EXAMINING THE BEAUTY OF CHARGES AS A SECURED CREDIT SYSTEM IN NIGERIA: LESSONS FROM OTHER JURISDICTIONS

Grace Ogonda Akolokwu*

Abstract

This paper examined charges as a secured credit system in Nigeria as well as in three other countries in Africa. It argued that a charge is a better form of secured credit transaction which embodies the essence of a regular mortgage transaction while jettisoning aspects that limit the debtor/chargorfrom optimal use of the property and at the same time, guaranteeing that the creditor's interest in the property remains protected during the subsistence of the agreement.Adopting the doctrinal method of research which examines legal instruments and data, this paper found that charges have over time been muddled up and presented in different fora as mortgages. Some statutes in Nigeria cause this apparent confusion by using both terms interchangeably and failing to define charges or specify modus operandi for their use. This work concludes that a Charge presents certain special features which distinguish it from the English mortgage transaction and which present it as the beautiful bride of secured credit transactions. There is need for more scholarship on the nature, operation and enforcement of Charges andbetter legislative inputfrom the States' legislative houses to guarantee more effective use of Charges for secured credit transactions in Nigeria.

Keywords: Charges, Mortgages, Credit Securities, Nigeria

1. Introduction

A person whether natural or artificial, whose business is finance and the advance of credit to suitors for various and varied reasons would usually as part of regulating its business and ensuring compliance to agreed terms of credit advance, insist on a form of collateral from the debtor to ensure the sustainability of his own business. Doing otherwise would be foolhardy as gentlemen's agreement of honour to repay loans have time and time again been broken with the creditor counting his losses and unable to attach to any security or collateral to re-plough his investment. The most dependable forms of securities which a creditor as a prudent man of business may enter into pertain to land which is considered the most viable asset a borrower can give as they are physical, fixed, have transferable title and usually increase in value with time.[1]The usual reasons adduced for the creditor's preference of real estate as security for credit is not far- fetched as he can, in situations of default by the debtor,wilful or otherwise exercise his power of sale over the property which is security for the loan or to foreclose, thereby effectively terminating the debtor's ownership or even appointing a receiver over the property to protect his interests.

* **GO Akolokwu**, PhD (Law),B.L; B.A. (History);Senior Lecturer, Department of Private & Property Law, Rivers State University, Nkpolu-Oroworukwo, Port Harcourt; akolokwu.grace @ust.edu.ng or akolokwu.grace@gmail.com.

[1]E Essien, *Law of Credit and Security in Nigeria* (2nd edition, Uyo: ToplawPublishments Limited, 2012)125

It is thus against the background of reducing the uncertainties that surround borrowing and lending, especially the repayment of credit advanced by a creditor (be it an individual, company and/or financial institution) to a borrower that make a deeper study of the nature of charges imperative. This is more so especially as charges, unlike mortgages, neither transfers ownership nor possession of the charged property to the *chargee* but guarantees legal protection of his interest whilst giving business efficacy and convenience of operations to the *charger*/borrower.

It is the existing legal frameworks that to a large extent, determines the mode of creation and perfection of credit securities in Nigeria as efforts deployed in engaging in such transactions outside the strict provisions of the law leave the parties bare and unprotected by the law. This paper therefore centres on examining charges as a viable means of securing credit in Nigeria. It will x-ray the nature of charges through definitions whilst attempting to differentiate same with mortgages; it will examine different forms of charges, mode of creation and their applications, it will consider the advantages and disadvantages of charges as credit securities; discuss rights of parties in a charge transaction; examine relevant legislation regulating charges in Nigeria; investigate the use and application of charges in other climes to identify better practices to be applicable under our laws and finally make the case that charges remain the beautiful bride of credit securities in the country.

2. Defining Relevant Concepts of Charges and Secured Credit

A charge is an agreed encumbrance on the property of the borrower to give confidence to the lender to release credit to the borrower on agreed terms. According to the English court *in Re Bank of Credit and Commerce International*[2]a charge is "a proprietary interest granted by way of security without a transfer of title or possession."It is thus a right a person called the *chargee* who has been defined as the holder of a charge on property or of security on a loan,[3] has to appropriate certain interests in the assets of another person called the *chargor* for the purpose of discharging an existing liability.

