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Redressing the Impact of the Enforcement of Mortgage Security Nigeria

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Abstract
Mortgage transaction is an indispensable practice in modern day business activities. In Nigeria however, mortgage is regulated by the legal framework provided by the Land Use Act, 1978 as amended. The article critically appraised, enforcement of mortgage security, rights of the mortgagor, enforcement of the covenant to repay, entering into possession, sale of mortgaged property, appointment of receiver, action for foreclosure and others. This article critically assessed the creation, operation and termination of mortgage transactions in Nigeria. It provided a veritable tool for the exposition, evaluation and criticism of the Act as it affects mortgages, with a view of promoting the legal framework that would guarantee a more efficient operation of mortgages in Nigeria. The article finally recommends Amendment of Land Use Act 1978, and establishing arbitration mechanisms for enforcement of security/rights, capacity building/public education and training this will accommodate the interest of the mortgagee/lender when the market goes dry.

1. Introduction
The essence of taking a mortgage security is to give the mortgagee an assurance of having property to fall back on upon failure of the mortgagor to meet his contractual obligation on the date fixed for payment of the mortgage debt. The method of enforcement of the mortgage is legal or equitable. The foregoing methods of enforcement are cumulative not exclusive so that where one method did not satisfy the debt owing to the mortgagee he can adopt another method accordingly. But once foreclosure proceedings are embarked upon by the mortgagee, he cannot afterwards fall back on any of the other remedies aforementioned. Mortgage transaction is an indispensable practice in modern day business activities. In Nigeria however, mortgage is regulated by the legal framework provided by the Land Use Act, 1978 as amended. Some authors are of the view that the Act poses functional and economic problems, thereby annihilating the efficient and smooth operation of mortgage transactions. It also appears that the Act is legally inadequate, and its interpretation often generates controversies in some respects.

a. Enforcement of the Covenant to repay
A covenant to repay is a necessary covenant in a mortgage agreement but where it is omitted, it is implied since in equity the receipt of money carries with it the obligation to repay in the absence of a covenant to repay.[1] This covenant may be assigned in accordance with statutory

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[1] See Sutton v. Sutton (1882) 22 Ch. P. 511 @ p. 516

provisions for a valid assignment of a chose in action[2] or by joining the original mortgagee in the assignment. It is a pre-condition for an enforcement of this remedy that the mortgaged property is in existence and that the mortgagee is in a position to recovery same. Thus where the mortgagee has parted with the property or has encumbered same, he cannot enforce the covenant.[3] Also, the mortgagee cannot enforce this covenant after foreclosure except the property remains intact but he reopens the foreclosure proceedings thereby.[4] A sale after foreclosure extinguishes the mortgagor's liability for the contract debt but any sale either with the express concurrence of the mortgagor or with express or implied power of sale in the mortgage deed does not extinguish the mortgagee's right to sue on the personal covenant to repay.[5] A judicial sale does not bar the mortgagee from enforcing the personal covenant to repay even though he can no longer recovery the mortgaged property.[6]

A covenant to repay cannot be enforced by the mortgagee and the principal sum secured by the mortgage irrecoverable after the expiration of twelve years from the date when the right to recover the money accrued.[7] But the right to recover money is deemed not to have accrued if the property subject of the mortgage or charge comprises any future interest which has not matured.[8]

b. **Entering into Possession**

A legal mortgagee by virtue of this legal title is entitled in law to enter into possession. The right arises immediately after the execution of a mortgage deed and he cannot be restrained by the court except such right has been contracted out by himself under the mortgage agreement.[9] Where physical possession is not possible due to the existence of leases binding on him, he can enter into receipt of rents and profits by notifying the lessees in possession to pay rent to him as opposed to the mortgagor.[10] Where a receiver has been appointed by the court, he may apply to court for the removal of the receiver.[11] And when the exercise of the forgoing powers is impeded by the mortgagor, he may bring an action to eject the latter.[12]

