

# The Challenges of Advancing Credit for Real Property Development in Nigeria: Interrogating the Role of the Banking Sector

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## ***Abstract***

*This paper examined the challenges of advancing credit for real property development in Nigeria. It interrogated the issue of credit security in Nigeria, particularly, as it relates to land by criticizing practices that aim at frustrating credit advancements. Credit security systems remain germane to issues of economic growth and development of nations as businesses whether private or corporate may not have enough resources to achieve their stated objectives except they are able to access external funds sourced through loans and credit facilities to make meaningful economic strides. Adopting the doctrinal research method, this paper examined relevant primary and secondary sources of law, such as statutes, case law and books in this area of law to interrogate how credit financing can encourage real property development in Nigeria. It examined the role of the banking sector in the advancement of credit as well as suggested how credit security can be adequately harnessed to improve the growth of real property in Nigeria. It found amongst others that the advance of credit to needed firms and organizations by statutory and other lenders is apposite to real property development. It also found that several challenges which hamper the grant of credits for businesses exist in Nigeria. It concluded that secured credit advances backed by adequate and enforceable legislation conforming with international best standards would guarantee a better development of real property in Nigeria; and therefore, recommended both executive and legislative imperatives to address the identified challenges.*

***Keywords:*** Credit, Security, Credit Security, Real Property, Development, Real Property Development.

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## 1. Introduction

Credit advances oil the wheel of economic activities in any country as businesses at different times need monetary inflows beyond their revenue capacity to engage more productively, increase their capital base and so achieve a more sustainable creation of personal, corporate and national wealth. Credit advances from financial institutions aid real estate development in nations of the world. Housing or shelter which is a critical need of man may continue to be a mirage to the vulnerable, poor and low-income earners who lack sufficient funds to build living and business quarters without access to loanable funds. Help to achieve sustainable housing for this category of persons and many others can only become a reality with financial aid in form of loans from financial institutions. The Federal Mortgage Banks in Nigeria for instance become a very critical catalyst to real estate development through the grant of one digit interest loans to real estate developers as well as to the potential house owners to enable them obtain low interest mortgages for different categories of homes.

Sustainable borrowing and lending of credits can only be achieved through the provision of adequate security/collateral to the lender by the borrower who would also be more encouraged to borrow if the security required is affordable by him. The role of the banking sector in the business of lending and borrowing cannot be over-emphasised. The banking sector is one of the most important sectors of the economy of any country. In Nigeria, banks which have one of its objects as lending belong to the private sector, and like most private companies, banks are incorporated as going concerns to maximise profit. Banks are a very important part of the economy because they provide financial services for both consumers and businesses. These financial services range from providing a safe place to store or safeguard cash via account opening, operation and maintenance, affording customers the opportunity to make deposits, withdrawals, bill payments, save money and earn interest on investment, provide credit opportunities for people and corporations, act as agent for its customers in all circumstances where there is a relationship with third parties etcetera.<sup>1</sup> Banks may also provide financial services such as wealth management, currency exchange and safe deposit boxes.

There are several types of banks including retail banks, commercial banks, corporate banks, mortgage banks and investment banks.<sup>2</sup> Deposits received by banks are used to lend to individuals and businesses that apply for loans. The goal of a bank which is to earn profit for

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<sup>1</sup> *FCMB PLC v CP-Tech Construction Company Ltd.* (2015) LPELR-250006 (CA); K.I. Igweike, *Law of Banking and Negotiable Instruments* (Africana-FEP Publishers, 1991), 86.

its owners who are mostly the shareholders is achieved by charging more interest on the loans that are granted to borrowers, than the banks pay to depositors whose funds are used to lend. Lending is undoubtedly a core objective of banks, particularly the commercial banks. Aside from deposits from customers, banks also borrow money from 3<sup>rd</sup> parties including foreign banks to facilitate its lending business. It is expected that banks pay interest on the depositors' funds as well as service the loans from its lenders and repay the principal sum. It follows therefore that banks cannot afford to lend to its customers without security as doing so will amount to advancing a loan which may or may not be repaid. Though there are several securities which are acceptable to banks for lending, banks have certain challenges with perfecting securities and enforcing them when the need arises. This paper therefore focuses on the role of the bank in encouraging credit advances for real property development in Nigeria despite possible credit enforcement challenges.

## 2. Relevant Concepts

### (a) Credit

Credits are advances of property whether real or personal on agreed terms of repayment at a future date. A loan is a type of credit vehicle in which a sum of money is lent to another party in exchange for future repayment of the principal and interest;<sup>3</sup> and it may be secured by a collateral or remain unsecured. Some of the facilities generally provided by banks in form of credits include personal loans, receivables discounting loans, short term finance, medium term finance, long term finance, asset financing, commercial mortgage loans, contract financing loans, overdrafts. Credit advances are usually required to be guaranteed by the borrower's assurances of repayment in form of collaterals and personal guarantees.