It is trite that this right to appropriate is not tantamount to a right to own or possess the property in question but is a right to have a protected proprietary interest on equitable grounds in the asset used as security. This proprietary right so conferred on the *chargee* by a charge transaction runs with the property regardless of who may have possession of same; and this right has been further described to be "the sum total of a number of rights and powers of a certain nature in or over a thing."[4]A charge therefore in creating an equitable proprietary interest actually grants the creditor a right to a judicial process in

[2] (No 8) (1998) AC 214 at 216; per Lord Hoffman
[3] *Black's Law Dictionary*(9th edn. Thomson Reuters, 2009)266
[4] R W James, *Nigerian Land Use Act* (Nigeria, University of Ife Press, 1987)88

the event of the borrower's default.[5] Going further, the court in *Re Cosslett (Contractors) Limited*[6] defined a charge "as the appropriation of real or personal property for the discharge of a debt or other obligation without giving the creditor either a general or special property in or possession of the subject matter of the security." A charge is further defined to include a mortgage.[7]

The term secured credit on the other hand is used to describe property to be appropriated by the lender/creditor for the payment of the sum of money borrowed by the debtor although legally speaking however, this is not correct because the property itself is not the security rather the right to the property is the security. The purpose of a credit security is to put the creditor in a position to recover the debt in the event of default in payment by the debtor. Securities may generally be divided into personal securities such as undertakings, guarantees and surety whilst real securities include mortgages, pledges and charges.

Credit security systems concern financial transactions of borrowing and lending of credit between parties guaranteed by real collateral. A credit system which involves trading in money would thus be termed secured when the contract evidencing the trade legally incorporates assets of the borrower which are willingly offered to the lender to hold as security for a loan and upon a specific agreement of the assets' return to the owner upon the satisfaction of his obligations. So, a security is created where a person (the creditor) to whom an obligation is owed by another person (debtor) by statute or contract in addition to the personal promise of the debtor to discharge the obligations, obtains rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtor's obligations to the creditor.[8]

3. Examination of Charges as a Viable Credit Security System

Modern secured credit transactions in Nigeria form part of the lessons from the nation's British colonial experience. The mortgage security system which started out before the intervention of Equity in England as more or less a pledge which was mostly commuted to a sale is still undergoing development prompting Essein[9] to declare that it has gone through the gamut of changes. The relevance of mortgages and other forms of credit securities in the development of the nation's economy cannot be over-emphasised. Charges considered in this work to be a better improved mortgage transaction expands

[5]*Swiss Bank Corp v Lloyds Bank* (1982) AC 591 where Buckley LJ described an equitable charge to be created "when property is expressly or constructively made liable or specially appropriated to the discharge of a debt or some other obligations and confers on the *chargee* a right of realization by judicial process, that is to say by the appointment of a receiver or an order of sale."
[6] Per Millet, [1998]Ch. 495 at 508
[7] S.222(13) Companies and Allied Matters Act, 2020.
[8]*Bristol Airport Plc v Powdrill* (1990) 2 All ER 493
[9](n2)67

the financial horizon of both the borrower and the creditor as it creates better room for the property which is subject to a charge to be further deployed for maximum utility even while the charge or encumbrance is subsisting. This paper is mainly concerned with charges on land.

3.1 What the Law says about Charges

Some statutes in Nigeria actually treat a charge and a mortgage as one and the same thing.[10] Some of the relevant legislation for charges in Nigeriaare examined in this segment: theConstitution, Land Use Act, Conveyancing Act, Property and Conveyancing Law, Lagos State Mortgage and Property Law, Companies and Allied Matters Act, Stamp Duties Act and the Lagos State Land Registration Law.[11]Under the various laws listed above as regulating charge transactions, the *chargee* who is the lender though not acquiring any recognizable common law interest in the charged property actually enjoys clear and identifiable equitable rights enshrined in the various Statutes and arguably akin the rights of a legal mortgagee.