For purpose of liability attached to the position of a mortgagee in possession in law, it is fundamental that the said mortgagee possess the actual power of control and management of the mortgaged property.[13] This can be established for example, by showing that the mortgagee is in actual possession of the property as a mortgagee and not as a lessee[14] a tenant for life,[15] or a purchaser under a sale which turned out to be invalid.[16]

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[2] For the requirements of the Law on assignment of choses in action, see section 25(6) Judicature Act, 1873; s. 9 Statute of frauds 1677; ss 25(6) and 78(1)(c) of the Property & Conveyancing Law cap 100 LWN, 1959

[3] See Walker v. Jones (1866) LR 1 CP p. 50; Schoole v. Sall (1803) 1 Sch&lef p. 176; Perry v. Barker (1806) E.R vol. 32 p. 459. Gordon Grant & Co. Boss (1926) AC p. 781

[4] See Perry v. Barker, Ibid

[5] See Rudge v. Richens (1873) L.R. 8 CP p.358

[6] See Gordeon& Co v. Boos (Supra)

[77] See section 28(1) of the Limitation Decree, No. 88 of 1966

[8] Ibid; s.28(2) The same provision applies in the case of a mortgage of a life insurance policy

[9] See Harman L.J. in Fourmaids Ltd v. Dudley Marshall (property) Ltd (1957) Ch p.17 @ p.320

[10] See Horlock v. Smith. See also footnote No. 158

[11] See Thomas v. Brigstocke E.R. vol. 38 p.729

[12] See Doe D. Roby v. Maisey E.R. vol. 108 p.1228

[13] See Noyes v. Pollock (1886) 2 Ch p.53

[14] See Vacum Oil Co ltd v. Ellis (1914)1 KB p.693

[15] See Lord Kesington v. Bourverie (1855)7 De F.M & G p.156

[16] See Parkinson v. Hanbury (1867) L.R. 2 H.L. p.1

When in possession, the mortgagee can create leases which bind the mortgagor but not after redemption unless otherwise agreed under the mortgage deed.[17] The powers of the mortgagee to create leases and take surrender of leases are regulated by statute and have been dealt with earlier.

Except the mortgaged property is facing the danger of being squandered by the mortgagor or destruction or depreciation due to trespass or general neglect, or there is the need to intercept profits anxiously towards discharging his claims under the mortgage, equity discourages the mortgagee from going into possession by imposing on him strict liability to account. The mortgagee has the obligation to be diligent in collecting rents and profits and be liable to the sums not recovered due to his negligence or willful default.[18] Where he is in physical occupancy, he is liable for occupation rent.[19]

He is obliged to keep the mortgaged property in a state of repairs which cost may be met from the rents and profits collected; and he is liable for deterioration of the property where it is left to degenerate into a state of disrepair.[20]

The mortgagee may charge only to the extent of reasonable improvements which enhances the value of the property but not extraordinary one made without the consent of the mortgagor.[21] He is entitled only to realize his security from the mortgaged property; he cannot make a profit or be compensated for the time lost and/or trouble taken in managing the mortgaged property.[22]

Although the mortgagee is liable for loss of rent and profits due to his neglect or willful default, he is not compelled to make the most out of the property either by speculating with it or by making special extortion to get the highest possible rent or profits from it.[23]

Where a mortgagee of land has been in possession of the mortgaged land for a period of sixteen years from the date the right of action first accrued, the mortgagor's right to redeem is lost.[24] But where the mortgagee acknowledges the title of the mortgagor or his equity of redemption[25] or receives any payment in respect of the mortgage debt[26], the time prescribed will start to run afresh.

An equitable mortgagee has no legal title which entitles him to possession[27] and cannot ask lessees in possession to pay rent to him.[28] He can however appoint a receiver where such right is reserved under the mortgaged agreement or apply to court for the appointment of a receiver to collect rents and profits on his behalf.[29] Where a legal mortgagee is in possession, the equitable