### b) Security

Security is the collateral given by a debtor to secure a loan.<sup>4</sup> Security is created where a person known as the creditor to whom an obligation is owed by another person known as a debtor, in addition to the personal promise of the debtor to discharge an obligation, obtains rights exercisable against some property in which the debtor has an interest, in order to enforce the discharge of the debtor's obligation to the creditor.<sup>5</sup>

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<sup>2</sup> Adam Barone, 'Personal Finance >Banking-Meaning of a Bank' [www.investopedia.com](http://www.investopedia.com) accessed on 22/08/2021.

<sup>3</sup> Julia Kagan, *Personal Finance >Loan Basics*, [www.investopedia.com](http://www.investopedia.com) accessed on 22/08/2021.

<sup>4</sup> Henry Campbell Black, *Black's Law Dictionary* (6<sup>th</sup> edn. West Group, Centennial edition), 1355.

The term security means an acquisition of rights over property taken to support a borrower's personal undertaking to repay a loan, and may be real or personal. Security or security interest is that proprietary or personal assurance that is given and that helps secure the repayment of a debt or that which crystallizes into value for the benefit of the creditor in case of default by the debtor.<sup>6</sup> The purpose of credit security is to put the creditor in a position to recover the debt in the event of a default in repayment by the debtor.<sup>7</sup> Securities cover the risk undertaken by the creditor for the debtor's default and so provide adequate value for risks taken. Security is a right exercisable against the property of a debtor to discharge an obligation.<sup>8</sup> Security is anything that makes the money more assured in payment or more readily assured.<sup>9</sup> Although security is an insurance against unforeseen circumstances, loans are not granted on the strength of the security offered but on the ability of the borrower to repay the cash through cash inflow.

The proposition to give a loan must be viable in its own right before consideration is made to the security.<sup>10</sup> Nigerian law recognizes various types of security interests. These security interests may be created over movable assets (tangible and intangible) and immovable assets (real estate) and may be taken in the form of a mortgage, charge, pledge, lien or assignment, depending on the type of property.

### c) **Credit Security**

Credit security or secured credits concern credits that are secured by the advancement of the borrower's property as a collateral to guarantee repayment. They are thus collateral backed loans<sup>11</sup> that may be protected by the physical transfer of the borrower's property to the creditor as a further assurance of repayment or a charge of the borrower's property. Secured credit not only concern itself with advancement of credit alone but also considers the protection of a credit to guarantee its repayment. Security is synonymous with collateral and may be tangible or intangible, real or personal, movable or immovable and include

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<sup>5</sup> *Bristol Airport PLC v Powdrill* [1990] 2 All ER 493.

<sup>6</sup> Enyia, Jacob Otu and Okon, Emmanuel Usang, 'Classification of Credit Security in Nigeria: Resolving the Perceived Dichotomy' (2018) vol 1 (2), *Journal of Economics and Business*, 190-197.

<sup>7</sup> (n 6), 7.

<sup>8</sup> Sykes and Walker, *The Law of Securities*' (5<sup>th</sup> edn, Law Book Co, 1993) 36.

<sup>9</sup> K J Aiyar., *Judicial Dictionary*' (13<sup>th</sup> edn, Butterworths) <<https://www.ebcwebstore.com>> accessed 19 August 2021

<sup>10</sup> (n7).

<sup>11</sup> (n2)

goodwill, investments, land, buildings, plants, machineries, motor vehicles, ships, aircrafts and fixtures, intellectual properties and after-acquired properties.

A mortgage is an example of a credit security. It is an interest in property created as a form of security for a loan or payment of debt and is determined on the payment of the loan or debt.<sup>12</sup> Mortgage is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt. Though mortgages are mostly preferred collateral for banks and other financial institutions, other types of assets including shares, life insurance, *etcetera* are also acceptable as security for lending.<sup>13</sup> A debenture defined as a written acknowledgment of indebtedness by the company is a credit security transaction setting out the terms and conditions of the indebtedness, and includes debenture stock, bonds, any other securities of a company whether constituting a charge on the assets of a company or not.<sup>14</sup> In *NDIB v. Olalomi Ind. Ltd.*,<sup>15</sup> Onnoghen JCA adopted the definition of debenture in the Black's Law Dictionary by stating that a debenture is a company's security for a monetary loan, and that the security usually creates a charge on the company's stock or property.

A charge is generally used to describe a security created on an asset particularly by a company which may take the form of a fixed charge on a specific property or a floating charge over the whole or a specified part of the company's undertaking<sup>16</sup> while a book debt is a debt due or to become due to the company at some future date on account of or in connection with a profession, trade or business carried on by the company, whether entered in a book or not, and includes a reference to a charge on a future debt of the same nature, although not incurred or owing at the time of the creation of the charge, but does not include a reference to a charge on a marketable security or a negotiable instrument.<sup>17</sup>

A guarantee is a personal undertaking to repay a debt if another person who should make repayment does not.<sup>18</sup> Guarantors are normally required to charge specific

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<sup>12</sup> Grace O. Akolokwu, *Law of Mortgages and Charges: A Learning Guide* (Faculty of Law, Rivers State University, Port Harcourt, Nigeria, 2019)8.

