons. Some challenges responsible for this unfortunate situation are discussed below.

5.2 Legal Challenges

Legal challenges militating against mortgage financing range from the problems posed by various laws to the lengthy courts proceeding. These constraints are making home or land ownership painfully unaffordable to the suffering masses. Some of these challenges are examined hereunder.

5.2.1 Challenges under the land use Act

One right of absolute land ownership is the power of the property ownerto alienate through whichever means he/she likes without interference. But because the absolute ownership is abrogated under the Land Use Act (LUA) and radical title to the land was conferred upon the Governor, transfer by whatever means is not possible. To effect this, the Act requires that the consent of a Governor of the state where the land is situated must be sought and obtained. Section 22 further 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 position was affirmed in *Savannah Bank vs.Ajilo*[6]and*Awojugbabe Light Industries Ltd. vs.Chinukwe*[7]. In *U. B. N Plcvs.Ayodare& Sons Nig. Ltd.*[8] the Supreme Court, per Oguntade JSC, stated that "section 22 of the Act postulates that the Governor shall sign the letter granting consent."

Similarly, Section 21 provides that "it shall not be lawful for any customary Right of Occupancy or any part thereof to be alienated by assignment mortgage, transfer of possession, sublease or otherwise howsoever". However, the section exempted the

[6](1989), 1 NWLR (Pt. 97), p. 305.
[7](1995), 4 SCNJ 162; (1995) 4 NWLR (Pt. 390), p. 379.
[8](2007), All FWLR (Pt. 383) 1 at 23.

requirements for consent only in cases where the property is sold by or under the order of any court under the provisions of the applicable Sheriffs and Civil Process Law; or in other cases without the disapproval of the appropriate Local Government. It follows that where the land is subject to a customary right of occupancy, the appropriate local government's consent is required so long as the transfer is not one subject to the Sheriff and Civil Process Law. Therefore, outside these exceptions, the purpose of the above provisions is to make any form of alienation without the Governor's consent unlawful. Consequently, for any transfer by way of mortgage to be valid, the Governor's consent must be obtained, or local government approval as the case may be.

Though the law requires the Governor's consent, the Governor can delegate his/her authority for granting consent to a State Commissioner. In *Union Bank Nig. Plc. Ishola*[9], the court held that where the Governor's power to grant consent was properly delegated via a legal notice to the State Commissioner for Housing and Environment who was in charge of land matters, the latter's consent granted to the mortgage transaction was proper and valid. However, where the Governor grants the consent through his delegate, such delegate must convey the approval under his hand and not under the hand of another state official. In *Federal Mortgage bank Plc. vs.Babatunde*[10],the court held that there is no evidence to show that the Governor delegated his powers under the Act to anybody, let alone to the Permanent Secretary, Ministry of Works, Lands, Housing and Environment, Kwara State on whose behalf the letter of approval was written.

Challenges include obtaining the Governor's consent and the issuance of Certificate of Occupancy. Regrettably, the Land Use Act did not stipulate the time within which the consent would be granted after submitting the application. Aboki[11] observed

[9](2002), FWLR (Pt. 100), p. 1253.
[10](2000) FWLR (Pt. 3), p. 385.
[11]Aboki, Y. (2015) Land Ownership and Rule of Law: A Call for the Review/Democritization of the Land Use Act, 1978. In Kabir Danladi (ed) *Transforming Federal Mortgage Bank towards Providing Adaquate*

that this has made consenting authorities develop a lukewarm and "I don't care attitude" towards an application for consent. However, some state governments have started enacting laws, stipulating the time within which consent must be given after submitting an application. For instance, Kaduna State, under Section 22 (1) of the Mortgage and Foreclosure Law 2017 concerning obtaining consent on mortgage transaction provides that "the consent of the Governor or appropriate local government Chairmen shall be given within thirty (30) days upon submission of the documents by the Mortgage Registrar." Undoubtedly, this is a very welcomed development as it will facilitate easy transaction in the mortgage markets.

Another important development brought about by the law is that it mandated the Mortgage-Registrar to receive the consent seeking application and make sure that Governor or local government consent is processed and obtained within the stipulated thirty-days.[12] There is no doubt that the above provision would facilitate an easy transaction and a viable mortgage market. Unfortunately, each state in the federation has its own conditions and procedures for obtaining the consent. Moreover, the procedures are characterized by bureaucratic bottlenecks, the heavy costs involved in obtaining consent, and a non-stipulation of time for granting consent and C of O. Nnamani J.S.C observed that:

> Aspects of the Act (I.e., Land Use Act) which have brought untold hardship include the provisions relating to the issue of Certificate and grant of consent to alienate. Both can take years and the applicant is subjected to the vagaries of bureaucratic act, which demands for survey plans, documents and a lot of to and from. These cumbersome procedures have adversely affected economic business activities and make industrial take off a matter very much in the future[13].

Social Security and National Development in Nigeria: Legal Essays in Honour of Gimba Ya'u Kumo, Managing Director, Federal Mortgage Bank of Nigeria, p. 38.

[12]Section 2 of the Law.

[13]Ogiji, op. cit., p. 2.

Unfortunately, the import of Section 21, 22 and expression provision of Section 26 of the Land Use Act imply that failure to obtain the Governor's consent before the actual mortgage itself may lead to many consequences. For instance, Section 26 of LUA provides that any alienation that does not comply with the Act's provisions shall be null and void. Thus, where the holder or occupier fails to obtain the requisite consent to mortgage his interest or where his application for consent is refused, the mortgage transaction would simply be void. *In Savannah vs.Ajilo*[14], any alienation of any interest in land without a Governor's consent is void ab initio.

In addition, the Governor may also find it appropriate to invoke his/her powers under Sections 28 (2) (a) and (3) (d), which provided for revocation in the case of a mortgage without the requisite consent or approval." Thus this section makes alienation without consent ground for the revocation of a right of occupancy, whether granted or deemed granted, and this amounts to the confiscation of such interest by the Governor as no compensation is payable. Furthermore, Sections 34(8) and 36 (6) of LUA respectively have prescribed dealings in deemed rights of occupancy without the requisite consent by prescribing stiff penalties for any infringement. Section 34 (8) provides

> Any instrument purporting to transfer any underdeveloped land in contravention of subsection (7) of this section shall be void and of no effect whatsoever in law and any party to any such instrument shall be guilty of an offence and liable on conviction to imprisonment for one year or a fine of ₦5,000.

The above section appears to make any transaction without obtaining consent void *ab initio*.Furthermore, guilty parties were prescribed punishment of imprisonment for one year or fine of N 5, 000. Therefore, a mortgagee must conduct an adequate investigation and be wary of accepting land granted to a mortgagor in contravention of the Act. In

[14]Supra.

Awojugbabe Light Industries Ltd. vs.Chinukwe[15],the Supreme Court per Iguh JSC held that any transaction without Governor's consent was inchoate until the consent was obtained after which it can be said to be complete and fully effective. The above decision shows that it is lawful for parties to a mortgage to begin negotiations for alienation before seeking consent. However, the consent must be obtained at the perfection of the transaction. Thus, in an agreement stage, the absence of Governor's consent may not invalidate an agreement for the sale of land, which is an equitable interest. In other words, the Governor's consent is only needed in the conveyance stage.

This is in line with a long line of decided cases that recognized the benefits of equitable interest in agreement for the sale of land as demonstrated in the decisions in *Okunneyevs. FBN Plc*[16] *and Awojugbagbe Light Ind. Ltd. vs.Chinukwe*[17] that enable people dealing in land to freely transfer their interest in land through the instrument of an agreement subject to Governor's consent without contravening the provisions of section 22 and 23 of the Land Use Act. So, despite the mandatory statutory consent requirement, "first had and obtained", the courts have held it means no more than that the mortgage transaction concluded becomes inchoate (in complete) pending when the requisite consent is eventually sought and obtained. Departure from doing this would have drastically had a telling effect on mortgage transaction efficiency in Nigeria.

In mortgage transactions, it is the responsibility of the mortgagor to seek the Governor's consent. In *Chief BelonwoUgochukwuvs. Cooperative and Commerce Bank Nigeria Ltd*[18], Balgore J.SC observed that "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". However**,**a problem may arise in mortgages where the

[15] (1992) 5 NWLR (pt. 390), 409.
[16] (1996) 6 NWLR (PT. 457), p. 479.
[17]Supra.
[18] (1996) 6 NWLR (pt. 456), p. 524.

mortgagor has collected the money, deposited the title deeds and executed the mortgage documents with the expectation that he will apply for the consent of the Governor, but only to turn round and allege that the consent was not obtained or even to frustrate the grant of the consent. In other words, a mortgagor who failed to obtain the requisite consent may use that as a shield against the liability incurred in the mortgage transaction. In *Ugochukwuvs. C. C. B*[19] *and Union Bank of Nig. Plcvs.Orharhuge*,[20] the courts have held that such a person would not be allowed to turn around and claim that the transaction was null and void because the consent was not obtained.

While it is the mortgagor's responsibility to seek the governor's consent, in practice, it is the mortgagee who seeks the consent because he/she is the one that stands to lose if the mortgage is set aside for lack of consent. However, the provisions of Section 22 (a) of LUA that Governor's consent 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, seems to suggest that the Governor's consent is not necessary for an equitable mortgage, where consent is sought and obtained for such mortgage, consent will not be required for a legal mortgage thereon. This rather implies that equitable mortgages also require the consent of the governor.

