

# Equitable Mortgage Creation in Nigeria: An Analytic Appraisal

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## Abstract

*The Law is relatively clear on what the Court should do in the event that a party creates an equitable mortgage on a property that is a subject-matter of a legal mortgage, which debt has not been discharged. There are several legal authorities in Nigeria and across the Common Law countries that sustain the standpoint that it is perfectly acceptable for a party to create a second mortgage over a property that is in dispute in the sense that the title Deed of the property in dispute is already in the hands of the mortgagee. In this case, the second mortgage is held under the equity of redemption which implies that the equitable mortgage subsists to such duration that the first mortgage is redeemed. The goal of this article therefore, is to investigate the legal lapses in the Law that are capable of derailing the creation of an equitable mortgage in Nigeria and, to proffer workable and sustainable solutions.*

**Keywords:** Equitable; Mortgage, and Creation.

## 1. Introduction

Mortgage transaction as a means of securing the repayment of money paid to a Borrower by the Lender has come to stay and almost indispensable in any economy. Creation of equitable mortgage different from a legal mortgage is recognized and can be resorted to even when the collateral is already the subject of a legal mortgage. This practice though desirable may not be without some challenges. The ways of creating an effectiveness of an equitable mortgage

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are therefore of great concern in the interest of mortgagee and mortgagors as well as the society.

## 2. Conceptual Framework

Mortgage has been a topical issue in Property Law and practice for decades, especially from the era of the creation of the Court of Chancery, also known as the Court of Equity of England.<sup>1</sup> Nonetheless, there has been several conceptual misunderstanding of what really is a Mortgage, which led to one of the foremost definitions of a Mortgage in the English case of *Santley v Wilde*<sup>2</sup> where it was defined thus:

*A conveyance of land as security for the payment of a debt or the discharge of some other obligation'. As mentioned in the introduction, in its most basic form, it is the borrowing of money with security for that debt. If the borrower defaults on the payment, a lender may use the property to recover the sum and any interest. The most common way a lender will do this is by selling the property.*

Despite the above explicit definition, there are contentions as to the appropriate expressions that legally provide a universally accepted meaning of the concept. For example, in *Samuel v. Jarrah, Timber v. Wood Paving Corporation*,<sup>3</sup> Lord Macnaghten explained that, "no one ... by the light of nature ever understood an English mortgage of real estate." Also, in the case of *Intercity Bank Plc v Feed and Food Farm Nig. Ltd.*,<sup>4</sup> the Nigerian Court of Appeal defined a mortgage as a conveyance of property as security for a debt which is lost or became dead to the debt if the money or the interest due on it is not paid on a certain date. By the same reasoning, in *Olowu v. Miller Bros Nigeria Limited*,<sup>5</sup> a mortgage was defined as a security created by contract for the payment of a debt already due or to become due. According to Samuel,<sup>6</sup> "A mortgage can be defined as a legal document by which the owner (that is, the buyer) transfers to the lender an interest in real estate to secure the repayment of a debt, evidenced by a mortgage note. When the debt is repaid, the mortgage is discharged, and a

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<sup>1</sup> N. P. Gravells. *LandLaw* (3<sup>rd</sup> edn. Sweet & Maxwell 2004) 892.

<sup>2</sup> (1899) 2 CH 474.

<sup>3</sup> [1904] UKHL 2; [1904] AC 323

<sup>4</sup> (2001) JELR 57824 (CA)

<sup>5</sup> (1922) 13NLR110

<sup>6</sup> A. Samuel. "Creation of Legal Mortgages under The NigerianLaw." 2018, *Afribary*. Retrieved from. <https://afribary.com/works/creation-of-legal-mortgages-under-the-nigerian-iaw-5170> Accessed 12 July 2022

satisfaction of mortgage is recorded with the register or recorder of Deeds in the country where the mortgage was recorded. Because most people cannot afford to buy real estate with cash, nearly every real estate transaction involves a mortgage." In *Suberu v A.I.S. & L. Ltd.*,<sup>7</sup> a mortgage is defined as "the transfer of the ownership of an asset by way of security by a borrower to a lender upon the express or implied condition that it will be re-transferred to the mortgagor upon the discharge of the secured obligations. Put differently, a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. The security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding."<sup>8</sup>

Despite the lack of a unified meaning of what constitutes a mortgage transaction, there are some legal weaknesses which tend to create confusion in the Nigerian Courts with regard to jurisdiction and the nature of the transaction based on the conflict of the existing parallel laws which flow from the location of the mortgage properties.