The Constitution[12]in recognizing the fundamental right of Nigerian citizens to acquire and own immovable property in any part of the country also protects the rights of persons under the general laws relating to mortgages and charges.[13] By this constitutional provision, the common law principles and legislative instruments regulating charges as credit securities creating proprietary interests in the property of the borrower and in favour of the creditor in Nigeria have become guaranteed. Although, the Land Use Act 1978 does not specifically mention a charge or defines the term, a charge is still an encumbrance on real estate which is the subject matter of the Act so the Act has implications for charge transactions albeit indirectly.[14]The Property and Conveyancing Law (PCL)is applicable in the western states of Nigeria whilst the Conveyancing Act (CA), a statute of general application, is applicable to the rest of the country. The PCL provides for a special method of creating a legal mortgage through a charge by deed expressed to be in form of a legal mortgage.[15]

[10] See the Property and Conveyancing Law of Western Nigeria 1959 which recognizes a charge by deed as a way of creating a legal mortgage; the Companies and Allied Matters Act 2020 goes further to include mortgages as forms of charges.
[11]Enacted as: the Constitution of the Federal Republic of Nigeria, 1999; the Land Use Act 1978; the Conveyancing Act 1881; the Property and Conveyancing law of Western Nigeria, 1959; the Mortgage and Property Law of Lagos State, (MPL) 2015; the Companies and Allied Matters Act 2020; the Stamp Duties Act 2004 and the Lagos State Land Registration Law, 2015.
[12] S43 Constitution of the Federal Republic of Nigeria 1999
[13] S.44(2)(c) *ibid*
[14]S. 21 (I) Land Use Act, 1978
[15]S. 2 Property and Conveyancing Law 1959

The Land Registration Law of Lagos State[16]provides that an instrument that is registrable is a document affecting land in the State whereby one party confers, transfers, limits, charges or extinguishes in favour of another party any right or title to or interest in land in the State... Also, it[17]demands that the consent of the Governor be first had and obtained before registration; and where such an instrument is not registered, such an instrument will not be admissible in court as evidence. The Companies and Allied Matters Act[18] on its own part defines a charge to include a mortgage; and demands that every company charge be registered.[19] It also permits companies to borrow money for its business by charging its undertaking, property and uncalled capital or any part thereof and issue debentures and other securities.[20]

A charge as a secured credit transaction is created by the agreement of the parties; and it is an instrument or document which appropriates the real or personal property of the *chargor* for the discharge of his obligation to the *chargee* in a contract duly executed by the parties and incorporating allterms agreed upon by them. According to the English court in *Swiss Bank Corp v LIoyds Bank[21]* a charge can be created when property is expressly or constructively made liable or specially appropriated to the discharge of a debt or some other obligation and confers on the *chargee* a right of realization by judicial process to appoint a receiver or order a sale of the charged property.Where the charge is statutory, it is trite that such a charge to be valid must necessarily conform to prescribed forms usually annexed to the Statute in question. The advantage of these forms of statutory charges is that the mode of creation is usually better suited to particular transactions as provided by law.[22]

3.2 Benefits of Charge Transactions

Charges guarantee greater ease of doing business by effectively protecting the interest of the *grantee* while freeing him from the encumbrance of holding and managing the charged property. One major advantage of charges over other secured credit transactions is that it gives priority to the *chargee* over the charged property where there are contending interests in the same property and the total value is not able to satisfy all the claimants. Where a property is under a charge, the creditor*/chargee's* interest becomes preferred to the interests of other creditors.Also, a charge has the advantage of being

[16]S.2 Lagos State Land Registration Law 2015 which repealed the Land Instruments Registration Law, cap 62 of Lagos State.
[17]S.10 *ibid*
[18]S.222(13) Companies and Allied Matters Act, 2020
[19]S.224(1) *ibid*
[20]S.191*ibid*
[21](1982)AC 584 at 594
[22]See variously, the Mortgage and Property Law of Lagos State 2015; Schedule 11, Form No 1; and the Property and Conveyancing Law of Western Nigeria 1959; Fourth schedule, Form 1.

easier to create and discharge than the English mortgage transaction. The agreement or contract creating the charge does not have to conform to any particular specification so long as the parties are in agreement that the property of the borrower be appropriated by the creditor as security for the loan[23] while leaving the *chargor*with possession and ownership of his property to deploy to other fruitful ventures without hindrance.