The combined effect of Section 21 and 22 of the LUA is that consent is only required to transfer the legal interest and not for an agreement to transfer the interest. Hence, consent of a Governor is also not required for the creation of debentures because a deed of debenture is a charge on the floating assets of a company and not a charge on the land which requires the consent of a governor[21]. Specifically, in *Okuneye vs. First*

[19](2000), 1 NLLC 361 at 383.
[20](2000), 2 NWLR (Pt 645), p. 795.
[21]Nig. Ind. Devs. Bank Ltd. vs.Olalomi Ind. Ltd. (2002) FWLR (Pt. 98), p. 995.

Bank Nigeria Plc[22] the court held that the deposit of a title document is an equitable mortgage not requiring the consent of the Governor on the basis that it is not alienation, but an agreement to alienate. In this case, the appellant had appealed the judgment of the lower court that granted the order of sale of his property deposited as security for a loan on the premise that the consent of the Governor was lacking.

As disused earlier, an equitable mortgage can be created by mere deposit of title deeds where the deposit was made with the intention to be used as security, mere agreement to execute a legal mortgage, the use of Form 15 in the Registration Area, and the use of equitable interest in land to secure a debt. An equitable mortgage transfers interest to the mortgagee. Though equitable, it is an interest in land and falls within the purview of Section 22 of the Act**.** It has been argued that if the nature of interest anticipated under the Act must be legal, section 51 of the Act will not define mortgages to include an equitable mortgage.

Though it is acceptable that agreement to alienate a Right of Occupancy is not prohibited under Section 22 of LUA, it is not absolutely correct to say that deposit of title deeds with an intention for the title deeds to be used as security for the loan is not alienation. To alienate is to transfer or convey property to another. The equitable mortgagor undoubtedly transfers or conveys an equitable interest to the mortgagee. Therefore, it must be taken that the prohibition of alienation without the governor's consent refers to alienation of legal interest. This is because Section 22 of LUA provided for a duly executed approval of the lessor who is the holder of the statutory Right of Occupancy.

[22](1996) 6 NWLR AT PART 457.

5.2.1.1 Difficulties in Perfecting Title

The bureaucracies involved in the perfection of title pose considerable difficulty to effective housing delivery, especially in most urban areas. In its 2019 Doing Business Report, the World Bank ranked Nigeria as 146th in a pool of 190 economies on the ease of registering a property. Registration of title demands for documents, such as survey plans and payment receipts involves the movement of files usually hindered by bureaucratic bottlenecks. These bottlenecks by the land registry staff usually cause delays between the time of submission of an application and when it is finally approved. These cumbersome procedures have adversely affected economic business activities and make industrial take off a matter very much in the future. In this regard, Chief F.R.A Williams of blessed memory, observed that "the implementation or consequences of the implementation of the consent clause in the Act; it is bound to have a suffocating effect on the commercial life of the land and house owing class of the society who use their property to raise loans and advances from Banks[23]."

In practice, there is no up-to-speed digital registry to capture and process the perfection of title applications. An accurate and comprehensive land registration system is a necessary condition for effective property rights. However, only a few states, such as Lagos, have begun to address this problem by establishing several land registries. While conceding this statement, Obaseki, JSC (as he then was) stipulated "I have no doubt that it will take the whole working hours of the state military Governor to sign consent papers (without going hallway). These areas of Land Use Act need urgent review to remove their problem nature."[24] Local studies have indicated that the processing time varies across states and could take as long as 3 years in some states of the country, although, in cities like Lagos, the registration process can last an average of 105 days.

[23]Savannah vs.Ajilo, supra.
[24] Ibid.

5.2.1.2 Exorbitant Cost

Additionally, corruption problems are evidenced in the form of private financial charges imposed by the staff of land registries on people trying to perfect their title documents when applying for Governor's consent is another major challenge created by the consent provision. Sometimes this could cost about 11.1% of value of the property.[25]In Ghana, only 6 procedures, 47 days and 6.1% of the property's value are required, and it costs 0.04 and 0.08% of the property's value in Canada and New Zealand, respectively[26]. The cost of obtaining governors consent in Kaduna State is also exorbitant as presented in the table below.

Figure 2: Cost of obtaining Consent and Registration of Mortgage Property in Kaduna State

S/N	Service	Cost
1	Search Fee	₦ 10,000.00
2	Payment of Grounded up to Rent	As per computation
3	Application Processing Fee	₦ 20,000.00
4	Registration Fee	2% of Consideration and added amount respectively
5	Stamp Duties	
6	Professional Fee	Mortgagor/borrower will pay 10% of the mortgage loan amount to KADGIS when the consent is given.

Source: Kaduna State Geographical Information System, 2019

This cost is high, especially the "Professional Fee," which costs 10% of the borrowing amount. This has limited the possibility of using the land or property in question as collateral for a mortgage. If mortgage lenders cannot exercise their right to collateral, mortgage lending will be constrained.[27]Questions that arise are, why is it that

[25]Delmendo, C. L., (2019) Nigeria's Housing Market Stabilizing, Amidst Improving Economic Conditions. Available at https://www.globalpropertyguide.com/Africa/Nigeria/Price-History
[26] Ibid.
[27] Kama, op. cit., p. 43.

professional payment is payable only after the consent is obtained, and is that not another way of collecting illegal consent payment? This is nothing but unauthorized use of the powers in the Land Use Act for income tax collection, which is questionable. *Gosling vs.Veley*[28] held that no pecuniary burden could be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those seeking to impose the burden, has been so often the subject of a legal decision that it may be deemed to be a legal axiom, and requires no authority to be cited in support of it.The case decided above that only the law that created and imposed a pecuniary burden could add any pecuniary burden in the name of tax, due, rate, toll or whatever it may be called. Therefore, these payments are illegal and supposed to be eradicated.

5.2.2. Uncertainty to Title

Section 1 of the Land Use Act[29] has vested the power of control and management over land in Nigeria on the government. Therefore, by this provision, the land ownership, which was evidenced with a bundle of documents in the form of conveyance, leases, assignments showing the root of title is no longer relevant. The implication of this is that where the right of occupancy is revoked for any reason, the mortgagee who has accepted it realizes that he has burned his own fingers[30] as he (the mortgagee) is not entitled to any compensation that may be payable[31]. Similarly, revocation by forfeiture will not attract payment of compensation. Therefore, these provisions need to be revised to provide a smooth economic environment.

Moreover, the procedures for obtaining a certificate of occupancy are too cumbersome as the applicants have to provide completed application forms, non-

[28]12 KB 407

[29] (1991), 6, NWLR, (Pt.195), p. 113.

[30] Nelson, D.E., (2013). Mortgage of Land as Security under the Land Use Act.In *Nigerian Juridical Review. Faculty of law, University of Nigeria, Enugu.* Vol.11, pp. 137-162.

[31]Section 51 of Land Use Act.

refundable prescribed fees; current three years tax clearance certificate, land site/survey plan; agreement of sales of land which must be duly stamped and registered; an affidavit by the vendor and customary right of occupancy in the case of non-urban lands.[32] Despite these cumbersome procedures, the Certificate of Occupancy only raises a presumption of title, not absoluteness albeitgranted by the Governor. Thus, in *Azivs. Registered Trustees of the Evangelical Churches*, the court held that the issuance of Certificate of Occupancy in respect of any land would not validate defects, if any, in the title of the holder. Therefore, it held that a Certificate of Occupancy granted to one of the claimants who had not proven a better title was invalid. When this happened, the mortgagee would realize that he/she is just holding a mere piece of paper as security.

Furthermore, in *Rt. Hon. Sir AdetokunbohAdemolavs. John Amoo& Others*[33], the plaintiff, Sir, AdetokunbohAdemola, instituted an action against the defendants claiming damages for trespass over a developed piece of land in an urban area that the plaintiff inherited from his late father. The plaintiff's root of title was traced to one Amoo who had sold it to one Subuola who had sold it to the plaintiff's father. The defendants relied on the fact that they purchased the land in dispute from the descendants of the late Amoo and the fact that some of them sought and obtained Certificate of Occupancy over the land in dispute from the Governor of Ogun State. It was also contended on behalf of the defendants that because the plaintiff did not object to the issuance of the Certificates of Occupancy when he was required to do so through an advertisement in the *Nigerian Tribune*, he could no longer complain.

On the evidence before the Court, Odunlami, J. had no difficulty pronouncing judgment in favour of the plaintiff. It was obvious that the descendants of Amoo had no interest in the land in dispute, which they could validly transfer to the defendants. On this

[32] Nelson, op. cit., p. 153.
[33](1982) O.G.S.L.R 273.

premise, it was improper for the Governor to have issued the Certificate of Occupancy to the defendants. Thus, the Certificates of Occupancy were declared invalid, null and void. A Certificate of Occupancy that is based on nothing cannot stand. It will collapse. This ruling has discouraged the habit of receiving title deeds as a security by banks.

5.2.3 Devolution of Right of an Occupier

Section 24 (b) of the Actprovides that the interest of an occupier can only devolve on the beneficiaries wholly without any divisions. The implication of this is that the division of land can only be validly made with the Governor's consent. This is a strange requirement because it restricts the rights of a testator who is merely an occupier to give out his/her occupational rights in parts to several persons. However, it must be emphasized that the Governor's consent is only required where the land subject matter of the right of occupancy is to be divided and where it is a statutory right of occupancy of an occupier. Thus, where the devolution does not entail the division of the land, but the whole of it, or the will is made by a holder and not an occupier or where it is a customary right of occupancy, the consent is not required for there to be a valid transfer by way of devolution as a will or devolution under customary law is a transfer. Thus, a mortgagee may consider it unsafe to accept a statutory right of occupancy from an occupier who became vested by devolution upon the death of the original occupier as security for a loan unless the mortgagor relying on devolution must have received the whole property and not as a result of partition of a larger land. Such security is liable to be voided for as little as the title was not properly conferred on the mortgagor, he cannot transfer a better title to the mortgagee. However, the courts are not likely to be inclined to accede to a mortgagor seeking to void a mortgage because the title is defective under section 23 of theAct**.** This

argument is based on the principle that a person should not be allowed to benefit from his/her own wrong. This was settled in*Solanke vs. Abed*.[34]

5.2.4. Customary Right of Occupancy

Another obstacle to the mortgage financing, especially to rural dwellers is the customary right of occupancy. Customary right of occupancy was defined under section 51 of the Land Use Act as the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by a local government under this act.

