

An Appraisal of the Viability and Enforcement of Secured Lending Transactions in Nigeria

Felix C. Amadi^{*}
Prince I. Azubuike^{**}
&
Nuleera A. Duson^{***}

Abstract

The financial sector's role in the sustenance of various projects has made a great impact on the economy of Nigeria. This support extends to all sectors of the economy. The importance of sustaining the financial sector is evident in the various consequences of a failed financial system on the economy of a nation. Mortgage is a major part of the financial system. There is the need to ensure that the mortgage industry in Nigeria is sturdy at all times as its failure would have a massive negative impact on the economy. The central aim of this paper is to establish the practicality and challenges of enforcement of mortgage security in Nigeria. The objectives of this paper amongst others are to highlight the various methods through which mortgage institutions can enforce and realize mortgage security. The research methodology employed in this paper was doctrinal. Using primary and secondary sources, it was discovered that the challenges inherent in the enforcement and realization of mortgage security in Nigeria range from social, legal, regulatory, legislative to judicial challenges. The challenges discovered inter alia are: the herculean consent provisions under the Land Use Act, environmental liability of a lender in possession, revocation of right of occupancy without compensation to the mortgagee, protracted judicial proceedings. This paper concluded by proffering recommendations towards the eradication of the challenges to the prompt enforcement of mortgage security in

* PhD (Nig), BL, Reader, Acting Head, Department of Private and Property Law, Faculty of Law, Rivers State University.

** B.Sc, LL.B., BL., LL.M., Ph.D. candidate at Nnamdi Azikiwe University, Awka Nigeria.

*** PhD (Nig), BL, Lecturer, Institute of Legal and Global Studies, Port Harcourt Polytechnic, Rumuola.

Nigeria. The recommendations include: improved statutory reforms to ameliorate the consent provisions under the Land Use Act, regular environmental impact assessment, the introduction of specialized courts for property matters. The paper asserts that maintenance of a viable mortgage industry and financial sector through adequate enforcement mechanisms is critical to the success of the Nigerian economy.

Keywords: *Appraisal, Viability, Enforcement, Secured Lending, Transaction*

1. Introduction

Land constitutes the basis of man's livelihood and existence. This is especially true because the extent of man's development is embedded in the value and measure of land. Inextricably linked with land is the housing sector which is at the core of any developed nation. The impact of the housing sector on the economy of any nation cannot be undermined as it is crucial to any solution proffered to the process of the nation's development. In most developed economies, it is seen as an important sector for stimulating economic growth¹. It plays a prominent role in both developed and developing economies of the world. In fact, it has been acknowledged as one of the guaranteed means for the creation of jobs, eradication of poverty, reduction of corruption and ensuring the security of the nation.² It has also made an impact in terms of ensuring social benefits in the aspect of contributing to community and nation building. As opined by the Nigeria Minister of Finance in her keynote address³ in India, each new housing unit generates 1.5 direct and 8 indirect jobs and in South Africa, each housing unit creates 5.62 direct jobs and 2.5 indirect jobs. This shows that the housing sector is one which must attract the focus of every nation. Even in Nigeria, housing has been recognized as a major priority but despite 62 years of her independence, much is still left to be desired in the mortgage industry. The housing sector has a significant impact on other sectors of the economy. This is because other sectors of the economy like agriculture, education, health, finance, technology among others have the need for the use of land and housing in one way or the other. It is to this extent that the use of real property in the financial sector (which ultimately flows to other sectors of the economy) will be examined in this

¹ L Okonjo, 'Unleashing the Housing Sector in Nigeria and in Africa.' (Paper Presented at the Global Housing Finance Conference in World Bank Headquarters, Washington, DC28 May 2014) <http://www.housingfinanceafrica.org/wp-content/uploads/2014/06/6th_Global_Housing_Finance_CME_Keynote_Speech.pdf> accessed 9 June, 2022.

² K Omotoso, 'Mortgage Banking/Housing Finance Sector in Nigeria: Past. Present. Future' (Paper Presented at Nigerian Real Estate 2011: Market Review and Market Projections in Nigeria3 February 2011) <<http://mban.org.ng/wp-content/uploads/2011/12/Mortgage-Banking-Housing-Finance-Sector-in-Nigeria-Past-Present-Future.pdf>> accessed 20 June 2022.

³ Okonjo (n 1)

research.

It is well established in any modern economy that the use of credit is essential for business and economic growth.⁴ Sometimes, private individuals and companies do not have the capital to embark on certain projects from time to time. Therefore, there is the need to obtain funds from lending institutions. Collateral is an important factor in credit underwriting.⁵ Real property serves as valuable collateral for loans. Although real property is not the only property that can be used as collateral for loans but about 80% of collaterals in banks is real property. This is because its value generally appreciates over time, it is more stable and reliable and it is easier to enforce judgment in case of default. Thus, the mortgage market plays such a vital role in the grand scheme of the ultimate development for the country. A typical mortgage situation involves the transfer of interest in land as security for the discharge of a debt or the performance of an obligation subject to redemption.⁶ It is the practice of giving rights/interests over land as security for debt.

The major role of the Primary Lending Institutions in any free-market economy is to transfer and direct funds from the financial surplus units of the economy to areas such funds are required in order to ensure growth and uniform development.⁷ These lending institutions are financial arbiters. They perform such a vital role in the development of the economy of every nation as they act as the channel through which funds are conducted towards specific and general requirements of other sectors in the economy. It is pertinent that these lending institutions are able to sustain this duty. In order to achieve this, it is crucial that the proportion of outflow to inflow of funds to these institutions should be equal at the least. In no situation should the outflow of funds exceed the inflow of funds. In the event of a default, recovery must be made from those sectors to which such funds have been channeled. However, this is not always the case.

Having established the link between real property and the Primary lending institutions which gives rise to the mortgage transaction, it is therefore pertinent to consider not merely how the

⁴ C CNwuba, and Others, 'The Application of Real Estate as Loan Collateral in Nigeria's Banking Sector' (2013) (4)(11) *Research Journal of Finance and accounting*<http://www.academia.edu/6582723/The_Application_of_Real_Estate_as_Loan_Collateral_in_Nigeria's_Banking_Sector> accessed 2 June 2022.

⁵ *Ibid*

⁶ F J Oniekoro, *Mortgages in Nigeria: Law and Practice*, (Enugu: Chenglo Publications, 2007) .