<sup>13</sup> Sylvester O. Imhanobe, *Legal Drafting & Conveyancing* (3<sup>rd</sup> edn, Temple Legal Consult, 2010)526.

<sup>14</sup> Companies and Allied Matters Act (CAMA) 2020, s. 868 (1).

<sup>15</sup> (2002) 5 NWLR (Pt. 761) 532.

<sup>16</sup> O.V.C. Okene and G.G.Otuturu, *Nigerian Company Law and Practice* (Faculty of Law, Rivers State University: 2021), 113-114.

<sup>17</sup> Companies and Allied Matters Act (CAMA) 2020, s. 222 (13)

<sup>18</sup> David Palfreman, *Law Relating to Banking Services* (4<sup>th</sup> edn, Pearson Education Limited, 1999)21

property in support of their personal undertakings.<sup>19</sup>

**(d) Real Property Development**

Real Property in this paper concerns land and buildings located on them. Real property according to Smith,<sup>20</sup> refers to immovable properties such as land and things attached thereto. It is trite that land is central to almost all forms of developmental strides in society as there can be no meaningful engagement of resources without land. In fact, it has been described as “the very basis of commercial and industrial enterprise in Nigeria.”<sup>21</sup> Real property development on the other hand involves the effective deployment of available land to achieve personal, corporate or national economic growth and development. It is thus the effective use of the asset called land to increase wealth. Goode<sup>22</sup> opines that the use of real property as security for credit advances enhances the progress of national as well as international trade through the sustenance of the flow of foreign capital and investment which boosts the wealth of nations.

**3. Challenges of Advancing Credit for Real Estate Development in Nigeria**

The challenges in advancing credit for real estate development in Nigeria revolve around the availability of credit to financial institutions to boost the business of lending and borrowing; the affordability and accessibility of credit advances by the borrower against the background of chargeable interest rates; and the nature of securities advanced for credit obtained from the creditors which relate to legal requirements for perfection and enforcement of the security. Some of these challenges start from the time of conducting search to ascertain the suitability of the property used as security for lending to documentation for the purpose of registering or perfecting the bank's interest in the security and finally to the marketability of the security where and when the need arises. Some of the challenges are:

- (i) The need to recapitalize the Federal Mortgage Banks in Nigeria to increase their capital outlay and expand resources to encourage more robust lending to needy clients. It is trite that the current lending abilities of these banks are directly tied to their capital base as they cannot lend more money than they have access to despite

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<sup>19</sup> *Ibid.*

<sup>20</sup> I O Smith, *Security credit in Global Economy: Challenges & Prospects* (edited; University of Lagos, 2003)2

<sup>21</sup> Enefiok Essien, *Law of Credit and Security in Nigeria* (2<sup>nd</sup> edn. Toplaw Publishments Ltd, Uyo, 2012)1

<sup>22</sup> R M Goode, *The Law of Company Security* (2<sup>nd</sup> edn. Sweet and Maxwell; 1881) 1

available and obvious need to meet lending demands of the public. This comparatively small capital base in the face of current economic realities in the country limits the ability of the bank to advance credit for real estate development by builders of estates or purchasers of built-up estates.

- (ii) The high cost of statutory fees payable for perfection of interest in immovable property poses a great challenge to credit security in Nigeria. Certain financial transactions do not see the light of the day due to the inability of some borrowers to foot the costs of perfection of instruments. These statutory fees range from consent fee, application fee, release fee, registration fee, revalidation fee, computer fees (all payable to the State Government), and Stamp Duties calculated at 0.375% and payable to either the State's Internal Revenue Service or the Federal Inland Revenue Service depending on whether the land is vested in the Governor or is granted to the Federal Government and the parties to the mortgage transaction. The consent fee which is *ad valorem* is mostly calculated by a percentage of the stamp duties to cover value of the mortgage and ranges from 0.5% to 2.5% or more depending on the State. Stamp Duty is also *ad valorem* as what is payable is a percentage of the Stamp Duty to cover value of the mortgage. It follows, therefore, that the Mortgagor is not only charged with the obligation of paying interest on the loan and repaying the principal sum, but also has to pay exorbitant statutory fees just to get the mortgage registered since banks would not disburse any approved credit to him until provision is made for the payment of statutory fees. The huge cost of perfection has the ability of taking the entire profit of business made from the utilized loan making borrowing pointless.
- (iii) Double Cost of perfection of credit instruments hamper the secured credit advances. In addition to making certain statutory payments for obtaining the consent of the Governor of the State where the land is situate and registering the mortgage at the relevant Lands Registry, where the party providing the security is a company, the Legal Mortgage Deed must be registered at the Corporate Affairs Commission (CAC) as registration of a charge at the CAC will constitute constructive notice of the matters specified in the mortgage or particulars of the charge. By the provisions of the Companies and Allied Matters Act, every company that has created a charge on any of its asset or undertaking, must register the mortgage or instrument creating the charge at the Corporate Affairs

Commission (CAC) within 90 days of creation of the charge upon payment of a registration fee of 0.35% of the stamp value of the charge.<sup>23</sup> This payment also applies where the mortgage is up-stamped as the borrower is made to pay another 0.35% of the up-stamped value to the CAC just to register the up-stamped value, after payment of stamp duties on the same up-stamping. The extra 0.35% payment to CAC after stamp duties and statutory fees payable at the relevant Land Registry has discouraged a good number of borrowers from accessing facilities and undertaking a mortgage transaction.