The effect of the above provision is to recognize that land could be owned owned by a community or family. In Nigeria, considerable land is held under customary right of occupancy where family and communal lands form part of the tenure system. Under many customs, communal dwellers have only possessory rights to the land they occupy. Therefore, it cannot be alienated by way of mortgage without the consent of the family or communal head. Moreover, statutory right of occupancy which associated with the lands in urban area is the principal title banks accept for collateral. It is generally considered more secure than the other forms of title and therefore, banks prefer it. This has curtailed the level of accessing mortgage financing by holders of Customary Right of Occupancy.

5.2.5. Compensation

Another challenge under Section 51 of the LUA is that a banker as a mortgagee cannot receive compensation if the land is acquired by government or revoked for overriding public interest. Only a holder of a right of occupancy or an occupier can claim compensation for unexhausted improvements on land in such an event because the definition of holder excludes a mortgagee. A banker who is a mortgagee has no right to proceed against and claim compensation paid by the government to the mortgagor and

[34](1962), ALLNLR (pt 1) 230.

where alternative accommodation is given by the government to the occupier of a residential building on the land, in respect of which a right of occupancy has been revoked, this can hardly avail the banker not being an occupier. It is rather unfortunate that someone in favour of whom a property is encumbered is not entitled to compensation in the event of revocation.

One would have expected that once an investigation reveals that a property is mortgaged and the land is revoked by the governmentall appropriate compensation due to the mortgagor would be paid directly to the mortgagee by government. This is not the case. With this problem, perhaps it would be expedient for the parties to a mortgage transaction to provide a mortgage clause with an express stipulation that where the government acquires the land during the pendency of the mortgage, all entitlements due to the mortgagor be paid to the mortgagee.

5.2.6 Restriction on the Age of Mortgagor

A mortgage entails a contractual relationship between the mortgagor and the mortgagee. Therefore, a party to a mortgage transaction must be a person who has the legal capacity to hold land or any other property, and not only to buy and sell same but can sue and be sued. However, under the Infants Relief Laws applicable in many states of the Federation, all contracts entered into by infants for the repayment of money are absolutely void. In effect, a mortgage transaction entered into by an infant is that the infant cannot be made liable under the contract. Furthermore, Section 7 of the Land Use Act restricted the right of a person the Governor to grant land to someone under the age of twenty-one years. The section provides that:

> It shall not be lawful for the Governor to grant a statutory right of occupancy or consent to the assignment or subletting of a statutory right of occupancy to a person under the age of twenty one years.

The provision of Section 7 of the Act is in tune with the Common Law Contractual age of majority, which was twenty-one years.[35] However, the law has changed globally. The age of majority is now generally accepted to be 18 years,[36]even in England from whence Nigeria borrowed most of her laws. In light of the foregoing, section 7 of the Actneeds amendment to align with global trends and section 77 of the Constitution of the Federal Republic of Nigeria.

5.2.7 Lengthy Litigations

In an interview with the researcher in Abuja, some Federal Mortgage Bank staff mentioned that lengthy court proceedings had created another problem. A common phenomenon is a resort to the courts by mortgage/rental defaulters to get court injunctions to prevent or restrain a foreclosure process from commencing, thereby delaying the process for many years. Furthermore, it has become common for a potential purchaser or tenant to insist on vacant possession of a property before payment. Experience has shown that one could actually pay for an occupied property and be eventually drawn into litigation over an occupier who had refused to vacate a property.[37] Moreover, mortgagors sometimes use their fault as a shield and go to courts to get covered from the consequence of their default. For example, a mortgagor may deliberately refuseto obtain consent. Upon receiving a loan and when it comes to payment, he/she will hide behind his not obtainment of consent to redeem his property. Lamenting this habit of some mortgagors, the penultimate court said that in *Pharmatic Industrial Project Ltd vs. Trade Bank (Nig) Plc& 84 Ors*[38]

> It is a sad commentary on the current state of our jurisprudence that in spite of the unconscionable consequences suffered by the respondents as a result of the

[35]Taiwo, A. (2011) The Nigerian Land Law, op. cit.
[36] See Article 1 of the Convention on the Right of the Child (CRC) 1990. Section 29 (4) (a) Constitution Federal Republic of Nigeria 1999 (as amended).
[37]Kama, *et al*, op. cit., p .44.
[38] (2009) 12 NWLR (pt. 1159) at pages 645-646 paras E-B.

> appellant's failure to obtain the necessary consent from the Governor before embracing on the entry into the Mortgage Agreement and Deeds of Debenture, the appellant can turn round to benefit from his fraudulent act which culminated into the derivation of value consideration in the form of loans.

This act of the litigants or parties to the mortgage is highly mischievous and supposed to be discouraged. The Federal Mortgage Bank of Nigeria staff explained that mortgagors mostly resort to this when they are served with a foreclosure letter to obtain an interim or interlocutory injunction to stop the processes for many years. This practice discourages many stakeholders in the housing mortgage industry from accepting the property as securities. This practice has contributed in no small measure to increasing the housing deficit in the country.

5.2.8 Enforcement Challenges

Theargument can be made that the laws laid down in the mortgage industry have huge mechanisms, but one burning issue with these is as if they do not exist. For example, section 5 (1) of the National Housing Fund Act provided that every commercial or merchant bank shall invest in the Fund, 10 per cent of its loans and advances at an interest rate of one per cent above the interest rate payable on current accounts by banks. Evidently, after nearly two decades after enacting the law, Commercial Banks have not started participating despite being mandated to. This lack of participation has been wreaking havoc in the industry.

5.2.9 Conflict of Judicial Pronouncements

Conflict of judicial pronouncement is another hindrance to the efficacy of housing provision in Nigeria. For example, Section 21 and 22 of the Land Use Act outlawed any alienation without obtaining governors consent. But the law is silent as to whether equitable mortgage needs governor's consent or not since it is a mere deposit of title, not alienation. Thus, the decision of the penultimate court in *Jacobson Eng CO and*

Anorvs.UBA ltd (supra) is a clear antithesis to the court's decision in *Okuneyevs. FBN (supra)*. In the former case, the court of appeal division of Lagos in 1993 held that consent must be obtained in any transactions created upon delivery of titles, whether it is legal or equitable mortgages. Unfortunately, the same division of the court in 1996 under another panel held that deposit of a title documents in equitable mortgage does not require any consent. Unfortunately, the court did not refer the case in Jacobson to distinguish between the two. This lack of distinction has left the lower courts wandering in a dilemma as to which of the authorities is to be followed. In turn, this has created a security risk for banks. It puts them in a precarious position where advances are made before obtaining consent on securities offered by the customers.

Another instance could be seen in *Adedejivs.National Bank of Nigeria*,[39]where the court was asked to determine whose duty it was to obtain the requisite consent and accordingly determined it to be mortgagor's duty. The courts have held (applying the principles of Equity) that mortgagor would not be allowed to plead a void transaction when he/she has benefited from the same. He/she who comes to equity must come with clean hands. Unfortunately, in *Ayodire v Union Bank of Nigeria*,[40] the Supreme Court went back to its earlier decision in Ajilo, holding that a mortgagor can still turn around to benefit from his wrongful conduct. This conflict of interpretation leads to a problem of conflicting decisions by the court. These conflicting decisions post a security risk for banks. It puts them in a precarious position where advances are made before obtaining consent on securities offered by customers. The rationale for this is that where a mortgagor failed to obtain consent, he could later rely on their wrong to assert that the mortgaged deed was void.

[39](1989) INWLR (pt 96) 212, p. All.*Gen.Federation vs. Sode* (1990) INWER (pt 128) 500, *Solanke vs. Abed* &Anor (1962) ALLNLR (pt 1) 230.
[40](2007) 12 NWLR (pt 1052) 567.

5.2.10 Low Level of Awareness of Mortgage Institutions

Despite its importance to the national economy and human wellbeing, the housing sector remains underdeveloped in Nigeria. There is an extremely low level of awareness of mortgage facilities, their benefits and the services provided. Research shows that mainly civil servants and individuals in formal employment in the cities get mortgages due to the monthly contributions to the National Housing Trust Fund.[41]In contrast, civil servants based in rural areas are less likely to consider using mortgage facilities than those based in urban areas. This imbalance results froman absence of unawareness of such facilities and earning capacity of the rural populace. Furthermore**,** according to the Central Bank of Nigeria occasional papers,[42]the available data on the implementation of the National Housing Trust Fund over the years indicate that the people who take up mortgages are mostly public servants and those in formal employment. Perhaps, this is because they make monthly contributions to the National Housing Trust Fund and are thus more aware than their private sector or self-employed counterparts. This further affects the level of participation in the National Housing Fund.[43]

5.2.11 High Interest Rates Charged By Domestic Financial Institutions

The interest rate is the amount that financing institutions charge for the amount advanced. Nigeria's mortgage interest rates range between 16-24% save for the Federal Mortgage Bank, which charges less than 10%. National Housing Funds (NHF) loan also have a single-digit interest rate, which is 6% per annum with repayment spread over 15 to 25 years. Unfortunately, this has proved insufficient to satisfy the yearnings of qualified contributors under the NHF scheme. Hence, the need exists for other sources of mortgage

[41]Alabi, M., (2017), "Assessment of the Operations of Nigeria National Housing Fund",*African Journal for the Psychological Study Of Social Issues,* Vol.20 No.3, p.90.
[42]Ibid.
[43]Ibem, E. O., Opoko, A. P. and Aduwo, E. B. (2013), "The Challenges of Public Housing in a Democratic Nigeria: a case study of the Presidential Mandate Housing Scheme", *ScottishJournal of Arts, Social Sciences and Scientific Studies*, 9(1), p. 28.

funds to complement NHF.[44] High rates of interest charged by financial institutions present a major disincentive for middle and low-income earners to use mortgage financing. For instance, Nigerian banks lending rates for a mortgage in 2019 is provided hereunder below.