[17] See Chapman v. Smith (1907)2 Ch p.97
[18] See Hughes v. Williams E.R. vol. 31 p.1143
[19] See Lord Trimleston v. Hamil, 1 Bull & B p.377
[20] See Sandon v. Hooper 49 E.R. p.820
[21] See Shaphard v. Jones (1882)21 Ch p.469
[22] See Re Walls (1890)25 QB p.176
[23] See Wragg v. Denham E.R. vol. 160 p.335
[24] See ss23 and 27 of the Limitation Decree No.88 1966. The period prescribed under the adopted statute in the old Western Nigeria is twelve years; see s.13 of the Limitation Law of western Nigeria cap 64 1959
[25] S.42 of the Limitation Decree No 88 1966
[26] Ibid, section 52
[27] See Ocean Accident and Guarantee Co. v. Oxford Gas and Co. (Supra); but he can do so by a special agreement under the mortgage deed.
[28] See Finck v. Tranter (1905)1 KB p.427
[29] For the right of an equitable mortgagee to appoint a receiver, see post

mortgagee may intercept the surplus rent and profits to which the mortgagor is entitled by asking the legal mortgagee to pay to him.[30]

c. Sale of Mortgaged Property

The power of a mortgagee to sell the mortgaged property upon the mortgagor's default is statutory and need not be express. The power of sale is conferred by the Conveyancing Act 1881 and the *Property and Conveyancing law, 1959* on any person for the time entitled to give and receive a discharge of the mortgage money. The statutory power of sale is limited to legal mortgages only and operates to over-reach the mortgagor's equity of redemption.

The right to sell a mortgaged property is dependent on two main conditions namely: that the power of sale must have arisen in the sense that the mortgage debt must have fallen due, and that the power of sale must have become exercisable. The question whether the mortgage debt has fallen due may be ascertained from the mortgage deed. If the money secured by the mortgage is payable by instalments, the power of sale arises as soon as the instalment is due and unpaid.[31]

For the power of sale to be exercisable at least one out of the following must have happened.[32]

(i) Notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of the money for three months after such service; or

(ii) Some interest is in arrear and remains unpaid for two months after becoming due notwithstanding that the principal sum to be advanced installmentally under the mortgage deed has not been advanced in full,[33] or

(iii) There has been a breach of some provision contained in the mortgage deed or in the statute and which imposes an obligation upon the mortgagor.

The mortgagee may upon fulfilling the foregoing conditions, sell the mortgaged property at any time thereafter and at any price obtainable. The sale may be by auction or private treaty and may be in one lot or several lots. Upon sale, the mortgagee is empowered to execute a deed vesting title in the purchaser and if the mortgagee exercises his power of sale bona fide for the purpose of realizing his debt, and without collusion with the purchaser, the court will not interfere, even though the sale is disadvantageous unless the price is so low as in itself to be evidence of fraud. In *Eka-Eket v. Nigerian Development Society Ltd & Anor,*[34] the finding of the lower court that the sale of the mortgagor's property by the 1st defendant (mortgagee) to second defendant (purchaser) was at an undervalue, was held by the Supreme Court not to be a sufficient reason to set aside the sale in the absence of bad faith or collusion on the part of the defendants.

The purchaser acquires an unimpeachable title basically on condition that the power of sale has arisen, for the statute protects him and frees him from the shackles of constructive notice that the power of sale has not become exercisable. The law provides: "where a conveyance is made in the professed exercise of the powers of sale conferred by this Act, the title of the purchaser shall not be impeached on the ground that no case has arisen to authorize the sale or that due notice was

[30] See Parker v. Calcraft E.R vol. 56 p.992
[31] See Payne v. Cardiff Rural District Council (1932) 1 KB p. 247
[32] See s. 20 of the Conveyancing and Law of property act 1881; S. 125 of the Property and Conveyancing Law cap. 100 LWN 1959
[33] Okafor and Sons Ltd v. Nigerian Housing Development Society & Anor (1972) NSCC vol. 7. P. 271
[34] (1973) NSCC vol. 8 p. 373

not given or that the power was otherwise improperly or irregularly exercised but any person injured by an unauthorized or improper exercise of the power shall have his remedy in damages against the person exercising the power."[35]

The purport of the foregoing statutory provision as explained by the Court of Appeal in *Oguchi v. F.M.B (Nig.) Ltd*[36] is to protect both purchaser and mortgagee acting in good faith so that where the mortgagee perpetrated fraud and sold the mortgaged property illegally or where the purchaser bought the property with actual knowledge that the power of sale has not become exercisable and that the title in the property cannot pass to him, the mortgagee would not pass an unimpeachable title to the purchaser. A purchaser is only entitled to the statutory protection therefore, if he can show to the satisfaction of the court that the mortgagor did mortgage his property to the mortgagee vendor, that the power of sale under the mortgage agreement has arisen in the sense that the mortgage debt has fallen due, that the power of sale was in fact exercised by the mortgagee and that the title in the property passed to the purchaser.