- (iv) Delays in obtaining Governor's Consent and perfection of instruments also challenge the advancement of credit for real estate development in Nigeria. Perfection of mortgages includes obtaining the Consent of the Governor of the State where the land is situate, payment of accessed stamp duties, stamping the mortgage for a value, and registration of the mortgage instrument at the relevant Lands Registry. The process of perfecting mortgages is usually marked by undue delays in some States of the Federation and recent investigations in the real estate sector of Imo State have disclosed a sorry situation of an almost zero perfection of mortgage instruments because consent for alienation is not being granted to real estate developers. This is despite the position of the law which demands that where a legal mortgage is created, the consent of the Governor of the State where the land is situate must be sought and obtained.<sup>24</sup> Failure to obtain the consent of the Governor makes the transaction null and void.<sup>25</sup> These delays have negatively influenced and affected the disposition of banks to approving loans that are to be secured by a legal mortgage on a property in Imo State. There are also cases where mortgages on properties securing loans with a tenor of three years or more which were commenced immediately the loans were granted were not perfected until the loans were fully repaid despite having paid humungous statutory fees for perfection.
- (v) Delay in the enforcement of equitable mortgage even after obtaining relevant Court Order has discouraged credit advances for real estate development. It is trite that to circumvent the delays associated with obtaining consent for legal mortgages, banks opt for equitable mortgages because an equitable mortgage

<sup>23</sup> Companies and Allied Matters Act (CAMA) 2020, s. 222 (12).

<sup>24</sup> Land Use Act, Cap L 5, Laws of the Federation of Nigeria, 2004; s. 22.

<sup>25</sup> *Ibid*, s. 26



despite the provisions of the Land Use Act does not in practice require the consent of the Governor as no land is in reality alienated.<sup>26</sup> This option is however not bereft of its challenges; one of which is enforcement of the equitable mortgage by the mortgagee on the default of the mortgagor. Unlike a legal mortgagee who has an outright power of sale upon default of the legal mortgagor when the power of sale has arisen and become enforceable, an equitable mortgagee does not have an automatic power of sale and to be able to activate his power of sale, an equitable mortgagee must apply to the Court for an order empowering him to sell the property subject of mortgage in order to repay the mortgagor's indebtedness. The process of obtaining an order of Court to sell the property does not come easy because of the length of time for dispensation of actions commenced in court particularly those relating to land.

- (vi) Inability of borrowers in some states of the Federation to provide collateral and title acceptable to banks. Every bank has its credit policy on what amounts to acceptable security for lending; and when it comes to real estate, some collaterals are unacceptable to banks. The most common instrument for conveyance of title in the States that make up the Eastern part of Nigeria is the Power of Attorney or Irrevocable Power of Attorney. The position of a Power of Attorney as an instrument of conveyance or transfer of title to land remains debatable. The attitude of the Court to an Irrevocable Power of Attorney remains that it is not an instrument for conveyance of title in land rather it is an instrument by which the principal called the donor appoints an attorney called Donee and confers authority and powers on the donee to perform certain acts in the stead and on behalf of the Donor of such power in whose interest the land is vested.<sup>27</sup>

Banks are hesitant to accept a property with a Power of Attorney as its title because of the uncertainty of the conveyance and division of opinion on the use of the instrument to transfer or alienate any interest in land. Courts seem to favour the view that a power of attorney without more and on its own cannot transfer land since it cannot confer, transfer, limit, charge or extinguish any interest in land.<sup>28</sup> The prominence of the Power of Attorney as an instrument in the Eastern States and the non-acceptability of properties with same as its title by banks makes it

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<sup>26</sup> *Okunmoye v First Bank of Nigeria Plc* [1996]6 NWLR (Pt 457) 749

<sup>27</sup> (n 7), 507

<sup>28</sup> *Ude v Nwara* [1993] 2 NWLR (Pt 278)638; *Amadi v Nsirim* [2004] 17 NWLR (Pt. 901) 111.

challenging for borrowers to provide acceptable security and difficult for banks to advance credit to borrowers who provide properties with such title. The same situation applies to a Deed of Conveyance in Rivers State where it is shown that banks are more comfortable accepting properties with Certificate of Occupancy, Deed of Assignment, and Deed of Lease.