Since the *chargee* does not acquire possession nor ownership of the *chargor's* property used as security for the loan advanced[24] he is less encumbered by the management of the c*hargo*r/borrower's property and so is free of the duty usually imposed on a legal mortgage who is in possession of the mortgagor's property to account to the mortgagor. So, the fact that the *chargee* has no legal estate transferred to him means that he is equally not concerned with the problems associated with land transactions under the Land Use Act 1978 such as revocation of rights of occupancy, consent for alienation and even payment of compensations in cases of revocation. This fact is of course applicable to a charge simpliciter which is equitable other than a statutory charge which is more or less a form of legal mortgage in jurisdictions where they occur.[25]

The ease of enforcement of a charge transaction by the *chargee*/creditor is borne out of the contract terms agreed upon by the parties and the equitable remedy of a specific performance available to the *chargee* who approaches the court to demand that the*chargor* carries out his obligations under the contract by making good his promise to repay the loan. The Statutory charges which are created by the filling and execution of appropriate forms have the advantage of protecting the *chargee* from the implications of creating a credit security via the instrumentality of assignments of unexpired interests in real property or by sub-demise.A great advantage of a charge transaction is the ease of termination upon the repayment of the loan by the *chargor.* The fact that a mere receipt acknowledging repayment of debt from the *chargee* to the *chargor* is a sufficient termination instead of another Deed of Relaease or Reconveyance required under a mortgage transaction saves the *chargor* from the rigours and expenses of drafting and registration of these instruments.

The fact that a charge transaction does not involve the transfer or alienation of interest in property makes it free from the challenges usually posed by the requirements of the Governor's consent before parties can validly enforce a mortgage transaction. This fact therefore makes a charge transaction to be less burdensome for both the*chargor* and *chargee.* It protects the *chargee's* interest from being voided by the *chargor* on the basis of non- compliance with the requirements of the Land Use Act 1978 on obtaining consent

[23]*Swiss Bank Corp v LIoyds Bank* (1982)AC 584 at 594 where Buckley L J stated that "a charge is created when property is expressly or constructively made liable or specially appropriated to the discharge of a debt or some other obligation, and confers on the charge a right of realization by judicial process…"
[24]Yusufu Y. Dadem, *Property Law Practice in Nigeria* (Jos University Press, 2012)138
[25]*Regent Oil Co v J A Gregory (Hatch End) Ltd*(1966)CH 402

of the governor for any form of alienation.Also, the nature of a charge security allows the creditor to follow and trace the charged property into the hands of a third party who is not a bonafide purchaser for value of the legal estate without notice of the encumbrance.

3.3 Shortcomings of the Charge

Note that a major disadvantage of a charge is that its enforcement is limited by the presence of a bonafide purchaser for value of the charged property because a charge cannot be enforced against the property if a person who had no notice of the charge had acquired an interest in the same property after furnishing valuable consideration.Another disadvantage is a fall-out of what is also considered to be an advantage of charges as security transactions. The fact that a charge transaction becomes discharged by the issuance of a mere receipt to the *chargor* does not help to remove the tag of encumbrance registered against the *chargor's* property since the receipt is not required to be registered by law. This fact however can be remedied by adequate legislative response which may demand the filing of receipt of discharge of obligations by the *chargor.*

Charges are essentially equitable in nature as they do not confer any common law rights of ownership but a right on equitable grounds to approach the courts to intervene in the recovery of investments in form of credit advanced to a borrower.There are various forms of charges and they include the fixed, the floating and the statutory charge which is a creation of law and acquires all rights and remedies of a legal mortgage without transferring any interest or proprietary right to the *chargee* but only the right to call for the repayment of the loan by attaching the charged property regardless of who may be in custody of the property at the relevant time and regardless of the holder's interest in the property except a bonafide purchaser.