S/N	NAME OF BANK	MORTGAGE LOAN INTEREST RATE PRIM/MAX RATE
1	Access Bank	14.00/29.00
2	Citi Bank Nigeria	16.00/22.00
3	Coronation Merchant Bank	19.10/19.50
4	Diamond Bank	20.00/23.00
5	Ecobank Nigeria	19.00/28.0
6	FCMB	5.77/77.0
7	Fidelity Bank	19.0/36.0
8	First Bank of Nigeria	20.0/27.0
9	FSDH Merchant Bank	14.85/20.0
10	Guaranty Trust Bank	18.0/23.0
11	Heritage Bank	27.0/30.0
12	Keystone Bank Ltd	19.0/34.0
13	Providus Bank	22.0/25.0
14	Rand Merchant Bank Nig. Ltd	20.95/20.95
15	Polaris Bank	28.0/34.0
16	Stanbic IBTC Bank	17.44/28.0
17	Standard Chartered Bank	20.0/25.0
18	Sterling Bank	24.0/30.0

[44] Gabriel A. A., Paschal I. P. O., and Willy N. U., (2018), "Effect of Mortgage Finance on Housing Delivery in Nigeria: The Primary Mortgage Institution Perspective", Vol. 8, Issue 2, p. 32.

19	SunTrust	22.0/30.0
20	Union Bank	24.5/36.5
21	United Bank for Africa	24.0/29.0
22	Unity Bank	24.0/32.0
23	Wema Bank	29.0/30.0
24	Zenith Bank	17.00/26.00

Source: Nigeria Galleria, 2019

High interest rates make renting relatively more attractive than buying. This is made even worse if other competitors are providing the services in the region or the country. High interest rates have also been associated with high repayment terms of the loans to a high level. Unstable interest and inflation rates have impacted mortgage growth significantly. High interest rates are known to cause a considerable number of Non-Performing Loans (NPLs) as the borrowers become unable to make payments.[45] Some reasons for a high mortgage interest rate are connected with the high cost of funds, a shortage of mortgage finance and limited supply of loanable funds with long duration, a mortgage infrastructure deficits which heightened industry risk, and the mortgage industry's low profit level which discourages investors from injecting more capital.

Commercial banks often use commercial loans as mortgage loans granted at high interest rates and tenors of not more than two years. Commercial banks commonly misrepresent commercial loans as mortgages which tend to have higher interest rates and for which the duration is usually a maximum period of two (2) years. Where such loans are taken, servicing them becomes financially burdensome and unbearable for the borrowers. As a result of this, the preferred options of Nigerians to fund housing projects are personal savings, monthly contribution groups, returns on the sale of previous houses,

[45]Popoola, O.O. and Alamu, O.I. (2016), "Financing housing services delivery and its challenges in Nigeria", *Journal of Economics and Sustainable Development*, 7(4), p.128.

and government subsidies on public sector housing. Housing finance is mostly out of reach of the middle-income earners becausehigh interest rates leading to high prices in the property market often scare away such income earners.[46]

5.2.12 Loss of Focus and Low Level of Capitalization of PMBs

Following the promulgation of the Mortgage Institutions Act[47]that paved a way for creating Primary Mortgage Institutions, the Federal Mortgage Bank of Nigeria licensed 195 Primary Institutions between 1991 and 1994 to alleviate housing deficit by providing finance for players in the market. The number of institutions rose to 249 by the end of 1996. Unfortunately, these institutions were unable to carry out their primary objective of providing fund for housing development in Nigeria. The loss of primary mortgage institutions has made them divert their strength to non-core activities. They now source funds for other purposes other than mortgage financing.[48] This is a major departure from their primary mortgage financing role and perhaps poorly positioned them to play a significant role in housing finance while their volatile, costly and short-term deposit base is not well suited to support long-term lending. These are perhaps among the factors that led to the failure of many PMIs. In 2009, only 98 Primary Mortgage Banks remained in operation in the economy with 60% and 10% in Lagos and Abuja respectively, while others were scattered over the remaining states. Ten years later, only 34 institutions remained in operation throughout the country with 18 in Lagos, the commercial capital, seven in Abuja, two in AkwaIbom and only One in Oyos, Delta, Ogun, Osun, Jigawa, Kebbi, and Abia States.

The undercapitalization of the PMBs is another constraining factor in providing long-term funding for housing development in Nigeria. The Primary Mortgage Institutions' capital is inadequate to finance housing on the scale the economy requires.

[46]Ibid, p. 32.
[47] Cap.M19, LFN, 2004.
[48]Awka, op. cit.

Most of the Institutions have been unable to grant loans exceeding three Million Naira to individuals, and generally, they could not cope with the volume of loan demand.[49] Thus, there is no doubt that a more substantial capital base would better position them for greater efficiency in their operations.[50]

There is also an inadequate network of Primary Mortgage Institutions as most are located in the cities such as Lagos and Abuja (as 74% of the institutions are in these two cities).[51] This maldistributionmakes the PMIs disbursements of loans from National housing Fund challenging. This is exacerbated by the fact that the PMBs act as the sole intermediaries between the Federal Mortgage Bank and mortgagors under the NHF guidelines.

5.2.13 Dearth of Long Term Commercial Mortgage Facilities

Access to long-term funds is a major impediment to the growth of mortgage finance in Nigeria. A survey of financial institutions that the Central Bank of Nigeria carried out in 2012 overwhelmingly showed that this was a more significant obstacle to growth in the mortgage market than foreclosure, housing supply and title registration. Without access to long-term funds, lenders are either unwilling or unable to further extend maturity mismatches on their balance sheets, despite being allowed to do so by the regulatory framework. The lack of access to long-term funds also prevents lenders from making the necessary investments in staff and systems to establish large-scale mortgage lending operations.[52] Most o sources of funds available for lending are short-term deposits with less than 365-day tenures. In the domestic financial system, an estimated 90% of deposits

[49]Ojo, Ibid, p.28.
[50] Ibid.
[51]www.cbn.govs.ng/supervision/inst-PMI.asp Accessed on 25 April, 2019.
[52] World Bank, op. cit., p. 33.

are short-term, thus constraining any serious[53] attempt at financing property acquisition, which often requires long-term financing.

5.2.14 Limited Sources of Fund Supply

One of the major problems for housing development and improvement is the limited supply of loanable funds. The PMBs and other financial institutions hold a meagre1.0% of institutional savings in the system. Furthermore, the gap between household incomes and housing costs is so broad that meeting financing/repayment obligations of borrowers is often uncertain. Nigeria's per capita income is estimated at US$2,300, and the monthly minimum wage is ₦18, 000 (US$114), both of which limit mortgage affordability. Also, the primary source of funds for the NHF is the 2.5% monthly contribution from the basic salaries of contributory members, which is grossly inadequate to reduce the housing deficit meaningfully. Furthermore, the authorized capital of the FMBN, which currently stands at N5billion, is considered low and the institution grossly undercapitalized to address the country's housing deficit adequately. Thus, stakeholders have called for the diversification of the sources of funds for housing development and the recapitalization of the Bank to meet the current challenges.[54]

5.2.15 Lack of Skilled Personnel

The shortage of qualified and technically skilled personnel in the industry is a challenge that has led to huge patronage and reliance on quacks for various aspects of the mortgage transactions value chain.[55] Pure commercial and merchant bankers led the pioneers of PMIs with the management staff drawn from among fresh graduates, underemployed graduates under National Directorate of Employment (NDE). According to Ayodele,

[53] Kama, op. cit., p. 44.
[54] Ibid.
[55] Kama, op. cit, p. 46.

PMIs were probably inexperienced with both human and material resources required in mortgage operations during the early development stage.[56]

5.2.16 Macroeconomic Environment

The high inflation rate negatively affected the macroeconomics environment and, as a result, does not encourage contribution to the fund because individuals are struggling to keep up with high prices in the economy.[57] High persistence makes nominal interest rates high, and thus, the real cost of credit/capital is very high, and homes are not affordable, and the effective demand for mortgage finance will be low.[58]

5.2.17 Lack of Capacity by Mortgage Institutions and Mortgagors

There is firm evidence that the PMBs do not have sufficient funds to finance or support home ownership in Nigeria. As a result, property sales in Nigeria[59] are usually on a "cash-and-carry" basis. Other reasons that have been adduced are the relatively low income-earning capacity, which constrains both savings and the ability to meet the loan re-payment terms and conditions required to secure a mortgage. For instance, anecdotal research evidence indicated that in the Federal Capital Territoryannual rental payments for 2-bedroom residential accommodation rangedfrom N400,000-N500,000 in the suburbs and N1million - N1.5million in the City. This makes it almost impossible for the average worker to be considered for a commercial bank mortgage loan. Such a client is more concerned about meeting and providing for the other basic needs of life.[60]

5.2.18 Low level of Savings

The low level of savings in Primary Mortgage Institutions and National Housing Fund are among the factors hindering the development of the Nigerian mortgage industry. The

[56]Olubunmi, A. (2009). The Role of Secondary Market in Expanding the availability of funds for Mortgage Finance in Nigeria. A masters of science thesis No. 483 submitted to the University of Stockholm, Sweden. p. 28.
[57]Awka, op. cit., p.2096.
[58]Olubunmi, op. cit., p.28.
[59]Kama, op. cit., p.42.
[60]Ibid, p. 43.

mortgage institutions operate through financial intermediation. That is to say, Primary Mortgage Institutions mobilize funds in the form of demand deposits, savings and other forms of time deposits. These deposits constitute a large proportion of funds used for financing housing loans investment. Therefore, the availability of loanable funds depends on the amount of savings mobilized.