- vii) The bureaucracy at the various Land Registries constitutes a challenge to credit securities in Nigeria. This is clearly seen in the attitude of officers of the registry and the lack of interest in the process as well as undue delay of the files of customers who do not appreciate them, cases of missing files and the lackadaisical attitude towards recovery of these files, institution of cartels in the Registry that clone documents, etcetera. Also, inconsistencies regarding survey plans pose a great challenge to advancing credit for real property development. For instance, in Lagos State where charting is a requirement before a mortgage can be registered to ensure that the survey plan covering the land subject of the mortgage does not encroach on other lands belonging to 3<sup>rd</sup> parties, the government or on easements, inconsistencies in survey plan remain a challenge. A borrower who has lodged the survey plan of a land he has proposed as security may be called to amend his survey plans where it is discovered in the course of charting that there is an encroachment or overlap of the land described in survey plan on other lands, thereby incurring additional costs to amend survey plans and possibly making him abandon all borrowing plans.
- (viii) Difficulty in realisation of collateral discourage financial institutions from advancing credit to borrowers. There is a misconception that banks intentionally frustrate borrowers to prevent them from repaying the loan and ensure that mortgaged property are sold. This is unfounded as banks are not interested in selling property. At the time of reviewing an application for credit, the key interest of banks are the borrower's source of income and capacity to repay the credit through cash flow. Securities are only an extra comfort in the event that the cash flow ceases or is unable to service the credit because the primary source of repayment is cash. There is thus the challenge of borrowers commencing frivolous suits, particularly on allegation of excess charges to frustrate the bank's effort to realize the security and the fact that Courts generally indulge the borrower by entertaining such suits. While this research is of the view that excess charges

should not be overlooked, it is safer if the borrower is made to pay the money owed into Court to avoid undue delays and avoidable expenses of any such suit.

- (ix) Enforcement of Guarantees and Set off clauses in credit transactions are problematic and do not encourage credit advances. While a guarantee is a type of security, it is a chose in action and therefore not automatic. This is because a guarantee is predicated on an existing contract between the creditor and the principal debtor. To that extent, a guarantee can only be called in when the principal debtor has defaulted in the fulfilment of its obligations and most times involves a lot of negotiation, Court battles and requires a Court Order before it can be enforced.

Where the credit is secured with cash in an account that belongs to the borrower and another, it is usually difficult to realise the security on the default of the borrower except where a Letter of Pledge duly signed by all parties with interest in the cash and/or account had been obtained from the beginning of the borrowing relationship. Banks incorporate a Set-off Clause in their loan documents which empowers them to set-off a borrower's indebtedness by applying funds in the borrower's account with the bank. Currently, the Central Bank of Nigeria has extended the rights of the bank to set off its customer's indebtedness from his accounts with the bank to the borrower's accounts with other banks by the introduction of the Global Standing Instruction (GSI) mandate. This has been criticized on the ground that it should not apply to joint accounts owned by the borrower and third parties. For most credit securities, banks request a separate letter of set-off and extract the borrower's undertaking to waive his rights and authorize the bank to set off against his accounts with other banks notwithstanding its nature. It however, remains to be tested in Court whether the GSI mandate will operate to protect a lender who activates same on joint account without first obtaining the consent of the joint account holders.

- (x) The continuous application of obsolete laws in form of the Conveyancing Act 1881 and the Property and Conveyancing Law of 1959 to mortgage transactions in Nigeria has hampered the advance of secured credits. The laws regulating mortgages in the Country are outdated and cannot address emerging trends and incidental issues relating to mortgages in recent times. With the exception of States like Lagos, mortgage transactions in Nigeria are regulated by the Conveyancing

Act of 1881 which is a statute of general application and the Property and Conveyancing Law of 1959. These principal legislation are both too old to address current realities as mortgage transactions have progressed beyond them.

- (xi) Depreciable nature of movable assets discourage lending and invariably real estate development. With the exception of land, charges used to secure the borrowing of a company are created on its movable assets including plants and machineries; and considering that floating charges created on plants and machineries are by its nature ambulatory and do not attach to a particular asset until it crystallizes; and the borrower continues to use the assets in the ordinary course of business subjecting them to reasonable wear and tear as well as depreciation which makes them unattractive as securities for credit. Also, for credit that is secured with Invoices or Local Purchase Orders (LPOs), the challenge remains the delay in payment of confirmed invoices or LPOs. Except with confirmed invoices of some multinationals, some principals do not make payments within the specified/required period to enable the creditor apply it to the repayment of the credit advanced on the basis of the Invoice. Furthermore, there is a usual delay of payments to contractors for completed work by Federal and State government agencies resulting in the restructure or impairment of the facilities before the payments are eventually made.
- (xii) Revocation and its effects on the rights of the mortgagee affect the confidence of the latter to advance credit to potential borrowers. The law permits revocation of a right of occupancy where the land is needed for public use or for overriding public interest.<sup>29</sup> There has been several calls for the reformation of the Land Use Act particularly as it relates to the revocation power of the government and compensation payable upon revocation to the holder of a right of occupancy. Without any consideration as to whether there is an existing mortgage or not, the right of occupancy of a mortgagor may be revoked before the mortgagee would have the opportunity of realizing the security or enforcing the mortgage as the legal date of redemption may still be subsisting and unexpired at the time of revocation. The compensation payable upon revocation is usually to the holder of the right of occupancy which is debatably the mortgagee. A holder of right of occupancy has been defined as a person to whom it has been validly assigned or has validly passed

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<sup>29</sup> (n 25), s. 28 (a) and (c).

on the death of the holder but does not include any person to whom it has been sold or transferred to without a valid assignment nor a mortgagee, sub-lessee or sub-underlessee.<sup>30</sup> To this extent, the mortgagee has been excluded from the definition of a holder, and consequently cannot be paid any compensation even if the mortgagor is still indebted to him at the time of revocation. Also, only the unexhausted improvements on the land are compensated without attaching the value of the land and more so, the courts are not allowed to inquire into any question relating to the adequacy of compensation payable upon revocation which places the mortgagee in a very difficult situation.