⁷ O Agbakoba, 'Debt Recoveries and the Judicial System.' Paper delivered at the Association of Banks Lawyers Conference), 25 November 1992<www.agbakoba-associates.com/Debt-Recoveries-and-the-Judicial-System-A-Call-for-Alternative-Debt-Recovery-Mechanisms-and-the-Establishment-of-Commercial-Courts.pdf> accessed 20 June 2022.

lending institutions are able to generate and keep funds in the event of default by the mortgagor but also how effective the methods of debt recovery are. This is the crux of this research. In the case of default by the mortgagor, the remedies open to the mortgagee in recovering his capital and/or interest are:

- a. Action to recover mortgage sum and interest
- b. Taking possession of the security
- c. Appointing a receiver
- d. Sale of the security
- e. Foreclosure
- f. Action for order of specific performance.

The choice of remedy opted for depends on whether the mortgagee wants his capital or the interest. The rights/remedies of the mortgagee are cumulative. This means that the exercise of one option is not to the ultimate exclusion of the other. In other words, if the mortgagee exercises an option and that option is not enough to satisfy the debt owed him, he can choose another remedy to recover the balance. However, the exercise of the option of an order of foreclosure terminates all other remedies.

Every mortgage transaction is predicated on three (3) major factors: (i) Protection, (ii) Assurance and, (iii) indemnification. Protection of the mortgagee's rights through the mortgage security, Assurance of a recourse in the event of default and Indemnification of the mortgagee to the state he was in before the default. The prevalent difficulty in the recovery of loans has resulted in banks operating in economies as Nigeria insisting on secured credit facilities before granting loans.⁸ Notwithstanding the importance of security (or "collateral"), it is pertinent to establish that the key objective of a secured credit is to ensure the repayment of loans by the borrower and not a venture to acquire assets by the lender.⁹ Security is "a right given to one party in the assets of another party to secure payment or performance by that other party or by a third party."¹⁰ In banking parlance, this suggests a debtor-creditor relationship in which the debtor owes some financial obligation to the

⁸ I O Imala, 'The Debt Dilemma in the Nigerian Banking Industry: Trends and Implications for the Economy' Paper Presented at the 2004 National Seminar on Banking and Allied Matters for Judges in *Proceedings of the 2004 National Seminar on Banking and Allied Matters for Judges*, E. Ogunleye and others, (eds), (Lagos: The CIBN Press Limited 2005) 63

⁹ K I Igweike, *Law of Banking and Negotiable Instruments*, (Onitsha-Nigeria: Africana First Publishers Limited, 2005)

¹⁰ R M Goode, 'Legal Problems of Credit and Security' in I O Smith (ed.) *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 4-5.

creditor.¹¹ Here, the debtor assigns proprietary rights in the asset (“collateral”) to the creditor to hold onto pending the repayment of the sum (“mortgage debt”) to the creditor.

2. The History of Mortgage Practice in Nigeria

Formal mortgage market was introduced in Nigeria with the establishment of the Nigeria Building Society in 1956. The Common Wealth Development Corporation was the vehicle that was used for this capital investment. However, the Building Society collapsed in the early seventies because of its inability to perform its statutory functions. Consequently, the government injected N20m into it and changed its name to the Federal Mortgage Bank of Nigeria (FMBN).¹² The FMBN was not without issues;¹³ its failure over the years and acute shortage of housing led to the promulgation of the National Housing Policy of 1991. This was promulgated to strengthen housing finance. The National Housing Policy and Mortgage Institutions Decree No. 53 1989 restructured the Nigerian mortgage market.¹⁴ The Nigerian mortgage market was divided into two tiers: (i) the FMBN as the apex (licensing and supervisory) mortgage bank and (ii) Primary Mortgage Institutions (PMIs). Presently, there are eighty-two PMIs in operation in Nigeria.¹⁵

3. Importance of Security in Mortgage Transactions

Security provides the creditor with an alternative source of recoupment if the debtor either cannot or will not pay voluntarily.¹⁶ Any good security must ensure protection, assurance and indemnification. More specifically, it:

- Reduces the incidents of risk or eliminates it in respect of a creditor's investment.
- Increases the pool of assets out of which the creditor may satisfy his claim thus giving him a preferred position in the insolvency or liquidation of the debtor.
- Demonstrates the debtor's good intention to meet his obligations and provides an

¹¹ T O Smith, *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006)

¹² L Oduwaye and others, 'Challenges of Housing Finance by Primary Mortgage Institutions.' <www.gla.ac.uk/media/media_129719_en.pdf> accessed 23 June 2022

¹³ A prevalent issue till now is the major challenge of how to recover the huge sums owed to it and the lack of sufficient funds to perform its statutory functions; S Oimhanobe, *Legal Drafting & Conveyancing (with precedents)* (3rd edn, Abuja: Temple Legal Consult 2010) 530

¹⁴ P K Mogaji, 'The Nigerian Mortgage Banking Sub-sector Reforms: The Expectations.' <Kenny-Morgans.blogspot.com/2011/09/Nigerian-mortgage-banking-sub-sector.html?m=1> accessed 26 May 2022.

¹⁵ <www.cenbank.org/Supervision/Inst-PMI.asp?NAV=1> accessed 26 December 2014.

¹⁶ J Omotola, *The Law of Secured Credit* (Ibadan: Evans Brothers 2006) 4.

¹⁷ Smith(n 11) 2.

incentive on the part of the creditor to provide credit.¹⁷

- By reducing the risk, security reduces the cost of credit by reducing the interest payable.¹⁸
- The secured creditor has priority over an unsecured creditor.

Security is an assurance of certainty of repayment as opposed to mere possibility of enforcing a claim by action of debt. This is advantageous because the borrower who solemnly promised to repay on the due date may turn out to be very adamant when called upon to fulfil his financial obligations to the lender.

Generally, some types of security that may be acceptable to banks are:

- (a) Goodwill:** Natural security without insistence on collateral securities; also known as policy lending, clean lending, special lending, unconditional lending.¹⁹
- (b) Lien:** aptly described thus: “*wherever a banker has advanced money to another, he has a lien on all paper securities which come into his hands for the amount of his general balance.*”²⁰
- (c) Pledge:** Deliberately handing over securities to the banker with a view to securing an overdraft or other advances.²¹
- (d) Hypothecation:** The process where things of merchandisable value are pledged to the banker either in simple form or by deed as security for lending.²²
- (e) Trust Receipt:** An authorization issued by a banker or financier of a specific consignment of merchandise to a selling agent usually the borrower's employee or nominee authorizing the sale/return remittance of the proceeds of the sale from such goods to the banker.²³

Other forms of security are: landed property, life assurance policies, stocks and shares,

¹⁸ Pedrazzini and Simpson, 'The Legal Framework for Secured Credit: A Suitable Case for Treatment' in I O Smith (ed.) *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 3.