Furthermore, there is also a low level of participation in the National Housing Fund's voluntary savings program. This low level is connected to several factors. First is the absolute rate of poverty in the country, which reaches 70%. Second, is the unemployment rate and third is the poor performances of the Primary Mortgage Institutions in the country, more significantly, before Central Bank of Nigeria assumed the regulatory function of the institutions. This is why, as some scholars have argued, the low income and poor savings culture in PMIs, can be blamed for the low level of participation to a large extent.[61]

5.2.19 Non-Payment of Equity Contributions

The National Housing Fund Act stipulated that every Nigerian worker earning three thousand Naira and above should contribute 2.5% of his monthly income to the Fund. Furthermore, the Act also provided that the commercial and merchants banks shall invest 10% of its loans and advances in the National Housing Fund. Commercial banks and insurance companies are also expected to contribute a certain percentage of their life funds to the NHF. The main challenge that the National Housing Fund faces is non-compliance with the law by both eligible Nigerians and the Financial Institutions. Thus, one challenge that the scheme faces is the willingness of those expected to contribute to the scheme to do so.[62]Because no government worker does not earn N3,000 per annum,every Nigerian worker should contribute to the National Housing Fund.

[61]Olubunmi, op. cit., p. 29.
[62]Akintunde, J. (2018). Available at https://www.financialnigeria.com/all-workers-should-be-contributors-to-the-nhf-interview-93.html accessed on 24th April, 2019.

Unfortunately, only 4.6 million of the working population of about 60 million workers contribute.

Figures from the Central Bank of Nigeria showed that loans and advances by Nigerian banks amounted to N6.7 trillion for the six years from 2011 to 2016. Because 10% of their loans and advances should have been sent to the National Housing Fund, about 6.7 trillion should have been invested in the NHF by the banks over the period. In 2016, the total loans and advances by the commercial and merchant banks was N15 Trillion.Atmandated 10% rate, the sum of N1.5 trillion should have been sent to the National Housing Fund by March 2017.[63]These sums were not sent. This non-compliance by the financial sector is hampering efforts to address the housing deficit in the country. Had these institutions and individuals complied with the Act, funds would have been available for affordable mortgage financing.

5.2.20 Low Level of FMBN Performance

The low level of performance of the FMBN arises from certain problems long-term institutional problems. Among others, these problems include administrative and operation bottlenecks and low capitalization and administrative and operation bottlenecks in the Federal Mortgage Bank of Nigeria. Furthermore, according to the Arch. Ahmed Musa Dangiwa, when he came to the FMBN board in 2017, he was confronted by the absence of any audited accounts for five years, a lack of proper automation of the banking operation, and abandoned uncompleted projects with huge non-performing portfolios. All these are evidence of the failure of some past FMBN administrations to manage the Bank properly. Problems also arose from the administrative intricacies of running state branch offices, most of which serve as additional application collection centres. This brought

[63] Ibid.

about substantial running costs. Political inference and manipulation in the staffing and running of the bank also impaired the operation of the Bank.[64]

One of the most critical hurdles to developingthe Federal Mortgage Bank of Nigeria has been undercapitalization. The bank is grossly undercapitalized with just N5 billion of which only N25 Million is paid up.[65] This problem arises from low initial capital relative to its expected mortgage responsibilities, and its inability to mobilize enough savings from institutions and private individuals. The primary sources of funds are loans from the Federal Government and the Central Bank of Nigeria (CBN). Between 1979 and 1983, such loans totalled N 220.8 million from the Federal Government and N 25.7 million from CBN. In addition to these, funds from savings deposits rose from N 21.4 million in 1979 to N 113.2 million in 1984.[66]

However, the funds available from all these sources are grossly inadequate. This results in a low level of loan disbursements. Between 1979 and 1986, the total amount of loan applications was N 3,259.1 billion, while the total amount available for loans in the same period was N 1,178.5 billion. Althoughthe capital base of the bank was increased to N 500 billion in 1998, these funds were still inadequate to meet the mortgage needs of the Nigeria populace. Other issues were unrealistic and fluctuating interest rates. The lending rate stood at 6-11% in 1981.[67]Over the years, this interest rate became unrealistic at up to 6% for NHF contributors and 10% for real estate developers. Although reductions were made to increase access to mortgage loans, a low interest rate does not allow the FMBN to compete favourably with other commercial and merchant banks to attract funds from the capital market.[68]

[64]Kabir, op. cit, p.1.
[65]Akintunde, op. cit.
[66]Kabir, op. cit.
[67] Ibid.
[68] Ibid.

5.2.21 High Cost of Production

Another constraint to housing in Nigeria is the cost of the units once built, which are often too expensive for most households, even when they have some credit accssability.[69]High costs handicap housing construction in Nigeria. The lowest price in Kano fora 2 Bedroom Semi-Detached Block of 6 Flats is NGN 11,948,082.33. The larger the house, the higher the price.Table 1.3 below show the prices of houses in an Amana City estate constructed the by Kano State Government.

Summary of Housing Pricesin Amana City Kano

AMANA CITY, KANO, NIGERIA			
S/N	Types of Houses	Plot Size in Meter (M)	Cost of House (NGN)
1	5 Bedroom Detached Duplex	30.00×45.00	34,167,522.94
2	4 Bedroom Detached Duplex	30.00×45.00	32,982,325.90
3	3 Bedroom Detached Bungalow with Pergola	22.50 × 22.50	18,564,940.85
4	3 Bedroom Detached Bungalow with Carport	22.50 × 22.50	18,717,894.74
5	3 Bedroom Detached Bungalow	22.50 × 22.50	15,688,892.24
6	2 Bedroom Detached Bungalow	15.00 × 22.50	13,688,793.06
7	3 Bedroom Semi- Detached Block of 6 Flats	30.00 × 22.50	12,151,850.50
8	2 Bedroom Semi- Detached Block of 6 Flats	30.00 × 22.50	11,948,082.33

[69] CAHF (centre for Affordable Housing Finance in Africa, 2018), Housing Finance in Africa: A review of Africa's housing finance markets. South Africa: Centre for Affordable Housing Finance in Africa. Available at www.housingfinanceafrica.org accessed on 22nd August, 2019

9	4 Bedroom Terrace House	10.00 × 45.00	33,186,525.27
10	3 Bedroom Terrace House	10.00 × 45.00	31,614,667.31

Source: Kano State Housing Commission (Culled from Muhammad *et al.*)[70]

The table above shows that 5 Bedroom Detached Duplex costs NGN 34,167,522.94 while a small house of two bedrooms cost NGN 11,948,082.33, albeit, this is average compare with other parts of the country where two bedrooms house may cost NGN 18,149,000 (USD 50,000). The cost is high compared to South Africa, where a two-bedroom house costs NGN 9,437,480 (USD 26,000).[71]

A factor contributing to the gross inadequacy of these desirable houses is the use of imported modern building materials that require costly, highly skilled labourand costs associated with poor roads and sewerage systems. This contributes to the high cost of housing supply and depletion of the country's foreign reserves.[72] For instance, about 75% of dwellings in Nigeria´s urban areas are built of concrete. In Nigeria, cement prices are about 30-40% higher than in neighbouring countries and world market prices. To better illustrate how these factors make the cost of housing production high, Table 1.4 presents a Summary of Work/Materials used on 5 Bedroom Detached Duplex at the previously discussed Amana City of Kano state.

Summary of Work/Materials Used on 5 Bedroom Detached Duplex at Amana City

S/N	Work/Materials	Cost of Materials
1	Substructure	3,841,710.00
2	Frames	635,760.00
3	Staircase	842,500.00

[70]Muhammad, M., and Bichi, A.D., (2014).Constraints and Challenges of Housing Provision in Kano City, Nigeria.in International Journal of Advancements in Research and Technology. Vol. (6) ISSN 2278-7763 op. cit.,p.15.
[71]Delmendo, C. L., (2019) Nigeria's Housing Market Stabilizing, Amidst Improving Economic Conditions. Available at https://www.globalpropertyguide.com/Africa/Nigeria/Price-History
[72] Muhammad, op. cit., p.12.

4	Upper Floors	2,019,700.00
5	Roof	2,917,380.00
6	Internal & External Walls	2,160,400.00
7	Windows	1,514,100.00
8	Doors	1,284,200.0
9	Fitting & Fixtures	900,000.00
10	Wall Finishes	3,119,400.00
11	Ceiling Finishes	986,000
12	Floor Finishes	2,083,200.00
13	Electrical Services	1,657,907.30
14	Plumbing & Mechanical Services	1,819,710.00
Total		**25,781,967.3**

Source: Kano State Housing Commission

The table above shows the high costs of building materials and works, which, in turn, result in high prices in the property market and hinders it is affordability for low-income Nigerians, who struggle with the 30,000 minimum wage. The price of the materials used is exorbitantly high, defeating the good intention of improving access to decent housing accommodations for the teeming urban population.[73]With the low earning capacity of the majority of the country's citizens, the building materials are rendered out of their reach. Unfortunately, alternative building materials such as burnt bricks and roof/ceiling tiles that are locally produced in the country, have found no favour from average Nigerians and have not been popularized. Simultaneously, their production costs are not competitive enough because of the problems associated with technology and economies of scale.