A mortgagee who takes a mortgage in unregistered land in a Registration area and who failed to register as first registered owner under the Registration of Titles Act[37] cannot in exercise of his statutory power of sale convey a valid title to the purchaser. Thus in Lagos Island and some parts of Lagos Mainland where the Registration of Titles Act applies, such a mortgage which ought to have been registered within the statutory period will be void if it was not registered and since the title is void, the purchaser of the mortgaged property afterwards gets nothing. In *Onashile v. Idowu & Ors,*[38]the appellant mortgaged to the bank certain unregistered lands situate in a Registration District. That Bank did not register the mortgage as a first registered owner under the statutory power of sale. The Supreme Court held that since the mortgagee should have been registered and was not registered within the statutory period of six months, the mortgage became void and therefore, the purported sale by the bank under the power conferred by statute was of no effect and did not convey the legal estate to the 1st and 2nd respondents.

Where an unimpeachable title passed to the purchaser upon sale of mortgaged property when the power of sale exercised by the mortgagee had not become exercisable in law, the mortgagor may sue the mortgagee in damages for injury to his equity of redemption.[39]

In the absence of fraud and provided the mortgagee acted prudently and carried out the sale after the statutory essentials have been satisfied and obtained a fair price, the sale will not be impeached by the court on the ground that his motive was dishonest.[40] The mortgagee is a trustee of the purchase money received and shall, after paying off any prior mortgages, pay all expenses incidental to the sale, the principal, interest and cost due under the mortgage and pay the surplus to the person entitled to the mortgaged property.[41]

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[35] See s. 21(2) of the Conveyancing Act, 1881; s. 126(2) of the property and Conveyancing Law cap 100 LWN 1959
[36] (1990) 6 NWLR (pt. 156) p. 335
[37] See cao. 166 of Lagos State, 1994
[38] (1969) 1 All NLR (pt. 2) p. 313
[39] See section 21(2) of the Conveyancing Act, 1881 section 126(2) of the Property and Conveyancing Law cap 100 LWN 1959
[40] See Jessel M.R. in nash v. Eads (1880) 25 sol. Journal p. 95
[41] See section 21(3) of the Conveyancing Act 1881; Section 127 of the property and Conveyancing Law cap 100 LWN 1959

A sale or a contract to sell mortgaged property destroys the mortgagor's equity of redemption and absolutely divest the mortgagor of any form of title to the mortgaged property.[42] Where the mortgagee embarks on the exercise of his statutory power of sale consequent upon mortgage instalment falling into arrears, he cannot be restrained from selling the mortgaged property by the mortgagor merely paying off the arrears; only payment in full of the principal sum and interest can restrain the mortgagee from selling. In *Nigerian Housing Development Society Ltd v. Mumuni*[43] the Plaintiff/Respondent by a mortgage deed mortgaged his leasehold land with buildings thereon to the 1st defendant as security for a loan of £3,000 on terms that the Principal and interest thereon be repayable by regular monthly instalments of £30:25:6d the first such instalments were to be paid on the last day of each succeeding month. The plaintiff paid his instalments fairly regularly between 1961 and 1967 but defaulted between 1967 and 1968 so that by March 1968, the Plaintiff was five months in arrears with his instalments. The defendant thereupon embarked on the exercise of his statutory power of sale and the mortgaged property was accordingly advertised in the Daily Times newspaper issue of 27th March 1968 by an auctioneer retained for the purpose. The Plaintiff on 26th April 1968, paid the sum of £240 being instalments up to and including May 1968. The mortgaged property was actually sold on 29th April to the 2nd defendant who immediately gave the Plaintiff notice to quit and deliver up possession of the said property. The Plaintiff instituted an action resulting in appeal seeking an order of court to set aside sale and to restrain the 1st and 2nd defendants from interfering with the plaintiff's possession of the property on the ground that payment of instalmental arrears to date ought to have stopped the sale of the mortgaged property. The Supreme Court setting aside the judgment of the lower court, held the plaintiff having breached his covenant to repay the mortgage debt by regular instalments was not entitled to succeed as the 1st defendant was entitled to exercise his power of sale under the *Conveyancing and Law of Property Act 1881*, the debt having been deemed to have become due and payable in 1962 and that nothing short of the payment in full of the principal money with interest could have restrained the 1st defendant from selling the property.