3.4 Rights of the Parties to a Charge Transaction

The parties to a charge transaction have recognizable rights in the charge agreement which are deployable towards the protection of interests of both parties. For the *chargee* who extends credit facilities to the *chargor*, his paramount interest is in recouping his principal sum as well as the agreed interest payable by the borrower. The right to be paid the charged debt as agreed out of the property of the *chargor* arises in favour of the *chargee* immediately the agreement is executed and resides in him until the debt is realized.This right of the *chargee* to be paid is statutory. [26] A charge that is created by Deed grants the *chargee* the statutory power of sale enjoyed by a legal mortgagee which is exercisable without an order of court.[27] In addition to the above however, the *chargee* still retains the right to seek the help of the court in the enforcement of totality of his rights ranging from the right to appoint receivers of income from the charged land and

[26]S.112 PCL 1959; S.20 MPL Lagos 2015
[27]See sections 123 PCL 1959; 19 CA 1881; S. 35 MPL Lagos 2015.

even sell the charged land should the need arise to recover debt; to the right to have the charged property kept in good condition so as not to reduce the value of the charged property; to the right to enter into the premises to inspect the property especially where the *chargee* doubts the sincerity of the *chargor* who remains in possession of the charged property.

The *chargor* on the other hand enjoys an uncluttered right to redeem his charged property by paying the sum due on the legal due date or anytime before the *chargee's* enforcement of the charge. Where the charge is created by Deed giving the *chargee* the power of sale upon default in payment, the *chargee* has a right to sue for accounts to be rendered by the *chargee* in case of a surplus from the sale.

4. Challenges of Charges and other Secured Credit Transactions in Nigeria.

Secured credit transactions concern real estate because both private and corporate bodies have more confidence in land as collateral for advancement of loans. This appreciation of land as a more valuable, accessible and durable security was re-echoed by Essien[28]when he asserted that"the preference for and insistence on landed security derives from the fact that unlike personalty, land is immovable and so the creditor is sure that except for an act of God – like earthquake- the land is always there to fall back on." It follows therefore that any issue that concerns land and real estate in Nigeria, whether legal matters, government policies and practice would invariably affect secured credit transactions.

It is interesting that the Land Use Act which is the major legal instrument regulating land ownership and use in Nigeria also provides for forms of secured credit transactions such as mortgages, pledges or 'otherwise howsoever.'[29] The fact that the Land Use Act of 1978 altered the nature of land ownership in Nigeria,[30] "removing allodial rights hitherto enjoyed unhindered by land owners; and introducing a limited usufructuary right over land known as a right of occupancy whether statutory or customary"[31] is the foundation of some of challenges of secured credit transactions in Nigeria. The major challenge that this extant law provides for credit transactions is that the interest any person can hold in land under the Act is a right of occupancy which he must necessarily hold at the pleasure of the grantor that is, the Governor of a State and upon certain conditions including possible revocation.[32] Herein also lies the beauty of a charge transaction over a mortgage

[28](n2)

[29]S. 21; S.51 (1) Land Use Act 1978, Vol.8, Cap 15 Laws of the Federation of Nigeria 2004 which interprets the term mortgage to include a second, and subsequent mortgage and equitable mortgage.

[30] See S.1 of the Act which provides that "subject to the provisions of this Act, all lands comprised in the territory of each State in the Federation is hereby vested in the Governor of the State, and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

[31]G.O. Akolokwu, "Mortgage Transactions in Nigeria: Is the Security of Interests of the mortgagee under the Land Use Act 1978 guaranteed? Online publication- Unizik Law Journal, vol 14, 2018

[32] U Jack-Osimiri; *Modern Law of Landlord and Tenant in Nigeria* (Port Harcourt: Pam Unique Publishers 1994)5; *Abioye v Yakubu* 91)5 NWLR (Pt 190)p 130 where the Supreme court stated that " rights of

as the former does not require the conveyance of any interest in land to the *chargee* and so may escape the challenges which the Land Use Act 1978 may place a typical mortgagee who may be taking a security that may be defective as the mortgagor cannot completely claim ownership and control of the land leased to him by the government and for a specific period.