¹⁹ O J A Oluana, *The Law and Practice of Banking, Collateral Securities and Mortgages*. (Lagos: Diversities Enterprises Publishers, 2000) 199. Although Section 18(1)(b) of the Banks and Other Financial Institutions Act (BOFIA) 1991 prevents unconditional lending to an extent. It provides to the effect that no manager or any other officer of a bank shall grant any advance, loan or credit facility to any person, unless it is authorised in accordance with the rules and regulations of the bank; and where adequate security is required by such rules and regulation; such security shall, prior to the grant, be obtained for the advance, loan or credit facility and shall be deposited with the bank.

²⁰ Lord Kenyon CJ in *Davis v Bowsheer* (1774) 5 Term Rep. 488; Oluana (n 19) 200.

²¹ *Ibid* 201

²² *ibid* at page 202

²³ *Ibid* at page 203.

debentures, goods and documents of title to goods and guarantees. The choice of form of security for a particular lending depends on the following:²⁴

- The amount of money (mortgage debt)
- The easy realization or otherwise of the particular form of security being considered.
- The relationship of the parties
- The status of the prospective borrower, individual, corporate body; business partnership, sole trader; tier of government, government agency or parastatal.
- Whether the prospective lender can easily perfect and acquire effective title to the security being considered in case of a default.

From the foregoing, it is observed that most of the factors stated are so linked to the feasibility/viability of the recovery of the credit facility through the security.

4. Legal Frameworks Regulating Mortgage Transactions in Nigeria

The following legal frameworks will be examined in this paper:

(i) Constitution of the Federal Republic of Nigeria, 1999

The starting point for the review of laws in any field in Nigeria is the Constitution of the Federal Republic of Nigeria. This is because every law derives its legitimacy from the Constitution which is the grundnorm of the country. The validity of any Law and the provisions therein are assessed on the basis of compliance with the Constitution which is the Supreme Law of the Country. The Constitution guarantees the right to acquire and own immovable property anywhere in Nigeria.²⁵ It also provides that such property will not be acquired compulsorily except in the manner and for purposes prescribed by law.²⁶ The Constitution further elevated the status of the Land Use Act to an extraordinary Statute.²⁷ The issue that arises is that, since land is a matter usually under the residual list, it seems inconsistent that a Federal Enactment could be made to deal with it. This inconsistency has been resolved by the Constitution which provides that the Land Use Act shall have effect as though it was an item in the exclusive legislative list.

²⁴ *Ibid* at page 203.

²⁵ CFRN, 1999 S. 43

²⁶ CFRN, 1999 S. 44

²⁷ *Nkwocha v Governor of Anambra State* (1984) 6 SC 403; where the apex court stated that the Land Use Act is an ordinary statute which became extraordinary because of its entrenchment in the Constitution.

(ii) Land Use Act²⁸

The Land Use Act is clearly the most significant development affecting mortgage security in Nigeria since the reception of the Conveyancing Act of 1881 as a Statute of general application and the passage into law of the Property and Conveyancing Law by the defunct Western Regional Parliament in 1959. Since then, the effects of the Land Use Act and the judicial attitude following it have drawn more commentaries than any other single subject in the development of Property Law in Nigeria. Forty four years after, the dust it raised on virtually every subject it covered, not least on mortgage, is yet to die down. Thus, this has elicited very passionate and sophisticated commentaries from every renowned scholar on Property Law and secured credit in Nigeria.

Up until 1978, there was no equivocation as to the nature and quality of estate that a person can transfer or mortgage in any part of Nigeria pursuant to the Conveyancing Act, Property and Conveyance Law and the Registration of Titles Law. Indeed, there was also no dispute as to the meaning and scope of applicable concepts of English doctrine of estate received and operational in Nigeria's Property Law. During the period of pre-1978, transfers and mortgages of freehold or leasehold interests were validly done almost as a private commercial transaction between a mortgagor and a mortgagee unhindered by any formal requirement for official approval (except perhaps in Northern Nigeria).²⁹ However, the combination of Sections 1, 47 and 48 of the Land Use Act, 1978 effectively subordinated the CA and PCL, and every other existing law relating to the transfer or mortgage of any interest in land to itself; and in so doing, fundamentally diminished and re-characterised the highest quality of estate capable of being transferred and mortgaged in Nigeria from fee simple estate to what is christened 'Right of Occupancy'.³⁰ Thus, it is said that the largest fee simple estate which an intending mortgagor of land had prior to 1978 became extinguished, sweeping away with it all the pre-existing unlimited rights of the mortgagor thereof.³¹ Arising from this is the development that only a right of occupancy which may either take the form of a granted/deemed right of occupancy or granted/deemed customary

²⁸ Cap. L5 LFN 2004

²⁹ E Essien, *Law of Credit and Security in Nigeria* (2nd edn.) Lagos: Toplaw Publishers 2012) 157

³⁰ LUA, 1978 S. 8

³¹ *Savannah Bank Ltd. v Ajilo* (1989) 1 NWLR (Pt. 97) 305

right of occupancy available to a mortgagor as an estate in land for securing credit under the LUA.³² Interestingly, among its several revolutionary land policy provisions that tended to modify the concept of land ownership and incontrovertibly converted old forms of estate into one called Right of Occupancy, there is no express provision as to the specific mode of mortgaging the Right of Occupancy under the LUA. Nonetheless, by virtue of section 48 which is to the effect that the determination of the modes of mortgage creations in the state of Nigeria continues to lie in the CA of 1881, the PCL of 1959, and the Mortgage and Property Law of Lagos State of 2010 and any other existing law making provision for mortgage, the LUA rather than solve a problem created more frenzy amongst scholars as to whether a Right of Occupancy can be equated to a leasehold or not for all purposes, including mortgage.

Clearly, there are two shades of thoughts on the status of the Right of Occupancy as an interest or estate in land. The first, perhaps led by Omotola,³³ poignantly maintained that any effort at alluding that a Right of Occupancy is another form of leasehold known to the doctrine of estate must be rejected because in reality, its salient feature suggest the contrary. According to him, the Right of Occupancy introduced under the Land Use Act is a new form of right not coming within any form of rights known to Property Law. The second shade presented by Osimiri,³⁴ and canvassed by many before him, holds that a Right of Occupancy by its very nature is in substance a lease, or as he puts it, is 'at least a form of statutorily created lease peculiar to Nigeria alone' despite the fact that its attributes does not strictly conform to the rigid features of orthodox English Common Law Lease.³⁵ Essien clearly shared this view as he pointed out with detailed illustrations that although a thorough juxtaposition of the Right of Occupancy under the LA and the conventional lease under the Common Law shows how disparate their attributes and nature of rights embedded in them are, in terms of certainty of term, exclusive right to possession and rent reservation still, since the provision of the LUA generally gives the Right of Occupancy ample resemblance with a Common Law

³²LUA 1978, ss. 34(2)(3)(4) and 36(20)(3)(4)

³³JA Omotola, 'The Nature of Right of Occupancy under the Nigerian Land Use Decree' (1980) 3 *PLJ* 22

³⁴U Osimiri, 'Mortgage Under Land Use Act, 1978 is not a Hazardous Business' (1991) (2)(1) *The Lawyer's Journal*; 65; C O Olawoye, 'Title to Lad, 1974 164; T O Elias, *Nigerian Land Law and Custom* (1962) 284; A D Badaiki, 'Modes of Mortgaging Land in Nigeria' (1994/95) (4)(1) *do State University Law Journal*; 47.