[73] Muhammad, op. cit., p. 13.

5.2.22Onlya Few Nigerians are able to Access Mortgage Finance

In Nigeria, financial inclusion declined between 2014 and 2016 as the adult population's growth over the period outpaced growth in the banked population. The number of financially excluded adults is rising, limiting access to housing finance in the country. About 41.6 million of the adult population are financially excluded.[74] For instance, only about 5% of the 13.7 million housing units in Nigeria are financed with a mortgage, the mortgage debt to GDP ratio is only about 1%, and mortgage loans account is less than 1% of commercial banks´ total assets (specialist mortgage banks accounted for about 57% share of the market, according to the Central Bank of Nigeria).[75]The government set financial inclusion as a key pillar of its Financial System Strategy (FSS) 2020, aimingto reduce the number of financially excluded Nigerians from 46% in 2010 to 20% in 2020; however, attaining this goal has huge challenges.

5.2.23 High Level of Poverty

More than half of Nigerians are living below the poverty line (i.e., U$1 per day). The unemployment rate increased from 10.4% in 2016 to 18.8% in 2017. Coupled with this is that the Minimum Wage remains at NGN 30,000 monthly, which remain constantly with even a high and increasing inflation.[76] This haslimited housing affordability, especially to low-income earners.

5.2.24 Inadequate Housing Supply

Both the government and private sectors do not provide adequate and sufficient housing units in the country, especially for the masses that need it. The formal housing production is at 100 units per annum which is highly inadequate because at least 1,000, 000 units are annually required to fill the housing deficit of 17-22 million by 2033 (if the population

[74] CAHF, op. cit., pp. 214-15.
[75]Delmendo, C. L., (2019) Nigeria's Housing Market Stabilizing, Amidst Improving Economic Conditions. Available at https://www.globalpropertyguide.com/Africa/Nigeria/Price-History
[76] CAHF, op. cit., p. 214.

rate growth of 3.5% continues).[77] It is estimated that it will cost at least U$364 billion to curb the housing difficulty, and the number is expected to keep growing.[78]

5.2.25 Security Instability

The socio-economic development and growth of any nation are possible only in a stable and peaceful atmosphere. These enable the realizations of an individual's fullest potentialsand reward industry as progress decays in a chaos and instability environs. The recent insecurity in the country has negatively affected the Nigerian property markets, which has impeded the development of the housing market. It also created challenges to the governments housing targets as it created more housing deficit by displacing many people from their homes. The Boko Haram crisis in the northeast and arm bandits cum kidnappers in the northwest and other parts of the country have displaced more than hundred thousand people from their environs and makes them wandering, looking for shelter across the country. Apart from increasing the housing deficit, insecurity has also prevented building more houses in the affected areas as the building materials cannot be taken to those sites.

5.2.26 Lack of Policy Implementation

A policy is a guideline that the government providesto meet the people's housing needs through a set of appropriate strategies, which involves fiscal, institutional, legal and regulatory framework.[79] Nigeria has had many housing development policies, but all have failed to meet their targets before the stipulated deadline. The First National Development Plan (1962-1968) accorded low priority to housing, focusing on accommodating government staff in the regional capitals and Lagos. A low proportion/percentage achievement was recorded. In the Second National Development

[77] Ibid.
[78] Ibid.
[79]Waziri, A.G., Roosli, R., (2013), "Housing Policies and Programmes in Nigeria: A review of the Concept and Implementation", *Business Management Dynamics,* Vol. 3 (2), pp. 60-68, p. 60.

Plan (1970-1974), the target was to construct 60,000 housing units (15,000 units in Lagos and 400 units in each of the remaining capitals). There was a marginal improvement at the end of that period. [80]

Although the efforts were intensified in the Third National Development Plan (1975-1984) to improve the condition of the housing with the injection of the sum of N2.5 billion to the housing sector and the Federal Ministry of Housing, Urban Development, and Environment was put to existence. Nigeria Building Society was converted to the Federal Mortgage Bank of Nigeria (FMBN) with an enlarged capital base from N21 million to N150 million to provide loans to individuals, state housing corporations, and private estate development firms. Even with all this intensification, the target production of 202,000 units (50,000 units for Lagos and 8,000 units for each of the, then, 19 states) only 47,500 were constructed across the nineteen states of the federation including Abuja, the Federal Capital Territory. Table 1.5 shows details of the housing delivered between 1980 and 1983, ranging from 1-bedroom to 3-bed room flats.[81]

Housing Units in Each State during the Third National Development Plan

S/N	STATES	HOUSING UNITS DELIVERED
1	FCT	1,908
2	Anambra	2,400
3	Bauchi	2,816
4	Bendel	1,422
5	Benue	1,980
6	Borno	2,808

[80]Ademiluyi, I.A., (2010), "Public Housing Delivery Strategies in Nigeria: A Historical Perspective of Policies and Progress", *Journal of Sustainable Development in Africa*, Vol. 12, (6) Clarion University of Pennsylvania, Clarion, Pennylvania, p. 157.
[81]Waziri, op. cit., p. 63.

7	Cross River	2,258
8	Gongola	3,038
9	Imo	2,758
10	Kaduna	2,716
11	Kano	1,590
12	Kwara	2,462
13	Lagos	2,634
14	Niger	2,692
15	Ogun	2,160
16	Ondo	2,930
17	Oyo	2,128
18	Plateu	2,546
19	Rivers	1,580
20	Sokoto	2,314
Total		**47,500**

Source: (Culled from Waziri)[82]

More recently, the implementation of housing policy of 2011 was a nightmare. Furthermore, The FSS 2020, which included many plans for the country, including reducing the deficit, did not record much success.[83]What is apparent is that the number of housing deficit is continuously increasing. Consequently, the lack of policy implementation remains a considerable challenge to the Nigerian Housing Market. Other hurdles to the housing sector includenon-remittance of NHF Fund by employers, repayments, the structure of bank deposit liability, a dearth of construction finance, and affordability that inhibit access to mortgage finance.

[82] Ibid.
[83] Government is yet to give any official assessment on the policy, but evidently, the policy did not record much success as its impact is yet to be seen in the society.

5.2.27 Corruption

Corruption is another factor militating against housing delivery in Nigeria. For instance, even as a contributor, securing a housing loan from the NHF or FMBN is difficult as sometimes officials in these agencies insist on collecting bribes before attending to the applicants. The applications of those who do not comply with such corrupt practices are not given the necessary attention. Sometimes, even those fortunate to secure a loan, face a serious challenge in securing genuine land title documents.[84]Syndicates are operating in the Ministry of Land and Housing that specialize in extorting prospective land title seekers. Getting a genuine Certificate of Occupancy and other land title documents is very challenging. If a prospective land title seeker is not ready to grease the palms of unscrupulous ministry officials, he or she may never get his or her land title documents processed. Sometimes, people are given fake land titles, even after paying all the official and unofficial levies. The land owners may not know this until they start developing the property, and officials of the Ministry of Land come around for inspection. By the time they request evidence of official approval for the building under construction and provide land deeds, they may be informed that the documents in their possession are fake land papers.[85]

The corruption chain is equally manifest in building projects. Most times, artisans employed to work on such projects are skilled in milking property owners. They inflate the prices of building materials and even end up buying inferior ones. Cases have been reported of bricklayers stealing bags of cement from project sites, especially when the property owners did not hire somebody to supervise the workers.[86] Carpenters on building sites also engage in their own sharp practices. They over-quote and under-supply building

[84]Kuma, S., (2015), "Assessing the challenges of access to housing finance in the north central states of Nigeria", *Ethiopian Journal of Environmental Studies & Management*, 8(2): p.161.
[85]Oyedeji, J. O. and Sodiya, A. K., (2015), "Corruption in Real Property Market in Nigeria: Factors and Solutions", *Journal of Management and Corporate Governance,* Vol.7, No.2, p.46.
[86]Daniel, M.M., Omogor, C., and Samuel, D. W., (2016), "Formal Housing Sector Reform in Neoliberal Nigeria", *International Journal of Built Environment and Sustainability,* 3(3), p.156.

materials. If they do not under-supply, they will buy woods and planks that are not insect resistant. As such, no sooner the house is built than the termites will eat off the roofing planks and woods, thereby necessitating substantive repairs. Many of the welders, the electricians, the plumbers and other artisans engaged in the building industry are merchants of corruption. They inflate the cost of materials and still end up buying substandard products. Many building contractors are masters of this sordid game. There is also a nexus between corruption and the flurry of building collapse incidents being experienced all around this country. Building houses and other edifices with substandard products is a disaster in waiting. Bribing ministry officials to obtain wrong approvals also contributes in no small measure to the spate of building collapses. Unless and until corruption is rooted out of the land and housing sector, there may not be an end to the heartrending incidents of building collapse.[87]

5.2.28 Psychological Factors

Some Nigerians feared being labelled as borrowers or debtors. With this mindset, they feel very uncomfortable approaching a mortgage or financial institution to borrow money to build a house as they think that instead of increasing their reputation as "house owners", they would only be recognized as borrowers. Culturally and psychologically, they believe that this state affair would reduce their estimation in the eyes of their group mates. To avoid such a stigma, they prefer to build their houses without relying on any form of financing from mortgage institutions.

[87] Jide O., (2019), "Corruption in Nigeria's Land and Housing sector",, *@https://africahousingnews.com/2019/03/27/corruption-in-nigerias-land-and-housing-sector/,* accessed on 20th February, 2020. 9:34.

CHAPTER SIX
CONCLUSION

6.1 INTRODUCTION

The chapter highlights some of the major findings in line with the objectives set for this research. The chapter provides recommendations based on the challenges identified, with the view to enhancing mortgage financing in Nigeria. The chapter also provides readers with a concise summary of the work and ends with concluding remarks.