The mortgagee's power of sale is not affected by attachment and sale of mortgagor's interest and any purchaser of the mortgagor's title in property under attachment takes subject to the existing mortgage. In *Kasumu v. Scott and Ors*[44] one Laja(L) owned land in Lagos which he mortgaged to one Miss Peters(P). The first three defendants (respondents) were in possession of the land as L's tenants. On 28th July, 1961, the 4th defendant bought the property on its sale by the Deputy sheriff under a writ of fifa issued at the instance of judgment credit of 'L'. In August 1961, 'P' as mortgagee advertised the property for sale and the property was actually sold on 5th of October 1961 and conveyed in December 1961 to the plaintiff. On 12th March 1962, the 4th defendant obtained from the court a Certificate of title certifying that he has been declared the purchaser of L's right, title and interest in the property. The defendants all denied the Plaintiff's title and on his claim for possession, the Supreme Court overruling the lower court, held that the 4th defendant having purchased the right title and interest of 'L' took the property subject to existing encumbrances, that 'P's power of sale under the mortgage had been effectively exercised and the plaintiff was entitled to judgment.

[42] See nash v. Eads (supra)
[43] (1977) NSCC p. 65
[44] (1967) NSCC vol. 5 p. 227

Although generally speaking, an equitable mortgagee has no power of sale statutory or otherwise, but where there is an agreement that the mortgagor shall give a legal mortgage if called upon to do so, the mortgagee may upon default by the mortgagor sue in equity for specific performance and if successful, he obtains a legal mortgage and can then pursue all the statutory remedies open to a legal mortgagee including sale of the mortgaged property.[45] Also, where there is a deposit of title deeds accompanies by a memorandum under seal, the mortgagee has all the rights of a legal mortgagee including sale of the mortgaged property[46] but he cannot vest legal title in the purchaser (since he has none himself) except a power of Attorney is incorporated in the said Memorandum under seal giving the mortgagor power to vest legal estate or a trust declaration in favour of the mortgagee making him trustee of the legal estate of the mortgaged property.

In view of the Land Use Act, a sale pursuant to the mortgagee's exercise of the statutory power of sale cannot vest an interest or right over the lands in the purchaser without the requisite consent of the Governor first sought and obtained,[47] otherwise such transfer shall be null and void.[48] The mortgagee's power of sale cannot be exercised and title to the land hitherto vested in the mortgagee becomes extinguished after the expiration of the period of thirty years where the power is vested in a state authority or twelve years in the case of a private person.[49] If the right of action accrued to a state authority, the action may be brought at any time before the expiration of the thirty years allowed to a state authority, or twelve years from the date the right became vested in a private person whichever period first expires.[50] But if the person in possession of the land acknowledges the mortgagee's title to the land, or such person or the mortgagor acknowledges the debt or makes any part payment, a fresh accrual of right of action is deemed to have taken place and time begins to run a fresh from that date.[51]

d. **Appointment of Receiver**

This remedy is open to both legal and equitable mortgagees. The legal mortgagee may appoint a receiver where he cannot go into physical possession (e.g. due to the existence of binding leases) for the same reasons as he goes into possession himself such as where the security is in danger of being squandered by the mortgagor or, that being in urgent need to his capital, he is anxious to intercept the profits and apply them to the discharge of the mortgage debt.