³⁵Osimiri, *ibid* p. 67

lease, it is therefore safe to conclude that Right of Occupancy is a 'statutory lease'.³⁶ Interestingly, the second shade, like the first seems to have earned judicial validation when in the case of *Savannah Bank v Ajilo*³⁷ the Court held that 'to the extent it can only be granted for a specific term under Section 8 of the Act, it has the semblance of a lease. Also to the extent that a holder has the sole right to and absolute possession of all the improvements on the land during the term of a statutory right of occupancy, a holder does not enjoy more rights than a lease under Common Law'. This paper align itself with the reasoning in the latter shade since no matter the minute differences of the Common Law Lease from a Right of Occupancy under the LUA, it will hardly be mistaken that the legislative intention of creating a Right of Occupancy is borne out of the view that a holder of land intending a mortgage cannot create one that will be lengthier than his statutory lease.

(iii) Secured Transaction in Moveable Assets Act, 2017

As a result of the deficiencies in the Bill of Sales Law of the various States examined above, the Secured Transactions in Moveable Assets Act, 2017 (STMAA) appears to have offered the much needed lending efficiency remediation and in fact an all-encompassing alternative aimed at establishing a National Collateral Registry that should cater for a wider scope of security interest in moveable property, without necessarily restricting the form of the security device that can be engaged. It is noteworthy that the STMAA is preceded by the 'Registration of Security Interests in Moveable Properties by Banks and other Financial Institutions in Nigeria (Regulation, No. 1 of 2015) otherwise known as Collateral Registry Regulation. The Regulation was issued by the Central Bank of Nigeria (CBN) in exercise of its statutory power provided for in Section 57 of the BOFIA (as amended). Undoubtedly, this effort by CBN is the most significant attempt made in Nigeria to herald the reform of the law of secured transactions now seen in the STMAA. Unlike the Bill of Sales Law, the STMAA as a federal legislation presented framework for individuals and micro, small and medium enterprises to facilitate access to credits secured with moveable properties, as well as to facilitate the perfection and realization of the security interests derivable from such moveable property. It is imperative to state that the STMAA applies to all

³⁶ Essien (n 5) 121

³⁷ (1989) 1 NWLR (Pt. 97) 305

security interests in moveable property created by agreement to secure payment or the performance of an obligation, excluding however any interest created in land other than accounts receivables, a right of set-off and, any interest created by a transfer, assignment or mortgage in moveable property governed by a law for which a registry has been established with regard to ships and aircrafts.³⁸ The STMAA established the National Collateral Registry which is saddled with the function of making possible, efficient and transparent electronically based registration regime upon which relevant real time information on existing encumbrances/interests over moveable properties can be accessed and gleaned, so as to facilitate the creation and perfection of security interests or for enforcements and realization.

The STMAA is purposefully drafted to move away from the formalistic nature that characterizes the Bill of Sales Law towards the embracement of a facilitative scheme that avoids unnecessary cost in the creation of security interest over moveable properties. Indeed, it abandoned the common law tradition that lies at the centre of all previous legislation governing creation of security rights in properties for a functional regime that nonetheless promotes effectiveness and efficiency in secured transactions involving moveable properties. What is more, the enactment of the STMAA appear to have been heavily influenced and guided by certain international policy frameworks, particularly by the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions. Premised thereon, it can safely be said that Nigeria has now launched itself into the global precincts as one that operates a modern secured transaction law in moveable properties capable of withstanding any international benchmark. What however remains to be seen is how this piece of legislation will fare in what may be referred to as the post-enactment acculturation period.³⁹

(iv) Companies and Allied Matters Act, 2020

The Companies and Allied Matters Act, 2020 has remained one of the most important piece of corporate and commercial legislation that serves to regulate, amongst other things, how companies in Nigeria can, within the confines of their

³⁸ STMAA, 2017 Ss. 2(1(a) and 2(a)(b) and (c)

³⁹ UNCITRAL Legislative Guide on Secured Transactions (United Nations Publications, 2010) 29

authorized objects apply their assets or properties towards raising capital.⁴⁰ Thus, the centrality of the requirement for registration of transactions involving companies which having borrowed money in furtherance of their business, mortgage or charges the whole or a specified part of their undertaking, including landed and moveable properties – tangible or intangible – as security, cannot be ignored. This is because, a Bill of Sale created by a company over its moveable properties as contemplated by section 197(2) of CAMA is absolutely incapable of registration in the registries established under the Bills of Sale Laws. As such, the public and potential creditors alike may be left with no possible way of knowing when a corporate body has encumbered its undertaking or property whether moveable or immovable.

This gap can be seen to have been filled by Section 197 of CAMA which makes it mandatory for every charge created by a company over its property or undertaking as security for repayment of a debt to be registered at the Corporate Affairs Commission (CAC) within 90 days after the date of its creation. According to CAMA, this requirement is inviolable with respect to charges on the company's landed properties and interests other than rent or periodic sum thereof, charges that secures any issue of debentures, charges on uncalled share capital of the company, charges akin to a bill of sale, charges on book debts of the company, a floating charge on the company's undertaking, a charge on a ship or an aircraft or any share in a ship, charges on calls made but not paid, and a charge on goodwill, on a patent or a licence under a patent, on trademark or on copyright or a license under a copyright.⁴¹ Failure to comply with the registration requirement after 90 days makes the debt or money secured become due and payable immediately at the instance of the creditor. However, this rule as stated in Section 197(2) of CAMA is modified by section 205 of the same Act, which empowers the court to upon an application, on just and expedient grounds, make an order that time be extended for the purpose of registering a charge out of time.⁴²

By the provisions of Section 179 of CAMA, a fixed charge on any property have priority over a floating charge affecting that property, unless the floating charge was granted upon certain negative pledge terms unequivocally prohibiting the

⁴⁰ CAMA 2020 Ss 38 and 166

⁴¹ CAMA 2020, s 197(2)

⁴² *Development Finance v Registrar of Companies* (1973) NCLR 497

company from creating any equal or higher ranking security than the extant floating charge as long as it remains undischarged. While it is not intended here to expand on the intricacies of these provisions, suffice it to state here that there exists some peculiar nuances of the rule of priority in respect of charges under CAMA.