#### **4. The Role of the Bank in Advancing Credit for Real Property Development.**

Banks play important roles in the economic life of a country through the provision of banking services, loans, advances and a variety of facilities, which could either be short term or long term. Lending is a vital function in banking operations because of its direct impact on economic growth and business development. In providing these facilities and lending to their customers, banks are exposed to some risks particularly the risk of non-repayment of the loan. The law provides that where adequate security is required for any advance, loan or credit in line with the rules and regulations of a bank, such security shall be obtained prior to the grant and any officer or manager that contravenes this provision will be liable upon conviction to pay a fine or a term of imprisonment.<sup>31</sup>

In granting credit, banks have a statutory obligation to take security as protection for the risks involved in advancing loans. Financial institutions required security as collateral can take the form of assets, property or cash and is usually offered by individuals or corporate entities for advancement of credit by them. Securities that are acceptable for lending would depend largely on the risk appetite and disposition of the bank in question. Most banks have policies on advancing credit, acceptable securities as well as non- acceptable securities. Depending on the risk appetite of a bank, acceptable security may be equal to, less or greater than the value of the loan advanced. Security interest can be created over movable assets (tangible and intangible) and immovable assets (real estate). These interests may be taken in the form of a mortgage, charge, pledge, lien or assignment, depending on the type of property. Forms of security include mortgage, charge, pledge, debentures, shares, book debts, insurance policy, money in the bank, intellectual property, guarantees, letters of

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<sup>30</sup> (n25) s. 50 (1).

<sup>31</sup> Bank and Other Financial Institutions Act (BOFIA) 2020, s. 17.

comfort, negative pledges, invoice discounting, letters of domiciliation. Generally, the type of security demanded by a bank for lending would depend on the several factors such as the nature of the facility sought, the amount, duration, integrity and financial strength of the borrower.<sup>32</sup>

In promoting real estate development in Nigeria, the Banking Sector relies on several strategies for advancement of credit while promoting their interests. These strategies such as cash in a bank account extends to fixed deposits, treasury bill investments and commercial papers used as security for lending upon the creation of a charge over the cash. In accepting cash as security, the loan granted to a borrower is secured by a pledge of cash in the account of the debtor or a 3<sup>rd</sup> party who has accepted to act as a guarantor to the debtor. In practice, banks extract a letter of pledge and set off from the borrower to apply the pledged sum to repay the loan granted in the event of default. When cash is pledged as security for repaying a loan, a charge is created over the cash which may be fixed or floating. A fixed charge is created over the cash where the bank has control over cash in the charged account such that the borrower or his guarantor is prevented from dealing with cash in the charged accounts without the consent of the bank. Conversely, a floating charge is created where the borrower has access to the cash and is allowed to operate the account as he pleases pending crystallization of the charge upon the occurrence of an event of default.

Shares and stock are acceptable forms of security for lending and so form a ready strategy for advancement of credit by banks for real estate development in Nigeria. Security interests can be established over same by creating a legal or equitable interest in favour of the bank over the shares or stock. Where the share certificate is merely deposited with the bank or trustee appointed by the bank, an equitable charge is created over the shares but where the bank is introduced as the new owner of the shares pending repayment of the loan and have its name registered as a shareholder in the register of members, a legal charge is said to be created.<sup>33</sup> This type of security can be used to secure a term loan facility.

Book Debts and Receivables are other lending platforms used by the banks for the advancement of credit. Trading companies frequently have debts, insurance policy proceeds which are paid on regular basis for goods and services provided and which may not be paid immediately the obligation to pay arises. Where this is the case, a company can use the

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<sup>32</sup> (n 7), 527.

<sup>33</sup> Resolution Law Firm, *Securitization & Types of Security for Bank Loans in Nigeria*, [www.mondaq.com/nigeria/securitization-structured-finance/1075236/securitization-types-of-security-for-bank-loans-in-nigeria](http://www.mondaq.com/nigeria/securitization-structured-finance/1075236/securitization-types-of-security-for-bank-loans-in-nigeria) accessed on 21/08/2021

money owed to it immediately rather than wait for payment. This can be achieved by obtaining a loan that is secured over its outstanding debts.<sup>34</sup> This form of security granted can be by way of an assignment or charge and can be used to secure a receivable discounting facility. It is trite also that domiciliation can be used to secure Local Purchase Order (LPO) facility. An individual or company may secure a loan granted to it by domiciling the proceeds of confirmed purchase orders of reputable companies with the bank. Here domiciliation of the contract proceeds is the security for financing the contract by the bank.