Appointment of a receiver is also a special right reserved for an equitable mortgagee since the latter has no legal estate and cannot ipso facto go into physical possession and enter into receipt of rents and profits directly. But what an equitable mortgagee cannot do directly by entering into physical possession he can do indirectly by appointing a receiver. A receiver may be appointed by the legal mortgagee either by himself making the appointment under a power in the mortgage contract or by an application to the court for a receiver to be appointed in the absence of an express stipulation in the mortgage contract. An equitable mortgagee can also apply to the court for a receiver to be appointed but cannot appoint a receiver on his own expect the equitable mortgage is created by deed.

[45] See Ogundiani v. Araba & Anor (supra)
[46] See Re White Rose Cottage (1965) Ch p. 940.
[47] See section 22 of the Land Use Act Cap 202 LFN 1990
[48] Ibid, section 26
[49] See section 24 of the Limitation Decree No. 88 1966
[50] Ibid, s. 25
[51] Ibid, sections 40 & 49

With the appointment of a receiver, the mortgaged property can be taken out of the mortgagor's control without the mortgagee having to assume any responsibility towards the mortgagor. If the appointment is made by the mortgagee under a power in the mortgage, the receiver will be treated as the agent of the mortgagor, while if the appointment is made by the court, the receiver will become an officer of the court and in neither case is the mortgagee responsible for the acts of the receiver.[52] Thus, a legal mortgagee who is desirous of taking the benefits of entering into physical possession without necessarily subjecting himself to rigorous accountability in equity may find the appointment of receiver a more suitable remedy than taking physical possession.

e. Action for Foreclosure

An action for foreclosure is a judicial procedure by which the mortgagee acquires the mortgaged property for himself freed from the mortgagor's equity of redemption.[53] It is a more effective remedy available to the mortgagee in urgent need of his capital which he cannot realize from the rents and profits accruing from the mortgaged property, or which in fact, is not existent. As a result of the foregoing constraints, the courts although jealous to protect the equity of redemption, allow a mortgagee to destroy the equitable right to redeem with its own assistance.[54]

Where the court deems it fit to decree foreclosure, an interim order known as foreclosure nisi is first decreed giving the mortgagor six months within which to redeem the mortgaged debt. Upon the lapse of this period and the mortgagor fails to pay, the foreclosure order is made absolute. The effect of the order absolute is to vest the whole estate of the mortgagor in the mortgagee absolutely and to extinguish the mortgage terms and all subsequent mortgage terms. But the rights of prior mortgages are not foreclosed so that the mortgagee takes subject to their interests.[55]

Where the applicant for an order of foreclosure is one of several mortgagees but the first, the law requires that subsequent mortgagees be made parties to the foreclosure proceeding and that the mortgagor and each of the subsequent mortgagees be given an opportunity to redeem. The court may direct in the order nisi that each incumbrancer repay the amount due to the first in time.[56] There are certain circumstances however in which the foreclosure may be reopened and the equity of redemption revived. This re-opening takes place if the mortgagee, after obtaining an order absolute, proceeds to sue on the personal covenant.[57] But in addition to this case, the court has discretion to re-open a foreclosure if such relief appears in the special circumstances of the case to be due to the mortgagor.[58] Moreover, foreclosure may be re-opened against one who has purchased the estate from the mortgagee.[59] It is impossible to lay down a general rule as to when the relief will be granted, for everything turns upon the particular circumstances of each case.

The remedy of foreclosure is available to a legal mortgagee no doubt. It is also available to an equitable mortgagee in respect of an equitable mortgage created by deposit of title deed accompanies by an agreement by the borrower to give a legal mortgage if required to do so. In

[52] See Waldock on Mortgages (2nd Edition) p. 241
[53] See Cheshire's Modern Law of Real Property; Butterworth (12th Edition) p. 673
[54] See Waldock on Mortgages (2nd Edition pp. 248-249
[55] The rule is "foreclose down."
[56] See Platt v. Mendel (1888) 27 Ch. P. 246
[57] See Perry v. Barker (Supra)
[58] See Jessel M.R. in Campbel v. Holyland (1877) 7 Ch. P. 166
[59]Capbell v. Holyland (supra)