The stamp of ownership of all lands within the territory of a State by the Governor demonstrated by the demand of the grantor that the grantee who is given a right to use land obtains a consent of the State to deal with the land which consists in the grant is another challenge of secured credit systems in Nigeria and conversely showcases the beauty of charges as a security transaction. A charge simpliciter does not require the consent of the governor to be validly created as it does not convey any interest in the land charged from the *chargor* to the *chargee* but only gives the *chargee* the right to appropriate his loan from the property charged. So, the charge transaction escapes the bureaucracy and expenses associated with satisfying the consent requirements as consent is not generally required for charges except for fixed charges.

Also, charges like mortgages equally face the challenge of the power of revocation of interests in land by the Governor for public purposes.The charged property which is the security for the *chargee* and from which the *chargee* can realise his loan is placed in a precarious situation where and when it becomes revoked under the law and so effectively extinguishing the collateral which is encumbered in favour of the *chargee.*As stated by Akolokwu,[33]"the security of the interest of the mortgagee in a mortgage transaction under the Land Use Act is jeopardized by the possibility of loss of the security through the revocation of right of occupancy by the Governor for lawful reasons."Infact the court[34] recognized the plight of the secured creditor in the face of revocations when it stated that where such "revocation occurs the mortgagee is left with a worthless document in his hands making the mortgage transaction very hazardous for him…"

The charge also faces the challenge of slow recovery of the *chargee's* loan in cases of default by the *chargor* as enforcement of the creditor's right of realisation is usually by a judicial process. Lack of adequate legal framework for the operation of charges as a secured credit system outside the company charges captured by the Companies and Allied Matters Act to create the needed incentive for creditors to willingly deploy their financial resources to desirous borrowers on terms is a major challenge.

---

occupancy bear a resemblance to leasehold interests. They can be assigned. They can be mortgaged and they can be underlet or sublet."

[33] (n30)

[34] *Ogundiani v Araba* (1978) 6-7 SC 55.

5. Lessons from Other Jurisdictions

This segment briefly examines aspects of secured credit systems in other common law countries in Africa, namely Ghana, Kenya and Uganda to elucidate the application of mortgages and charges in these countries.

In Ghana, secured credit transactions are regulated by law.[35] The Borrowers and Lenders Act is to among other purposes improve on the existing information on lending and borrowing to promote a consistent loan recovery and enforcement system by lenders towards encouraging investments and the growth of the Ghanaian economy. The Act established the Collateral Registry under the Bank of Ghana which is charged with the registration of charges and collaterals. The Registry is also empowered by law to provide information on securities registered with it to interested parties amongst other functions. The recovery of loans and enforcement of securities have become better enhanced by the enactment of the Borrowers and Lenders Act 2008.

According to the Ghanaian court, [36]the advantage of the law is that it provides creditors with options of enforcement of securities to quickly recover their loans even without the necessity of going to court so long as certain conditions spelt out in the Act are met. The conditions so stated[37] include obligatory registration of the charge with the Registryby "the *chargor* or any person interested in the mortgage or charge" which opens a window for the *chargee*as an interested party to also carry out the registration of the charge which protects his interest better. Where a charge is not registered in accordance with the enabling Statute, it will not be void as between the parties but will have no effect for the purposes of enforcement.[38]Enforcement of a charge that is not registered with the Collateral Registrytherefore becomes ineffective against the borrower as the creditor can no longer validly exercise rights of enforcement contained in the charge agreement.