4.5 Stamp Duties Act⁴³

As this paper has shown earlier, obtaining a Governor's Consent pursuant to the LUA in respect to mortgage of instruments over land and registration of mortgage instrument (whether on personal or real property) in designated registries established by relevant statutes are strict statutory requirements for stamping of such instruments which has indeed become *sine qua non* for the realization of the entire process (that is, obtaining the consent of the Governor and generally registering the mortgage instrument). Thus, before the consent of the Governor pursuant to the LUA can be obtained to enable the perfection of a land-backed mortgage by way of registration, there must be clear evidence that the Applicant would have paid the required stamp duties denoted by impression or a die adhesive stamp on the said document.

More than anything, Stamp Duty which is governed by the Stamp Duties Act, fulfils the revenue generation functions of government both at the Federal and State levels, and thus, is a constitutionally recognized type of tax⁴⁴ imposed strictly on documents within the meaning of the Stamp Duties Act, and payable either as fixed stamp or *ad valerom* Stamp Duties on the value of the transaction in the case of the latter. Hence, Stamp Duties chargeable under the SDA are payable on all instruments, including mortgages, charges and Bill of Sales, without which such instruments becomes inadmissible in evidence.⁴⁵ And unless such deficiency (non stamping) is remedied, as has been held in plethora of cases,⁴⁶ by payment of the appropriate stamp duty and consequential penalty, the inadmissibility of the instrument will hold dire implications for the enforcement of that instrument.

In terms of time limit, every instrument specified under the SDA for stamping has a period of 40 days (if charged as fixed duty), or 30 days where like mortgages an *ad valerom* duty is charged.⁴⁷ After these statutory periods, late stamping of any such instrument, as noted

⁴³ Cap. S8 LFN, 2004

⁴⁴ *Commercial Bank Credit Lyonnais Ltd v Union Food (Nig.) Ltd* (1992) FHCLR 344; U Jack-Osimiri and E Jack-Osimiri, 'Conveyance as a Tool for Effective Stamp Duties Operation' (2004) 24 *JPPL*, 3

⁴⁵ SDA 2004, S 22(4)

⁴⁶ *Okawobi v Ishola* (1973) 3 SC 43; *Opigo v Yukwe* (1997) 6 NWLR (Pt. 509) 428

⁴⁷ SDA 2004, S 23(1)(3)(a)

earlier, attracts penalty payable in addition to the stamp duty charge. It would appear that by the provision of the SDA strictly construed, there is, in the words of *Ayai v Adeoba*,⁴⁸ no legal obligation in Nigeria to stamp any instrument at all. In practice however, none of the registries examined above (that is, Land Registries, Bills of Sale Registries, the CAC Registry and the Central Ship Registry), except for the National Collateral Registry, will accept an unstamped instrument for registration. This is even against the background of certain judicial pronouncements which inferred to the contrary that an unstamped instrument should not be denied registration under a law that registers instruments on the basis of non-compliance with another law (that is, the SDA).⁴⁹ Whatever the case, stamp duties payable in Nigeria remains an integral part for the cost to be incurred in perfecting mortgages and charges, despite the fact that the functional equivalent legislation and indeed originator of the SDA in Nigeria (being the UK Stamp Duties Act of 1859) has longed been abandoned in England. It is submitted here that the continued practice in Nigeria under the SDA constitutes additional burden and cost that continues to make collateral security less valuable and attractive.

5. The Enforcement of Mortgage Security in the Nigerian Financial System

Following the adoption of the National Housing Policy in 1990, the Federal Mortgage Bank of Nigeria (FMBN) is empowered to license and regulate primary mortgage institutions in Nigeria and act as the apex regulatory body for the mortgage finance industry.⁵⁰ The mortgage industry in Nigeria is faced with certain daunting challenges in the enforcement of mortgage security. Problems encountered by mortgagees in the enforcement of mortgage security result in a significant fall in the desire to lend, thus negatively affecting housing delivery in Nigeria. In order to achieve sustainable growth in the Nigerian banking system, it is pertinent to address the constraints in the enforcement of mortgage security in Nigeria.

6. Challenges to the Enforcement of Mortgage Security in Nigeria

6.1a Challenges posed by the mortgagee's remedies:

One major challenge to the enforcement of Mortgage Security is the fact that

⁴⁸ K Ajai and K Adeoba, 'Stamp Duties Assessment and Payment in Nigeria' (2000) (5)(1) *Modus Interanal Law and Business Quarterly*; 113

⁴⁹ *Registrars of Companies v Kehinde* (1979) 3 LRN 213

⁵⁰ <<http://www.nigeriaconsulate.org.hk/Common/Reader/Channel/ShowPage.jsp?Cid=5&Pid=4&Version=0&Charset=iso-8859-1&page=0>> accessed 3 January 2015. Section 5 of the Federal Mortgage Bank of Nigeria Act (Cap. F16 Laws of the Federation of Nigeria 2004) provides to the effect that it shall be the function of the mortgage Bank to supervise and control the activities of mortgage

borrowers seek injunctions at the Courts to block enforcement action.⁵¹ This cut across all the remedies. It is not uncommon for the mortgagor's solicitor to file various preliminary injunctions and interlocutory applications all in a bid to frustrate enforcement of the mortgage security.⁵²

6.1b Action to recover Mortgage Sum and Interest:

Henchman,⁵³ opines that this is probably the last resort of a mortgagee. This is because unless the mortgagee is satisfied that the mortgagor is a person or company of substantial means, there is little point in bringing an action on the personal covenant before the mortgagee's power of sale is exercised. Such efforts to enforce this remedy may prove futile. It is better to first sell and then bring an action on the personal covenant for any deficit.⁵⁴

6.1c Sale:

This remedy has been described as the most litigated aspect of the mortgagor and mortgagee relationship.⁵⁵ Allegations of fraud in the conduct of a sale constitute a major challenge to the exercise of this remedy. If a mortgagee is alleged to have acted in bad faith, an injunction may be sought by the mortgagor to prevent the mortgagee from proceeding with the sale.⁵⁶ These delays proceedings and reduces the pace of enforcement. Another challenge is evident where the interest in a mortgaged property is a customary right of occupancy; the power of sale may not be exercised without the consent of the Governor if

institutions in Nigeria. The FMBN is under the control of the Central Bank of Nigeria (CBN) which is the apex regulatory authority of the financial system in Nigeria.

⁵¹Loan Market Association. <<http://www.lma.eu.com/pages.aspx?p=451>> accessed 3 June 2022.