6.2 SUMMARY

The importance of housing arises from its being a yardstick and touchstone of measuring standard of living. Houses were cheap in the past, though they were impermanent because most were in rural areas where the cost of land, building materials and labour were cheap and affordable. In recent times, the substantial financial requirement for housing production is often beyond the capacity of medium or low-income groups. Consequently, most government and corporate bodies have established banks and financial institutions to finance housing in the country.

This research has examined the legal and institutional framework for mortgage financing in Nigeria, along with the challenges that have bedevilled effective housing delivery in the country. This research has explained that to satisfy the human desire for housing, governments of various jurisdictions have made laudable and necessary arrangements to guarantee the right to adequate housing for their citizens. For instance, Article 25 of the Universal Declaration of Human Right, adopted and proclaimed by the UN General Assembly and section 16(1)(d) of the 1999 Constitution of the Republic of Nigeria has enjoined the government "to provide suitable and adequate shelter for all citizens".

In Nigeria, the incorporation of the Nigerian Building Society (NBS) in 1956 to mobilize saving from the public for housing loans was among the first effort of the government to ensure the adequacy of housing. The NBS was later transformed into the Federal Mortgage Bank of Nigeria (FMBN) in 1977. Furthermore, the emergence of the national housing policy of 1991 created a two-tiered housing finance structure with Primary Mortgage Institutions (PMIs) on one side and Federal Mortgage Bank on the other. The Federal Mortgage Bank of Nigeria is the only institution at the federal level charged with the responsibility of encouraging the flow of funds from various sources to the housing fund division. Furthermore, the FMBN is charged with the responsibility for the arrangement of the National Housing Fund.

Moreover, the FMBN has regulatory and inspectorate division charged with monitoring and regulating housing finance sector operations and corporate service division to provide administrative, accounting and management information service to the core divisions. Thus, with the emergence of the National Housing Policy of 1991, the FMBN ceased operation as a retail housing finance institution. This role is now to be performed by the Primary Mortgage Institutions. The PMIs access the funds from the National Housing Fund and disburse it to the eligible personnel for housing provision in the country,

This research gave a conceptual clarification of essential and germane concepts such as housing, housing policy, collateral, mortgage finance, mortgage institutions, primary mortgage market, secondary mortgage market, and property lien. The study revealed that housing refers to the process of providing a comfortable, affordable and convenient building than one lives in.

To finance housing, government introduces housing policies. A housing policy containing government plans on the way and manner in which identified housing

problems are to be solved. It addresses the role of government that may vary from the planning and control of all aspects of housing production – land, investment, construction and occupancy – to intervention only at certain levels or when solutions are needed to specific problems involving such matters as land use plans and controls, credit and financial aids, subsidies to low-income groups, rent control, and slum clearance.

To secure a mortgage loan, collateral must be provided. Collateral is property that is given as security in mortgage transactions. Collateral makes a mortgagee feel secured because he can always fall back on the property in case of default by the mortgagor. Notably, one of the most essential means of satisfying housing desire is mortgage financing. Mortgage finance is a long-term loan at market interest rates by formal sector financial institutions, such as loans that mortgage institutions give to purchase, build or renovate houses. A mortgage institution is a body established to provide mortgage finance or engage in mortgage financial transaction to the public.

Basically, there are two types of mortgages; legal and equitable mortgage. A legal mortgage is any mortgage transaction involving the execution of a deed under seal. In contrast, an equitable mortgage does not fit the criteria of a legal mortgage but is considered mortgage under equity (in the interests of justice) because money was lent and security was promised. A mortgage can be financed in many ways. These ways include owner or self-finance and seller finance. Third-parties such as families or friends, finance companies, insurance companies, bank or other depository agencies, can all finance housing provision.

The research analyzed the legal framework that governs the Nigerian mortgage industry and discussed the mortgage market and its actors. Various laws govern the mortgage market in Nigeria. Property and Conveyancing Law 1959, Conveyancing Act 1882, Land Use Act, 1978 Mortgage Institution Act, Bank and Other Financial Institution

Act, Stamp Duties Act, Registration of Title Act, National Housing Fund Act, Federal Mortgage Bank Act, Investment and Security Act, Company and Allied Matters Act, are all examples of laws that govern the Nigerian Mortgage market. However, despite all these laws, there is no uniform law that governs the Mortgage Creation in the Country. The Land Use Act is the only enactment operated throughout the country. However, it does not contain provisions on the mode of creating and financing a mortgage. Consequently, the creation of a mortgage depends on the state in which it is situated. For instance, Property and Conveyancing Law operates in Western Nigerian States such as Oyo and Ondo, Conveyancing Act States such as Kano and Gombe and more recently, Lagos State enacted Lagos State Mortgage and Property Law, 2010 and in 2017, Kaduna State enacted Mortgage and Foreclosure Law, 2017.

Various acts establish mortgage institutions. For instance, the Federal Mortgage Bank Act established the Federal Mortgage Bank, assigning it the responsibility of promoting the mortgage industry. It has many functions which include provisions of the long-term credit facilities to mortgage institutions, encourage the emergence and promote the growth of viable primary and secondary institutions to service the need of housing delivery in all parts of Nigeria. It is also the custodian of the National Housing Fund, which the National Housing Fund Act established. However, this bank is undercapitalized, which has been among the problems hindering its development.

Additionally, the Mortgage Institutions Act established and governs the activities of primary mortgage banks such as Aso Savings Banks and Delta Mortgage Finance. The functions of the PMBs include mortgage financing, acceptance of saving and long time-term deposits. Others are the acceptance of mortgage-focused demand deposits, drawing from mortgage fund, e.g., National Housing Fund facility) for on-lending. The involvement of banks in mortgage lending brought the Bank and Other Financial

institution Act to form part of the legal structure of the mortgage industry. The Bank and Other Financial Institutions Act did not make provisions for the ways of creating mortgages in Nigeria. However, it set out hash conditions on the grant of advances, loans and credit facilities in the banking sector. Even though PMIs have been in operation for many years, they have performed at a very low level and are restrained by many challenges. For instance, there are inadequately networked. In 2019 there are only 35 PMBs in the country, with most of them operating in Lagos and Abuja. Of these 35 only two operate in Northern Nigeria, i.e., Jigawa Savings and Loans based in Gumel of Jigawastate and Kebbi State Homes in BirninKebbi.

The Nigerian mortgage market is three-tiered, and each tier involves some institutional actors that traded on it. For instance, Primary Mortgage Banks and Commercial Banks are all actors in the Primary Mortgage Market. The primary mortgage market (PMM) is a market where all the new mortgage loans are originated. Also, securities or goods are created in this market. On its platform, the mortgage originators and borrowers come together to set the mortgage deals and negotiate the terms and condition regarding that deal.

The secondary mortgage markets (SMM) is a platform where mortgage originators can sell their receivable from the loans before maturity, in return for capital. The secondary market is the mortgage market segment where existing mortgages are resold, not where they are originated. The secondary market exists when the primary lenders and permanent investors buy and sell existing mortgage from each other. One of the most important actors on this platform is the Nigerian Mortgage Refinance Company. This market is underdeveloped and involves only a few actors. Capital Market is the third mortgage market in the Nigerian Mortgage Industry. It is an essential instrument of a long-term loan. The Capital market refers to a market where financial institution

mobilizes the savings of the people and lends them for a long-term period for raising new capital in an economy. Additionally, real estate developers are also traders on this platform.

Despite all the mechanisms to facilitate the housing finance or housing delivery in Nigeria, the mortgage industry remains underdeveloped, and a lack of adequate housing remains the acutest challenges to many Nigerians. This research has explained that this may be connected with a low level of awareness of mortgage infrastructure, legal and regulatory challenges such as difficulty in perfecting, obtaining and transferring title documents, high interest rates charged by financial institutions in Nigeria, loss of focus of PMIs, the difficulty of obtaining, perfecting and transferring title document, a dearth of long-term commercial mortgage facilities, nonpayment of equity contributions, and an inadequate branch network of PMBs are all problems bedevilling mortgage financing in this country.

6.3 FINDINGS

Given all that has been discussed, particularly the challenges identified in the preceding chapters, the thesis makes the following findings:

1.Difficulty in obtaining, perfecting and registration of title to property

There is a long delay and difficulty in obtaining, perfecting and registration of title to a property. In Nigeria cities such as Lagos, the registration process can last average for 105 days, taking an average of 12 procedures and costing about 11% of property value. This is cumbersome when compared to what is obtainable in other jurisdictions. For example, it takes only 6 procedures and costs 6.1% of a property's value and an average of 47 days to register a property in Ghana. The factors responsible for delay include bottlenecks (arising from the delay between the time of submission of application and when it is approved) and corruption that appears in the form of private financial charges imposed by

the staff of land registries on people trying to perfect their title documents when applying for Governor's consent. These bottlenecks limit the possibility of using the property as collateral for a mortgage.Section 21 and 22 of the Land Use Act make any alienation of land or transfer of the same by way of mortgage unlawful without obtaining the Governor's consent first. Under Section 26 of the Act, any mortgage transaction entered into without obtaining the consent of the Governor is null and void, with the consequence that the Governor may invoke his powers under Sections 28 (2) (a) and (3) (d) of the Act to revoke the mortgagor's certificate or right of occupancy. In practice, the cumbersome and challenging requirement has adversely affected potential mortgage transactions in Nigeria.