Ogundiana v. Araba & Anors,[60]the Supreme Court explained the application of the remedy to equitable mortgages in the following way:

> *In considering the scope of the rights of an equitable mortgagee (not by way of charge), it should be borne in mind that the general rule is that foreclosure (and not sale) is the proper remedy of an equitable mortgagee… and when an equitable mortgagee by deposit of title deeds and agreement to give a legal mortgage if called upon to do so takes foreclosure proceedings to enforce his security the court usually decrees that the deposit operates as a mortgage and that in default of payments due under the mortgage the mortgagor is trustee of the legal estate for the mortgagee and that he must convey the estate to him.*[61]

Since equity regards as done that which ought to be done, an agreement to give a legal mortgage accompanying a deposit of title deed operates to enlarge the title of an equitable mortgagee upon an order of foreclosure by the court. A purchaser of a legal estate subject to this type of security may however have a worthless legal estate afterwards if in the event of mortgagor defaulting to repay the loan on the agreed date, the equitable mortgagee embarked on foreclosure proceeding and consequently obtained the order of foreclosure.

A notice of foreclosure once given and received, remains valid and in force until the exercise of the mortgagee's power of sale and the mortgagee is not bound to make any concessions or to suspend the exercise of its power of sale.[62] An action for foreclosure being an action to recover land, must be brought within twelve years from the date upon which the right of recovery accrues, i.e. the date fixed for payment of the principal, otherwise it becomes statute barred.[63] There is a fresh accrual and the limitation period starts to run again from any payment of principal and interest by the mortgagor or from his written acknowledgement of the mortgagee's title.[64]

The applicability of the consent provisions under the Land Use Act to an order of foreclosure depends on whether the mortgage is legal or equitable, and where it is a legal mortgage, on the part of Nigeria in which the transaction took place. In the case of equitable mortgage, an order of foreclosure enlarges the estate of the equitable mortgagee and vests the mortgagor's legal estate absolutely in the mortgagee. The process no doubt involves a transfer of the legal estates from the mortgagor to the mortgagee by operation of law and it is ineffectual unless Governor's consent is sought and obtained under the Act.[65] The position is the same with regards to a legal mortgage created in the old Western and Midwestern state (i.e. Oyo, Ogun, Ondo, Ekiti, Osun, Edo and Delta States) where mortgages are created by demise, or sub-demise, or by charge[66] in which case an order of foreclosure operates to vest the property in the mortgagee absolutely since the mortgagee never had the property vested in him in the first place.

A legal mortgage created in the Eastern or Northern States or in Lagos State already conveyed a legal estate to the mortgagee subject to ceaser on redemption by the mortgagor. As such, an order

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[60] Ibid
[61] Per Idigbe JSC @ p. 345
[62] See Ojukwu v. Agbonmagbe Bank Ltd &ors (1966) 2 All NLR p. 277
[63] See Limitation Decree 1966 as adopted in various states of the Federation E.g. Limitation Law cap. 118 Laws of Lagos State of Nigeria 1994
[64] See Limitation Act No. 1966
[65] Section 22 of the Land Use Act refers to 'transfer'
[66] See section 108-110 of the Property and Conveyancing Law cap 100 LWN 1959

of foreclosure upon default by the mortgagor makes absolute the title initially vested in the mortgagee subject to ceaser on redemption. There is no transfer in any form and Governor's consent is not required since the mortgagee by the initial conveyance had the property vested in him and what happens is that upon the destruction of the mortgagor's right in the property consequent upon the order of foreclosure absolute, the mortgagee takes free of it.

2. Conclusion

In the light of the foregoing, this research comes to the conclusion that lending and secured financing in Nigeria can only thrive when there are good laws that will protect both the lenders and the borrowers. But that the present state of less than one percent of three hundred Nigerian firms having access to credit according to a survey cites in this work, under 'summary of related literature,' is a logical outcome of the unsatisfactory legal framework of secured lending in Nigeria-typified by the mortgage laws of Rivers State and in some respects of Lagos State.