⁵²*Intercity Bank Plc v F&F.F. (Nig) Ltd* (2001) 17 NWLR (Part 742) P. 342 was an appeal against the **interlocutory injunction** granted by the trial court restraining the appellant from exercising its power of sale under a mortgage deed over the 2nd respondent's property. The Court of appeal in allowing the appeal stated obiter that the court will not intervene or restrain the mortgagee from exercising his right of sale of the mortgaged property which is the only certain shield and he should be allowed to sell. Similarly, this was the case in *Afribank Plcv Adeniji Adele* (2000) 15 W.R.N. 16; *ACIB v Awogboro* (1991) 2 NWLR (Part 176) 711; *Cornelius Ltd v Ezenwa* (1996) 1 R.M. L.R (Part 2) p. 42.

⁵³A P Henchman, 'Remedies of the Secured Creditor' Paper delivered at Annual Summer School, Law School of the University of Western Australia, 8 February 1972 <<http://www.austlii.edu.au/au/journals/UWALawRw/1971/2.pdf>> accessed 7 June 201522.

⁵⁴*Ibid*

⁵⁵M Hilton and J Barbaro, 'Managing the Mortgagor and Mortgagee Relationship' (2009) 16 *Australian Law Journal* 204 in J Squelch, (ed) 'Mortgagee's Power of Sale and the Duty to Sell at Market Value' <<http://www.austlii.edu.au/au/journals/LegIssBus/2009/6.pdf>> accessed 7 June 2022.

⁵⁶*Sablebrook P/L v Credit Union Australia Ltd* (2008) QSC 242 in Joan Squelch, 'Mortgagee's power of sale and the duty to sell at market value' <<http://www.austlii.edu.au/au/journals/LegIssBus/2009/6.pdf>> accessed 7 January 2015.

the sale is by way of court order under the Sheriff and Civil Process Act.⁵⁷ This process is challenging as the procedure for seeking and obtaining Governor's Consent is a herculean task.⁵⁸

6.1d Possession:

According to Anyanechi,⁵⁹ the practical issue with enforcing security by this method is that the mortgagor may not allow the mortgagee to peacefully exercise this right. Considering the fact that this is a non-judicial method, most mortgagors will resist and virtually frustrate attempts by the mortgagee to take possession of the mortgaged property, without a Court Order compelling the mortgagor to allow the mortgagee to enter into possession. Again, mortgagees in possession have to account strictly to the mortgagor for the rent accruing from the property. In opting to take possession of the property, the mortgagee is bound to account strictly to the mortgagor and any subsequent secured lender not only for actual receipts, but for what they should have received from a proper management of the property, and must also take reasonable care of the property.⁶⁰ The mortgagee in possession is liable to effect repairs on the property.⁶¹

6.1e Receivership:

The challenges inherent in this remedy are reflected in its disadvantages which are: The receiver is remunerated out of the income received from the mortgaged property; the mortgagee while having control over the appointment

⁵⁷Section 21 (a) and (b) Land Use Act, 1978 CAP 22 LFN 1990. But there is no requirement of consent if the sale is out of court pursuant to express or statutory powers or where an equitable mortgagee applies for a judicial power of sale; A Evangel, and ME Brown, 'Mortgage, Pledge and Charge Transactions in Nigeria: Comparative/Distinctive Analysis and Legal Examination.' (2013) (13)(6)*IOSR Journal of Business and Management*; 100-107.

⁵⁸D Olanrewaju, 'The Fallacy of using Power of Attorney to avoid the Consent Provisions under the Land Use Act' (+2012) (1)(2)*Babcock University Socio-Legal Journal*; 176.

⁵⁹O Anyanechi, 'Bank Finance and Regulation: Multi-Jurisdictional Survey Nigeria. Enforcement of security interests in banking transactions.' <https://www.google.com.ng/search?q=Bank+finance+and+regulation.+Multijurisdictional+survey+Nigeria.+enforcement+of+security+interests&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gfe_rd=cr&ei=oqCsVK-yOIGA0AW-6YDwCA> accessed 7 June 2022.

⁶⁰Field Fisher Waterhouse 'Security over land' (June 2011) <<http://www.fieldfisher.com/media/2457/Security-over-land.pdf>> accessed 28 May 2022.

⁶¹Although the cost of such repairs is from the rents and profits collected from the security; J F Oniekoro, *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 151.

⁶²T Cox and K Lees, 'Mortgagees' Remedies in a Shaky Market.' <<http://www.falcon-chambers.co.uk/uploads/docs/section9/>>

of the receiver, has less control than when in possession; in practice, the mortgagee may have to agree to indemnify a receiver against some or all of his potential liability to the mortgagor.⁶²

6.1f Foreclosure:

The major challenge in the exercise of this remedy is that foreclosure processes are seen to be cumbersome and time-consuming. During the period between Foreclosure Orders *nisi* and *absolute*, proceedings are protracted.⁶³ According to Pepple,⁶⁴ most players in the industry are of the view that Foreclosure Law is not helpful to the lender and weighs heavily against it. This gives latitude for borrowers to default in the repayment of their loans.

6.2 Legal/Regulatory/Legislative Challenges

Nigeria's Mortgage Laws need reform to bring them up to date with modern needs.⁶⁵ The Land Use Act 1978 has caused difficulties that may impede the exercise of certain remedies by the mortgagee. For instance, in a sale, by virtue of the provisions of Sections 21 and 22 of the Land Use Act, the responsibility to obtain consent to alienate a statutory right of occupancy is on the mortgagor who is the holder. The mortgagor may intentionally or negligently fail to do this. This renders the mortgage void in law⁶⁶ where the mortgagor defaults and the mortgagee would not be able to exercise the power of sale.⁶⁷ This is aggravated by the

⁶³ Y Osibanjo, 'Challenges of Enforcement of Securities in Nigeria'

<http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIES-CHALLENGES.pptx&ei=hPWYVKKpGcGyUd-AgegM&usg=AFQjCNFPgF3fD4JDWk-vVozFr2MFRM1GoA&sig2=I_8usNhZ6xB6ITCEoZM5xw&bvm=bv.83339334,d.d24> accessed 7 June 2022.

⁶⁴ A Pepple, 'Housing and Urban Development at the Real Estate Lawyers Association of Nigeria' (RELAN) 2013 Summit.

<<http://thenationonlineng.net/new/adoke-others-seek-mortgage-laws-reform/>> accessed 4 June 2022

⁶⁵ J Jibueze, 'Adoke, others Seek Mortgage Laws Reform' *The Nation* (25 June 2013) <<http://thenationonlineng.net/new/adoke-others-seek-mortgage-laws-reform/>> accessed 4 June 2022; The Attorney-General of the Federation Mohammed Adoke (SAN), former dean Faculty of Law, UNILAG Prof. Imran Smith amongst others said the existing laws were old. This was at the Real Estate Lawyers Association of Nigeria (RELAN) 2013 Summit with the theme: Foreclosure Law and processes in relation to Mortgage security in Nigeria.