Liens are strategies adopted by banks to advance credit for real estate development by creating a lien or a charge over assets financed by the bank as security for a loan granted. The asset here is purchased in the names of the bank and the borrower creating joint ownership of the property. This joint asset may be registered in the National Collateral Registry at a flat rate of N1,000.00, thus creating a lien on the assets until the loan is fully paid up coupled with the borrower's undertaking restating the rights of the bank to repossess the equipment. This type of security can be used to secure an asset finance facility.

Intellectual property such as copyrights, trademarks, patents and industrial design can be used as security for lending. Although, this is not a very common type of security in Nigeria, the security interest is created by way of a fixed charge via assignment of rights or floating charge when the bank and borrower execute agreement setting out the terms and conditions on which the security is to be utilized as collateral for lending. Stock Hypothecation from goods or products, usually consumer goods or fast-moving consumer goods financed by the bank can also be used as security for lending. This form of security is mostly utilized by traders and wholesale distributors of consumer goods. For this type of security, a special agreement is entered between the bank and the customer to have the goods that are financed, warehoused and released to the borrower in bits either in exchange for the cash equivalent of the goods worth or cash equivalent of goods released previously to the customer's bank account before more goods are released.<sup>35</sup>

Documentary credit as a type of security is mostly used by traders or businessmen who import goods into the country. Here, the shipping documents such as bill of lading are deposited to the bank to access credit granted to the buyer. To initiate this type of lending, the buyer will apply for a letter of credit from its bank in favour of the beneficiary, the seller. The bank can fund the Letter of Credit through a loan granted to the buyer where the Bill of

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<sup>34</sup> (n 12), 94.

<sup>35</sup> (n 20).

Lading will serve as the security for such a loan. In this circumstance, the bank may be listed as the consignee of the goods contained in the Bill of Lading deposited with it.<sup>36</sup> This type of security can be used to secure an import finance facility.

Security for a loan can be granted over a company's machinery and equipment in form of a mortgage, charge, or pledge. It is created by a transfer of title to the asset on the condition of re-possession upon discharge of the loan facility or sold if the applicant defaults in the loan repayment. Most times, liens on machinery and equipment also known as charges are used to secure loans granted to companies and corporate bodies. A Debenture is a document that gives details of a company's indebtedness to a creditor called the Debenture Holder.<sup>37</sup> The indebtedness of a company to a creditor is generally acknowledged by way of a debenture.<sup>38</sup> A Deed of Asset Debenture is used to create a charge over a specific asset of the company or the whole or part of its undertaking as security for lending. The charge created here may be a fixed or floating charge of a company.

Guarantees are a common form of security used in finance transactions. A guarantee is a promise to answer “for the debt, default or miscarriage of another” if that person fails to meet their obligation and involves three parties that is; the creditor, the principal debtor and the guarantor or surety. It involves two separate contracts.<sup>39</sup> A guarantee must be in writing (or evidenced in writing) and signed by the guarantor or a person authorized by the guarantor. There must be an existing valid debt between the creditor and principal debtor and the liability incurred by the guarantor is only secondary as he has no interest between the contract between the creditor and principal debtor.<sup>40</sup>

Landed properties including constructed buildings, fixtures on land, leasehold on a property (intangible rights) are acceptable securities for bank loans in Nigeria. Real estate is the most recognized and widely used form of security for loans. It requires depositing the borrower's title document such as Certificate of Occupancy, Deed of Assignment, Deed of Gift, Deed of Sub-Lease, or any other acceptable title deed to the bank.<sup>41</sup> Security over real estate or immovable property can be created by either a mortgage or a charge. A mortgage over landed property may be created by way of a legal or equitable mortgage. Legal mortgage involves a

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<sup>36</sup> *Ibid.*

<sup>37</sup> E.M. Asomugha, *Principles of Company Law* (Bencool Press Limited: 1994), 37.

<sup>38</sup> A. Dignam and J. Lowry, *Company Law* (11<sup>th</sup> edn, Oxford UK: Oxford University Press, 2020), 87.

<sup>39</sup> (n 12), 378.

<sup>40</sup> (n12)378

<sup>41</sup> (n 20).



transfer of the legal title of the property to the bank as a security for the repayment of a loan. The transfer is subject to the condition that the title will revert to the applicant when the loan is repaid.<sup>42</sup> This type of mortgage can be created in different ways depending on the part of the country that the property is situated, including assignment of the mortgagor's unexpired interest with a covenant for reassignment of the mortgage or demise for a term absolute subject to a provision for cesser upon redemption; a sub-demise of the mortgagor's leasehold interest for a term at least one day shorter than the original lease with a proviso for reconveyance upon redemption or sub-demise of unexpired leasehold interest for at least a day shorter than the term of lease, temporary passing of title to a mortgagee for a term of years with the mortgagor's right to redeem the property, and by a deed of statutory mortgage or charge by deed expressed to be by way of legal mortgage.<sup>43</sup> The consent of the Governor must be obtained and there must be registration of the mortgage at the relevant State's Land Registry as well as the Corporate Affairs Commission where the property belongs to a company to make the mortgage valid and enforceable.