Furthermore, although the legal language, particularly in the drafting of laws, should be unambiguous, this research found an ambiguity in the wordings of some provisions of the Land Use Act, which led scholars to a heated debate on their meaning. For instance, the definition of a holder was construed to exclude the mortgagee. At the same time, some scholars, for example, Professor Y. Aboki interpreted it to include mortgagee as long as Governor's consent was obtained before the mortgage transaction. This has created a considerable problem as it threatens the nature of security of the title held by the mortgagee. This is because, in case of compulsory acquisition, section 29 of the Land Use Act provided that only a holder of the C of O is entitled to compensation. Moreover, there is no uniform law that governs mortgage financing in the country. In other words, the Land Use Act is the only enactment that is operated throughout the country. Unfortunately, it does not contain provisions on the mode of creation and financing a mortgage.

2. Non-Compliance with Statutory Provisions

Section 9 of the National Housing Fund Act enjoined employers to deduct a certain percentage of the monthly salary of their employees and remit same to the National Housing Fund. This research has found a lack of compliance with these statutory provisions as only 5.1 million of the country's 60 million workers remit their *contributions to the Fund. Additionally, Sections 5 of the NHF Act mandated commercial banks and insurance companies to invest in property development. However, they only commit a relatively small part of their funds to property development. They are also selective in their security, and their lending terms are so prohibitive that only a small percentage can benefit. This non-compliance with the provisions of the Act creates scarcity for development funds, thereby defeating an effort to address the country's housing deficit. Furthermore, several policieson housing finance have been put in place by the governments at all levels to increase and improve the overall quantity and quality of housing in Nigeria. Unfortunately, these policies have not been fully implemented. For instance, Financial System Strategy 2020 had many policies regarding the provision of adequate housing in Nigeria; however, most of these policies were not successfully implemented.Section 21 and 22 of the Land Use Act make any alienation of land or transfer of the same by way of mortgage unlawful without obtaining the Governor's consent first. Under Section 26 of the Act, any mortgage transaction entered into without obtaining the consent of the Governor is null and void, with the consequence that the Governor may invoke his powers under Sections 28 (2) (a) and (3) (d) of the Act to revoke the mortgagor's certificate or right of occupancy. In practice, the cumbersome and challenging requirement has adversely affected potential mortgage transactions in Nigeria.

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3. Non Existence of Laws Regulating Securitization

Laws regulating concepts such as securitization are non-existent. The Nigerian stock exchange only supports the equities market. Even though Section 191, 192, and 193 of the Companies and Allied Matters Act (CAMA) provided that debentures are transferable, debenture holders in Nigeria are yet to freely transfer their interests as security on the floor of the stock exchange due to the absence of laws regulating securitization of this type of security. The market is not yet matured to reach the trading platform of these securities despite their importance.

4. Undue delay in Mortgage Proceedings

Mortgage parties usually suffer untold hardships during proceedings arising from undue delay. For example, it sometimes takes mortgagees 10 or even 15 years of litigations to get an order of foreclosure from courts. It took the court eight years in the case of *Federal*

Mortgage Bank of Nigeria vs.Olloh (supra) to determine which court had jurisdiction to entertain the matter. Furthermore, a conflict of judicial interpretation is another reason that creates such delays during the proceedings. For example, while it is clear that Section 21 and 22 of the Land Use Act outlawed any alienation without obtaining Governor's consent, the courts, particularly in *Jacobson Eng CO and Anorvs. UBA ltd (supra)* and *Okuneyevs. FBN (supra)* have not been unanimous as to whether an equitable mortgage needs a Governor's consent. In the former case, the court of appeals division of Lagos held that consent must be obtained in any transactions created upon delivery of titles, whether it is legal or equitable mortgages. Unfortunately, the same division of the court in 1996 under another panel held that deposit of a title documents in an equitable mortgage does not require any consent. This has left the lower courts wandering in a dilemma as to which of the authorities is to be followed. In turn, this has created a security risk for banks. It puts them in a precarious position where advances are made before obtaining consent on securities offered by the customers.

5. Conflicts and Inconsistencies of the Laws

Section 25 of the Insurance Act is inconsistent with section 5 of the NHF Act. Section 25 (3) (a) of the Insurance Act provides that the Insurance Company should invest a maximum of 35%from its life fund in real property development; however, section 5 of the NHF Act provided that Insurance Companies should invest a minimum of 40% of its life funds in real property development. The bone of contention is that, while the NHF Act required Insurance Companiesto invest at least 40% of its life fund in property development, the Insurance Act outlawed the Insurance companies from investing more than 35% of their life fund in real property. This has created a considerable problem asit dug a hole where the said companies can hide from contributing their quota to mortgage

finance. It is based on this that Insurance Companies have failed to make their equity contribution.

Furthermore, under the Infant Relief Law of some states in Nigeria, all contracts entered in to by an infant for the repayment of money are absolutely void. In effect, a mortgage transaction entered in to by an infant is that the infant cannot be made liable under the contract. Thus, section 7 of the Land Use Act restricted the right of a person under theage of twenty- one (21) to be granted land by the governor. This implies that 21 years is the age of majority recognized by the Land Use Act. This is inconsistent with the provisions of section 77 of the 1999 Constitution of the Federal Republic of Nigeria, which recognizes 18 years as the age of majority.

6. High Interest Rate

Commercial banks charge high interest rates on mortgage loans. Interest rates charged by banks in Nigeria range between 17% to 25%. These reflect the costs of borrowing and charges and commission levied by banks.

6.4 RECOMMENDATIONS

Sequel to the findings above the thesis makes the following recommendations with the view to enhancing mortgage financing in Nigeria:

1.Procedure for Perfecting Title

The process of obtaining, perfecting and registration of title to a property is rigorous. The procedures and days for registration should be made less rigorous and shorter so that land transaction can be conducted without much delay. The cost should also be reduced to 2% to 3% of the total value of the property. Moreover, strict enforcement of penalties for corrupt staff should be observed. Because the governor's consent is among causative agents of such delays, the National assembly should lay down the procedure for obtaining Governor's consent, such as stipulating a time frame within which application for the

consent must be processed. For example,a governor's consent must be processed within 30 days of submitting an application. Furthermore, the National Assembly should insert into the LUA the standards of practice that each trustee (i.e., the Governor) should be expected to observe in administering land for the common benefit of all Nigerians.

2. Mechanism for Enforcement of Penalties

The government should create avenues for the enforcement of sanctions provided under Section 20 of the National Housing Fund Act on any employer or institution that fail to comply with the provisions of sections 9 (a) and (b) of the Act on deduction and remittance. The provision of section 20 should be amended to include sanctions for banks that fail to make available funds to contributors who have met all the necessary conditions at retirement. All stakeholders should also be compelled to register their employees for the National Housing Fund. Furthermore, a stakeholders forum should articulate all the issues militating against the National Housing Fund to have a holistic amendment. The federal government should also invest adequately and recapitalize the FMBN atleast to the tune of 500 billion to service mortgages. This infusion would go along way to eradicate the challenges of mortgage financing in the country.

3.The need for regulation of mortgage-backed security in Nigeria

Sections 191, 192, and 193 of CAMA should be amended to provide detail framework for the regulation of mortgage-backed security in Nigeria. This framework can guide the capital market in mobilizing long-term funds for housing development through debentures stocks andthe purchase of shares in property companies. This would also enable investors to know their rights and obligations in the system.

4. The need for Accelerated Mortgage Proceedings

Laws should be enacted to regulate the time framework within which mortgage proceedings should be conducted. Notably, Kaduna State in its Mortgage and Foreclosure

Law 2017 limited foreclosure proceedings not to exceed six months. All states and federal laws should be amended to reflect such development. The time framework should not be limited to foreclosure only but should be extended to include all mortgage transactions issues. A similar innovation was introduced for pre-election matters in Nigeria. It is on record that the initiative has dramatically reduced delay in the determination of such matters. A similar result is achievable if various mortgage laws across the country are amended to provide a time frame within which mortgage-related issues must be determined before the court.

5. Legislative Drafting

To avoid inconsistencies in our laws, legal draftsmen should be cautious while drafting laws by examining all laws containing a provision related to the "would be enacted" or "would be amended law" to save the courts and the parties from conflict. Furthermore, precision, logic, non-verbosity, brevity and clarity are known to be the characteristics or the cardinal expressive features of the legal language. Therefore, laws that are centered on mortgage financing in Nigeria should be amended to reflect such characteristics. Additionally, Section 7 of the Land Use Act is in line with common law contractual age of majority of twenty-one years. However, laws have changed globally.The age of majority is 18 years in England from which Nigeria has borrowed most of her laws. Thus, Section 7 of the Act, need to be amended to align with global trends and with Sections 29 and 77 of the Constitution of the Federal Republic of Nigeria, 1999.

6. Subsidy on Interest Rate

The government should subsidizeinterest rates in mortgage loans to make them affordable in guaranteeing a long-term loan for funding mortgages, especially for the private sector. Furthermore, the banks and other financial institution Act (BOFIA) allowed the creation of the non-interest banks in Nigeria. Government through the CBN should encourage the

participation of these non-interest banks in providing housing finance. This would make a mortgage more accessible to average Nigerians. The immense contribution of these banks to housing finance could be seen in other jurisdictions like Bangladesh and the United Kingdom, which are hubs of non-interest banking, otherwise known as Islamic Banking.

6.4. CONCLUSION

This thesis examined the legal and institutional framework for mortgage financing in Nigeria. It has shown that the government has made commitments to enact laws, such as Land Use Act, Mortgage Institutions Act, Federal Mortgage Bank of Nigeria Act, Property and Conveyencing Law and also established agencies such as Federal Mortgage Bank of Nigeria, Nigerian Mortgage Refinance Company, Primary Mortgage Banks in compliance with their legal instruments to tackle the difficulties associated with assessing funds for mortgages. However, despite the enormous effort put in place, the mortgage industry is still underdeveloped as assessing housing finance remains a challenge in the country. Thankfully, the thesis makes several recommendations that could help address the problem of mortgage financing in Nigeria.

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