⁶⁶ Section 26, Land Use Act 1978

⁶⁷ LLM Class seminar UNILAG. 'The Mortgagee's Power of Sale: Problems and Solutions'

<http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fsecuredcredit.files.wordpress.com%2F2011%2F02%2Fthe-mortgagee-grp-6seminar-paper.doc&ei=wfiyVPziEoTnUs2Pg4A1&usg=AFQjCNF5p--hEiNSVx3_I28pMi4QeMZFAw&sig2=R1dMhnMStZgG2eCzYhdYkA&bvm=bv.83339334,d.d> accessed 6 June 2022.

herculean consent application process in Nigeria. Some states have turned the request for consent into a money-making venture. This has caused unnecessary delay in the process of giving Consent thereby slowing down land development.⁶⁸ In practice, obtaining Governor's consent for transactions takes about 61 days on average depending on the State where the land is located.⁶⁹ Ultimately, this affects the mortgagee seeking to enforce the security.⁷⁰ Obaseki, JSC., in the celebrated case of *Savannah Bank (Nig.) Ltd. v. Ajilo*⁷¹ on this issue stated thus:

The Land Use Act is bound to have a suffocating effect on the commercial life of the land and house owning class of society who use their properties to raise loans and advances from the banks. I have no doubt that it will take the whole working hours of a Governor to sign consent papers (without going halfway) if these clauses are to be implemented.

Furthermore, Section 28 of the Land Use Act does not portray the right of occupancy as an adequate or efficient security for a mortgagee.⁷² Section 28 (1) provides that it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest. The wide range of instances covered by the overriding public interest in the revocation of a right of occupancy accounts for its inefficiency as security for a mortgagee.⁷³ In addition to this, the definition of the term “holder” of a right of occupancy in the Land Use Act⁷⁴ renders the mortgagee incapable of laying claim to any compensation upon the revocation of the right of occupancy.

⁶⁸ D Olanrewaju, 'The Fallacy of using Power of Attorney to avoid the Consent Provisions under the Land Use Act' (2012) (1)(2)*Babcock University Socio-Legal Journal*; 176.

⁶⁹ NMRC <<https://greymile.wordpress.com/tag/nmrc/>> accessed 3 June 2022

⁷⁰ This is especially so because it is the Governor's consent that vests a valid title on the mortgagee. *P.I.P. Ltd. v Trade Bank (Nig.) Plc* (2009) 13 NWLR (Pt. 1159) 577 C.A.

⁷¹ (1989) NWLR (Part 97) 305 at 329.

⁷² N A Amodu, 'Efficiency of Mortgage Transactions under the Land Use Act: Myth or Reality'

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241> accessed 6 June 2022.

⁷³ Section 28(2) and (3) state a range of possibilities that amount to overriding public interest to warrant a revocation of a statutory right of occupancy and a customary right of occupancy respectively. For example, the alienation by the occupier by assignment, mortgage, transfer of possession, sub-lease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made thereunder; the requirement of the land by the government of the state or by a local government in the state, in either case for public purposes within the state....

⁷⁴ Section 51 Land Use Act (LUA). It expressly excludes the mortgagee from its definition. "In relation to a right of occupancy, means a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-underlessee."

This is due to the fact that once the right of occupancy is revoked, the security is gone and does not attach to the mortgagor's interest in any changed form. Rather, the mortgagor may be entitled to compensation for the value of his unexhausted improvements on the land, leaving the mortgagee without remedy. The fact that the mere issuance of a certificate of occupancy to a person without title to a parcel of land acquires no right or interest which he did not have before⁷⁶ further aggravates the mortgagee's position. This occurs where the certificate of occupancy is set aside if it turns out that the holder had no right to the land or in favour of a pre-1978 conveyance or in favour of a deemed grantee of right of occupancy under section 34 of the Act.⁷⁷ The certificate raises a rebuttable presumption of a right of occupancy.⁷⁸ The security of the mortgagee becomes an unsecured debt recoverable by action for recovery of debt like any other debt.⁷⁹ In *Eriketola v. Alli*⁸⁰ a mortgage was set aside where a domestic servant used family property given to him without the consent of the family head/principal members as security for personal loan.

6.3 Judicial Challenges

The Judicial system has been described as slow and porous.⁸¹ For instance, in an action for foreclosure by the mortgagee, courts are more inclined to give several opportunities as possible to the mortgagor to redeem.⁸² This is aggravated by the

⁷⁶Section 29 (1) and (2) LUA to the effect that if a right of occupancy is revoked..., the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvement. - Amodu, N.A., 'Efficiency of Mortgage transactions under the Land Use Act: Myth or Reality' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241> accessed 6 June 2022.

⁷⁷*Ogunleye v Oni* (1990) 2 NWLR (Part 135) 733; *AlhajiGoniKyariv AlhajiCiroma Alkali &Ors*(2001) 11 NWLR (PT 724) 412; E Ekpeyong, 'The Challenges Associated with Exercising the Power of Sale under a Mortgage in Nigeria'<http://www.academia.edu/7553472/The_Challenges_Associated_With_Exercising_The_Power_Of_Sale_Under_A_Mortgage_In_Nigeria> accessed 8 June 2022.

⁷⁸In Sir *AdetokunboAdemolav Amao&Ors*(1982) CGSLR p.273 reported in J A Omotola, "Cases on the Land Use Act" p. 132; N A Amodu, 'Efficiency of Mortgage Transactions under the Land Use Act: Myth or Reality' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241> accessed 6 June 2022.

⁷⁹In *Agboola v U.B.A. Plc* (2011) 11 NWLR (Part 1258) 375 it was stated that a certificate of occupancy regularly issued by competent authority raises the presumption that the holder is the owner in exclusive possession of the land in respect thereof.

⁸⁰<https://www.google.com.ng/search?q=THE+DISTINCTION+BETWEEN+A+MORTGAGE+AND+A+CHARGE.IS+IT+MERELY+IN+NOMENCLATURE%3F&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gfe_rd=cr&ei=mf6yVPL0KcjDaJnMgpAP> accessed 7 June 2022.

⁸¹(1941) 16 NLR 56

⁸²LLM Class seminar UNILAG. 'The mortgagee's power of sale- problems and solutions' <http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fsecuredcredit.files.wordpress.com%2F2011%2F02%2Fthe-mortgagee-grp-6seminar-paper.doc&ei=wfiyVPziEoTnUs2Pg4AI&usq=AFQjCNF5p--hEiNSVx3_l28pMi4QeMZFAw&sig2=R1dMhnMStZgG2eCzYhdYkA&bvm=bv.83339334,d.d> accessed 7 June 2022.