And until the legal framework as it stands in Nigeria is overhauled and streamed-lined to drive economic activities and allow MSME's the benefit of borrowing with their movable assets, including after-acquired or future assets in line with global trends (without the normal pressure of producing real property) Nigeria will remain in the muck and mire of unsatisfactory and deficient secured lending system.

3. Recommendations

In the light of the foregoing, the following recommendations are offered as solutions to the festering challenges confronting the advancement of mortgage transactions in Nigeria.

a. Amendment of Land Use Act 1978,

It is here suggested that since land is the most appreciated commercial asset in secured credit circles, no meaningful discussion on the way forward for the deepening and advancement of secured lending in Nigeria can be had without recourse to the debilitating effects of Land Use Act. This Act which has caused more pains to mortgages following its suffocating provisions and a hydra of court judgments pointing in many directions requires fundamental amendments. But first, there is the need to extricate the Act from the stronghold of the Constitution of the Federal Republic of Nigeria, 1999 which by virtue of *sections 315(5) and 9(2)* fastens the amendment or alteration of the Act to a rigid constitutional amendment procedure. When this is achieved, it is expected that the National Assembly will be positioned to consider and alter with less effort provisions such as the 'consent,' 'revocation and compensation provisions which has brought hardship, complexities and cost implications upon parties to mortgage lending transactions. It is proposed that any amendment done on Land Use Act must be premised on the clear consideration of mortgage lending being an economic tool that should not be unreasonably gagged by government interference and control through laws that increase the legal risks in such transactions.

b. Streamlining and Harmonization of laws to strengthen Mortgage Transaction,

While other researches may have randomly proposed a unification or enactment of a unified (Single) Act to regulate security transactions throughout Nigeria without clearly identifying the scope and property type that such Act will cover,[7] it is not lost on the present research that

[7] See for example DwinOkeziNebedum, 'Mortgages, Charge and Pledge as means of Secured Credit Transaction in Nigeria, (Unpublished LLM Dissertation, Rivers State University 2017), 112-113

security transaction may involve moveable or immovable property and that it is not the global practice for countries to lump both subject matters under a single law. In fact, as indicated in chapter one of this study, the broad spectrum of international policy frameworks and standard guidelines of international and regional finance/trade institutions such as the IFC, the UNCITAL and the EBRD on secured transaction laws clearly avoided conflating the subject of movable and immovable property rights and obligations under a single law.

Upon the above premise, it is suggested that secured lending laws in Nigeria such as the Conveyancing Act 1881 and the Bills of Sale laws should remain streamlined as they are presently according to real and personal property. However, it is proposed that States like Rivers State must repeal the secured-lending laws on real and personal property, specifically the *Conveyancing Act 1881 and the Bill of Sales Law of Rivers State* 1999 to meet emerging complex property rights and interest, by replacing them with modern and well-developed body of commercially-minded law which provisions will be harmonized with a federal law on the subject where one already exist. In other words, Rivers State must abrogate its Bills of Sale Law with a view to replacing same with a modern secured lending law covering a broader scope of personal property. Importantly, the new law should be harmonized with the provisions of the STMAA recently enacted by the National Assembly. Similarly, the Conveyancing Act 1881 must be repealed and a modern law on mortgage of real property capable of strengthening lending enacted. For harmonization purposes, the drafting of such real property mortgage law must take into account the provisions of all current federal laws on real property. What is being proposed here should be similar with the operations of the Article 9-UCC in the US; contrary to the misconception that the existence of the Article 9-UCC is a federal US law that meant the absence of local state laws on moveable property in the US. It is misconceived to consider the Article 9-UCC as a federal law and product of the US Congress mandatorily applicable in all the States of the US. In reality, the Article 9-UCC is a product of the National Conference of Commissioners on Uniform State Laws, American Bar Association and the American Law Institute. The code becomes law only in States that first adopted its provision and then formally enacts it as State laws. Instructively, whereas generally all fifty states in the US have adopted and enacted Article 9-UCC as State laws, some state enacted only parts or sections of it as law.