Where the charge is created by a Company and concerns a company's debenture, the Act requires such a charge to also be registered with the Collateral Registry in addition to its registration with the Registrar of Companies as provided under the Companies Act.[39]Where the company fails in its duty to register, "the Company and every officer of

[35]Borrowers and Lenders Act 2008 (Act 773)
[36]*Ivory Finance Co Ltd v Global Green Built (Gh) Ltd and 4 others* [2015] DLCA 4923 where the court decided that the effect of S.25 Act 773 is that it enables the grantor to realize the charge without the necessity of going to court.
[37]See S. 25(1) Act 773 which provides that "a borrower shall register a certified copy of the charge or collateral created by the borrower in favour of a lender with the Registry within 28 days after the date of creation of the Collateral or charge."
[38]S. 25(3) Act 773 provides that "a charge which is not registered in accordance with subsection 1 is of no effect as security for a borrower's obligations for repayment of the money secured and the money secured shall immediately become payable despite any provision to the contrary in any contract."
[39]S. 107 Companies Act, 1963 (Act 179).

the company who is in default is liable to a fine not exceeding five hundred penalty units"[40] which is Ghs 6000. The effect of non - registration of a company charge is similar to the effect on individual charges already stated. But where a company charge has been duly registered with both the Collateral Registry and the Companies Registry, the release of such a security upon the repayment of the loan is by the issuance of a memo of release of debt in the register and which memo is made available to the borrower upon application in a prescribed form.

Another condition for enforcement of securities under the Borrowers and Lenders Act is the borrower/*chargor's* default in payment at the agreed due date. According to the provisions of the Act,[41] there must be notice of the default made to the borrower/grantor in writing and request for repayment within 30days. Where the borrower continues to be in default after the 30days notice of default in payment and demand of payment has been served on him by the creditor, such a continuing default raises in the creditor/grantee a right to take possession of the properties used as security for the loan. This position is stated by the court n *Kwabene Boateng v Melbond Microfinance Co Ltd,*[42]which going further, held that after possession of the charged properties, the creditor/*chargee*has the rights under the Act establishing the Collateral Registry to sell the property without the court order so long as due notices were issued to the borrower/*grantor* and notice of intention to recover property forwarded to the Collateral Registry.

It is trite that after the due notices have been issued to the borrower and registered with the Collateral Registry upon confirmation by the of notice by the Registrar of Collateral Registry, he will issue a certificate confirming the enforcement of security so that the land which is charged can become disposed by judicial sale or by an out of court auction in accordance with the Auction Sale Act.[43]Usually, such a sale or enforcement out of court does not require the consent of the government except the security concerns a property in which government has an interest.

In Kenya, securities can be created over several forms of assets such as shares, land, personal property etcetera. The interest of this paper is however on charges created over real property.Charges over land are required to be created through an instrument in a prescribed form which must be registered in the Land Registry. In Kenya, registration of charges have no time limits but they become effective only upon registration with the date of registration determining priority among charges. It is also the *chargor*who is the grantor of the charge is by law required to deposit the registered title deeds with the *chargee.*

[40]S.111(3) Act 179
[41]S. 32(1) (n37)
[42][2018] DLHC 3342
[43]Auction Sale Act 1989 (PNDLL 230).

Enforcing a charge on land in Kenya must be in compliance with the provisions of the Land Act (Number 6 of 2012) and the Land Registration Act 2012. Under this Act, enforcement can only commence where the *chargor*has been in default for a month or more as it is only after this time frame that the *chargee*can serve a notice to the *chargor* demanding payment of his loan. Where the default is not remedied however within two or three months the *chargee* can either sue for the amount due, or appoint a receiver of the income from the property or lease the land or take possession of the land or sell the land by private contract or through a public auction.It is important to note that the rights exercisable by the *chargee* over the property of the *chargor* are not applicable to lands considered customary or community land.

To validly sell the charged property by a private contract, the *chargee*is required to give a 40 days' notice to the *chargor;* and if the sale is to be by public auction, a 45days notice to the *chargor*is required in addition to advertising the sale publicly. The *chargee*is also required to obtain a proper valuation of the property which should be contained in a "forced sale valuation" report and ensure that he sells in good faith. Where the sale concerns agricultural land, a *chargee*can conduct an out of court enforcement of security but must obtain the consent of the Land Control Board to do this. Where the security concerns the deposit of an ownership instrument, the *grantee/chargee*requires the permission of the court before he can possess or sell such a secured land.