⁸³Y Osinbajo, 'Challenges of Enforcement of Securities in Nigeria' <<http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source>

fact that foreclosure is enforceable only through the Court. The enforcement time also depends on whether the mortgagor challenges the process or not.⁸³ The mortgagor may file different preliminary objections to frustrate the mortgagee's attempts at enforcement. Adoke⁸⁴ opines that the current complicated procedures in our Law Courts and the unduly slow pace of proceedings cast a dim pall on the chances of achieving growth in the areas of enforcement of mortgages.

6.4 Social Challenges

Co-ownership of property as subject-matter of security is one of the complications that arise in the enforcement of mortgage security.⁸⁵ This is especially challenging where there are inadequate provisions as to the ownership of the property in relation to the mortgage transaction. In such situations, disputes may arise in relation to how the property is to be owned between co-owners; limit on liability to pay the mortgage according to the proportion of ownership, what happens if one co-owner wishes to sell, the price at which a co-owner may purchase the interest of the other owner, who is to pay for ongoing expenses like water rates and repairs, what happens if one party fails to pay their contribution on their mortgage, is one or more of the parties to be entitled to exclusive occupation of the property?⁸⁶

Land taken as security may be contaminated or be prone to environmental liability which might reduce the value of the security during enforcement. Also, a lender in possession may be exposed to liability under the environmental legislation. Under Nigerian environmental laws, occupiers of premises are generally liable for environmental breaches.⁸⁷ The Federal Government of Nigeria has promulgated

=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIES-CHALLENGES.pptx&ei=hPWYVKKpGcGyUd-AgegM&usg=AFQjCNFpGf3fD4JDWk-vVozFr2MFRM1GoA&sig2=I_8usNhZ6xB6ITCEoZM5xw&bvm=bv.83339334,d.d24> accessed 7 June 2022.

⁸³O Anyanechi, 'Bank Finance and Regulation. Multi-jurisdictional survey Nigeria. Enforcement of security interests in banking transactions.' <https://www.google.com.ng/search?q=Bank+finance+and+regulation.+Multi-jurisdictional+survey+Nigeria.+enforcement+of+security+interests&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=flb&gfe_rd=cr&ei=oqCsVK-yOIGA0AW-6YDwCA> accessed 7 June 2022.

⁸⁴Jibueze (n 40)

⁸⁵Smith, RELAN Vice-President in Jibueze, J., 'Adoke, others seek mortgage laws reform The Nation' *The Nation* (25 June 2013) <<http://thenationonline.ng/new/adoke-others-seek-mortgage-laws-reform/>> accessed 4 January 2015.

⁸⁶F Sonntag, 'Property Co-ownership: The Pitfalls.' <http://www.rockwellolivier.com.au/Whats%28news%29/Latestnews/Tabld/105/ArtMID/572/ArticleID/2479/Property-co-ownership-the-pitfalls.aspx?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original> accessed 9 June 2022.

⁸⁷T Owolabi and others, 'Lending and taking Security in Nigeria: Overview.' Law stated as at 1st April 2014. <<http://us.practicallaw.com/4-524-5665?q=&qp=&qo=&qe=>> accessed 15 June 2022.

⁸⁸O Makinde & T Adeyoke, 'Environmental Law in Nigeria' <<http://www.mondaq.com/x/53804/Energy+Law/Environment+Law+In+Nigeria>> For example, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act,

various laws to safeguard the Nigerian environment.⁸⁸ These laws have attendant liability for failure to abide by them.⁸⁹ Owners of land are responsible under the law for environmental hazards caused by them, there is no exemption for lenders who assume possession of the mortgaged property.⁹⁰

7. Conclusion

The fact that easy realization of credit is crucial to confidence in lending cannot be undermined. The major concern of mortgage institutions is the repayment of the mortgage debt. This could be by the mortgagor simply repaying the mortgage debt or the mortgagee resorting to the security to recover the debt. The ultimate aim is to attain a viable mortgage industry that can favourably compete in the global economy. This can only be achieved where the mortgage institutions are sturdy and there is a balance in the inflow and outflow of funds in the economy. Although there is a variety of remedies available to the mortgagee in the enforcement of the mortgage security in Nigeria, it is evident that these processes are beset with many challenges. Therefore, in order to ensure continuous growth in the Nigerian mortgage industry, improvement and innovation are required in the challenging areas.

8. Recommendations

Based on the challenges involved in the enforcement of mortgage security in Nigeria, the following recommendations are being made:

1. Improved statutory reforms which would include creating authorities and bodies for handling of enforcement of mortgage securities.
2. On the revocation of the right of occupancy subject matter of mortgagee's security, the Land Use Act should permit the mortgagee to have an equal right to claim the compensation money unlike the present situation.
3. Also, before the issuance of the Certificate of Occupancy, there should be an effective way of revalidation of the claim to the Right of Occupancy of the applicant. This would add to the value and weight of the certificate and probably

2007 Act No.25 (NESREA) , Environmental Impact Assessment Act of 1992, Harmful Wastes (Special Criminal Provisions etc.) Act of 1988 (Harmful Wastes Act) with the Federal Ministry of Environment (FME) as the body that administers and enforces environmental laws in Nigeria.

⁸⁹For example, failure to comply with the Environmental Impact Assessment Act is tantamount to committing an offence liable on conviction, in the case of an individual, to a fine or to a term of imprisonment for up to 5 years; fines are also imposed on guilty firms or corporations. By virtue of Section 25 (1) of NESREA ACT, the agency (National environmental standards and Regulations enforcement agency) may make regulations for the purpose of protecting public health and promotion of sound environmental sanitation. (2) a person who violates the provisions of the regulations made pursuant to sub-section 1 shall be guilty of an offence and punished under the penalties imposed in the regulations made pursuant thereto.

make it a good root of title.

4. To avoid the delays linked with the consent giving process, the Land Use Act should specify a duration within which the consent of the Governor is to be given. The Act should also address the issue of the Governor withholding consent unreasonably. More practically, it has been advocated that mortgage to banks and other financial institutions should be exempted from the consent provisions of the Act as was the case under the Acquisition of lands by Aliens Law.
5. Also, even without strictly complying with the consent provisions, a mortgage should be treated as an equitable mortgage. Although defective mortgages may pose challenges in their enforcement, there are certain viable equitable doctrines which may salvage the situation.
6. The mortgagee may ask the Court to declare the defective mortgage as an equitable mortgage to replace it.
7. The Doctrine of Constructive notice may also be employed to the effect that the holder of a competing lien may be held to have constructive notice of the defective liens.
8. **Accelerated Court Processes:** The reduction of Court involvement in business matters by permitting private enforcement of collateral with recourse to the Courts only for disputes will greatly reduce enforcement time and encourage lending. The introduction of summary procedures for commercial disputes greatly reduces litigation time.