An equitable mortgage is defined as a specific lien or charge upon real property to secure the payment of money or the performance of other obligations which a Court will recognize and enforce but which lacks the essential features of a legal mortgage because it grows out of a transaction of parties without deed.<sup>44</sup> An equitable mortgage creates a personal right against the borrower (mortgagor), which cannot be exercised without an Order of the Court. This type of mortgage can be created by deposit of the title deeds with the mortgagee, by an agreement to create a legal mortgage and by creating a mortgage over an equitable interest.<sup>45</sup>

Notwithstanding the various types of collateral security enumerated above, land remains the preferred and most acceptable form of security, particularly, for long term loans of 12 months and above for a good number of reasons such as the fact that land is immovable, as such a more stable asset than other assets; land appreciates in value over a period of years; it may be easier to enforce the mortgagor's rights against land than other types of security;<sup>46</sup> it is the most important factor of production in industry as well as agriculture and its usefulness and importance cut across all forms of businesses and professions.<sup>47</sup>

The enforcement of a mortgagor's rights against land may be limited to a legal mortgage that

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<sup>42</sup> *Ibid.*

<sup>43</sup> (n 6), 36-39.

<sup>44</sup> (n6) 79.

<sup>45</sup> (n6). 82-84.

<sup>46</sup> (n 7), 527.

<sup>47</sup> Enefiok E. Essien, *Law of Credit and Security in Nigeria* (2<sup>nd</sup> edn, (Uyo: Toplaw Publishments Ltd, 2012), 1

has been duly registered as the mortgagee acquires a statutory power of sale under a legal mortgage<sup>48</sup> and as such does not require any authorization to enforce the mortgage once his power of sale arises and becomes enforceable unlike the equitable mortgage where the mortgagee must first apply to the Court for the grant of an Order to sell the land and apply its proceeds to repay the outstanding on the mortgagor's loan.

## 5. Conclusion and Recommendations

Individuals, Corporate institutions, Banks and the Government have responsibilities towards achieving the desired growth in the economy through improved borrowing and lending strategies. It is trite that since most individuals and businesses require additional finances to achieve set objectives for developmental growth; and a thriving business would bring about stability and economic growth resulting in increased internally generated revenue available to the government to achieve its obligations to the citizens, a better legal framework for the advancement of credit and its enforceability remains a *sine qua non* for further creation of wealth and sustainable development.

The government therefore has a responsibility to ensure that the applicable laws relating to credit securities and perfection of security interest conform with international best standards and practices. There is also need to ensure the availability of adequate provisions in the applicable laws for seamless registration of credit security and enforcement where necessary. Nigeria is encouraged to borrow a leaf from America. The average American lives on loans and mortgages, yet the United States of America is one of the world's powers with appreciable development in the economic and other sectors due to the enabling laws that regulate credit securities. It is believed that banks would be open to more lending where there are enabling laws which protect the interests of debtors and creditors alike as well as the assurances that the government would not frustrate the efforts of lenders to secure their exposure.

To tackle the identified challenges to the advance of credit for real estate development in Nigeria, this paper recommends legislative imperatives in form of amendments of the Land Use Act to include a provision compelling the Governor to consent to land transactions within 6 months of application for consent; and failing which the State should be made liable to pay certain damages to the mortgagee where he suffers a loss for his inability to sign mortgage documents. Secondly, the Land Use Act should be amended to re-define the holder

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<sup>48</sup> Conveyancing Act 1881 s. 19(1)(i), Property and Conveyancing Law, 1959 s. 123 (1) (i)

of a right of occupancy to include a mortgagee, particularly, for the purpose of paying compensation upon revocation of the right of occupancy. The mortgagee should be subrogated to the position of the mortgagor in equity for the purpose of receiving compensation for unexhausted improvements in cases of revocation of the mortgaged security.

Thirdly, the enactment of new mortgage laws to reflect modern economic realities. Also, a flat rate should be applied on registration of subsequent up-stamping of legal mortgages over land belonging to companies at Corporate Affairs Commission. Executive Imperatives in the form of new policies and establishment of relevant agencies and institutions are recommended. Some of these imperatives include:

- \* the establishment of special courts or court divisions and procedures to determine matters relating to land transactions, particularly, mortgages and issues arising from mortgages for a quick and efficient dispensation of such matters.
- \* also, there should be a review of what amounts to improper conduct of the Governor to include failure of the Governor to perform acts which he has been empowered to perform by virtue of his office or delegate powers to perform the said act where the law allows him to delegate such powers.
- \* the education, training and sensitization of officers at the Land Registry by approved agencies of government as well as insisting that the consent of joint account holders be obtained before accepting the cash in a bank account as security where cash is the proposed collateral are also recommended.