A similar situation observed in Kenya plays out in the Uganda where securities can also be created over land, shares, personal property and tangible assets among others. Here, there are generally no restrictions on who can legally grant or hold a security interest so long as the individual or company has sufficient capacity and authority to do so. However, possible restrictions may apply to regulated industries and securities which encumber family or marital property.

Charges over land in Uganda are required to be registered at the Ministry of Lands Registry. There is no fixed time lines for registration of charges but they become effective only upon registration with the date of registration determining priority between charges. To register a charge over land, two original copies of the charging instruments or deed, a copy of certificate of title are to be deposited with the Land Registry. In addition, the grantor of the security interest is required to deposit the title deeds with the *chargee.*Under this law, it is the person taking security that has obligation to bear the cost of stamp duties except as otherwise agreed. All registrable company charges are required to be registered within 42 days of creation in a prescribed form.

The Act[44] regulates the enforcement of charges over land and provides that the *chargee* can commence enforcement proceedings against a *chargor* who has been in default for at least 45 days. The *chargee* is required to serve a demand notice upon the *chargor*for

[44]Uganda Mortgage Act 2009

redemption and repayment of loan. Where the default is not made good within 30 days, the *chargee* may serve the notice of default on the *chargor* and upon the completion of the 45days, the *chargee* may sue for the amount due, or appoint a receiver of the income due on the property by giving the *chargor*an additional 15days written notice of prior appointment. The grantee can also lease the land after giving 15 days additional notice of intention to lease or take possession of the land after serving an additional 5 working days written notice to the *chargor*of his intention to take possession of part or the whole land or to sell the land by private contract or public auction after an additional 21 working days written notice to the *chargor*informing him of the sale. Also, any public sale of the charged property must be publicly advertised in a newspaper of wide circulation for 3 days from the date of publication of the advert.

6. Concluding Remarks

This paper has portrayed charges as the beautiful bride of secured credit transactions as it is a more flexible loan transaction that allows the borrower to make optimal use of his property charged as security as well as providing the needed assurance to a creditor who invests his funds in the grant of a facility that his interest is very protected within the ambit of enabling laws. A charge as a secured credit transaction ensures that the creditor finds himself at a safer position than other unsecured lenders in cases of the borrower's insolvency.

Companies must necessarily borrow additional capital to grow their businesses. In borrowing the needed capital, it is usual for the borrowing company to give its creditors additional guarantees beyond the verbal reassurances of its directors through the issuance of debentures and charges on assets whether fixed or floating that they were going to satisfy the obligations owed to the creditor. In seeking to actualize the guarantees given, many companies have become so muzzled up by contractual constraints that they encounter serious liquidity problems. It is in such dire economic situations that the beauty of the floating charge on a company's assets which gives the borrower greater opportunities to manage and reinvest its assets for better output becomes more glaring since he can continue to deal with the assetsin the ordinary course of business without hindrance from the *charge* while this form of charges also gives the *chargee*better options in terms of assets to attach in the realization of his interests.

There is no arguing the fact that personal, corporate and even national economic growth and development depend largely on financial investments of relevant stakeholders in different sectors of the economy. Countries of the world that have over time updated their investment laws to incorporate modern realities and ensure ease of doing business have gained appreciable milestones in growing their economies while outdated laws especially in the area of secured credit transactions can only remain a clog in the wheel of economic advancement and achievement of personal wealth as economies are driven by viable

access to credit which can only be enhanced and made possible by the provision of better legal and institutional frameworks to give the financial institutions who are the major creditors the needed confidence to part with their credit.

This paper therefore recommends the overhauling of the current legal architecture on mortgages and charges in most parts of the country which still depends largely on a British colonial legacy, that is, the Conveyancing Act 1881and the enactment of current State laws to regulate charges and mortgages as viable secured credit transactions in Nigeria. In addition, Nigeria can borrow a leaf from Ghana, Kenya and Uganda which provides the right of a *chargee*to an out of court realisation of security within the confines of the law to boycott judicial delays which only portend ill for economic investments in real estate development.