### 3. The Parties and Rationale for Mortgage Transaction

There are two parties involved in mortgage transactions namely- the Lender "mortgagee" and the Borrower "mortgagor". The mortgagee's rights comprise exclusively in a security interest over the mortgaged property.<sup>9</sup> The mortgagee's primary intention in granting a loan in return to the mortgagor is thus, subject to the mortgage. By holding unto the security interest in the property, the mortgagee becomes certain, so far as possible, that the mortgagor shall repay the sum due including all accruing sum of money (interest) which has been stated *ab initio* in the instrument of the transaction as stipulated in the case of *Kreglingerv New Patagonia Meat & Cold Storage Co Ltd.*<sup>10</sup> The mortgagee may be reluctant to rely on a mere *in personam* right in that it is not a very strong security even though it could sue for damages based on the express and implied provisions of the instrument of the transaction.<sup>11</sup> It should be understood that:

*A security interest is a real interest, a right in rem, and there is simply no way of denying the fact that it is a proprietary right.*

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<sup>7</sup> (2007) ALL FWLR (Pt. 380) 1512 at 1526 Paras. B - C (CA)

<sup>8</sup> OlubukolaSeun-Oguntuga. 'Nigeria: Taking Security: A Review of Mortgage Creation Under Nigerian Law', Online at: [https://www.mondaq.com/nigeria/...](https://www.mondaq.com/nigeria/) Accessed 10 August 2022

<sup>9</sup> *Esso v Harper's Garage* [1968] AC 269

<sup>10</sup> [1914] AC 25

<sup>11</sup> Toby McKinnon, 'Mortgages as Security Interests.' Online at:

[https://www.academia.edu/1091979/Mortgages\\_Mere\\_Security\\_Interests](https://www.academia.edu/1091979/Mortgages_Mere_Security_Interests) Accessed 12 July 2022

*However, at the same time reference to security interests is often made to distinguish this kind from a full proprietary interest. This might appear paradoxical at first but we simply need to be very careful with our terminology. In some way, a security interest seems to be a lesser proprietary right than the conventional interests and certainly less than an estate in land.<sup>12</sup>*

Security interest empowers the mortgagee to undertake actions for possession with the intention of re-sale of the property, in the event of the mortgagor's default on his repayments. In *Cheltenham & Gloucester BS v Norgan*,<sup>13</sup> the Court explained that, in theory, the mortgagee has a consummate right to possession of the property, and to a certain degree. The right to possession on the part of the mortgagor, who in the vast majority of cases remains in possession of the mortgaged property, is not explicitly recognized by Law. This right being only circuitously recognised in that the mortgagee must permit the mortgagor to redeem if possession is sought or taken; the Court might be persuaded to imply a right for the mortgagor to possess the land; and in that it is in any way exceptional for a mortgagee to seek possession before default, as the power of sale depends upon default.<sup>14</sup> However, in *Horsham Properties Group Ltd v Clark*<sup>15</sup> the Court stated that it is legally wrong for the mortgagee to take possession without a Court order.

#### **4. Complexity of Mortgage Creation in Nigeria**

The complexity of mortgage creation in Nigeria revolves on the lack of generally applicable legislation.<sup>16</sup> Therefore, the method of creating a mortgage in Nigeria is contingent on the location of the property.<sup>17</sup> This is because not all States are covered by Property and Conveyancing Laws. Some States are also not covered by the Conveyancing Act and/or Mortgage and Property Law of Lagos. For example, The Property and Conveyancing Law, 1959 covers only the states in the old Western States, namely: Delta, Edo, Ogun, Ondo, Osun, Oyo and Ekiti states. The Conveyancing Act 1881 covers the former old Eastern region which are: Rivers, Bayelsa, Cross River, Akwa-Ibom, Ebonyi, Abia, Imo, Enugu,

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<sup>12</sup> Toby McKinnon, 'Mortgages as Security Interests.' Online at: [https://www.academia.edu/1091979/Mortgages\\_Mere\\_Security\\_Interests](https://www.academia.edu/1091979/Mortgages_Mere_Security_Interests) Accessed 12 July 2022.

<sup>13</sup> [1996] 1 All ER449

<sup>14</sup> [N. 9]

<sup>15</sup> [2009]1 WLR1255

<sup>16</sup> F. J Oniekoro, 'Mortgages in Nigeria', (Chenglo Ltd.) 1

<sup>17</sup> I. O Smith. *Practical Approach to Law of Real Property in Nigeria*, 7999(Ecowatch Publications Nig. Ltd.) p.5.

Anambra, and all States in northern Nigeria. Similarly, the Lagos State Land Registration Law and Mortgage and Property Law, 2015 only covers properties in Lagos State.<sup>18</sup> In essence, the mode of creation of mortgages depend on where the property is positioned.<sup>19</sup> Therefore, in Nigeria there are three distinctive jurisdictions namely - the Conveyancing Act (C. A) States; the Property and Conveyancing Law States; and Lagos State which is exclusively under the Lagos State Land Registration Law and Mortgage and Property Law.<sup>20</sup>

Each jurisdiction has its own peculiarity in terms of how mortgages are created. For instance, under the Conveyancing Act, a mortgage can be created through assignment, sublease or sub-demise and Deed of Statutory Mortgage.<sup>21</sup> Under the Property and Conveyancing Law, the creation of mortgage must be by demise, sub-demise or sublease and legal charges.<sup>22</sup> Under the Mortgage and Property Law, a mortgage creation depends on whether the legal interest is a right of occupancy or a leasehold interest.<sup>23</sup> However, whichever the location of the subject of the mortgage, there are two types of mortgage.<sup>24</sup> Another dicey aspect of creating a mortgage in Nigeria is rooted in Section 22 of the Land Use Act,<sup>25</sup> where the consent of the Governor of a State where the property is located is required in order for the holder of a statutory right of occupancy to alienate his right of occupancy by assignment, mortgage, transfer of possession, sublease, or otherwise.<sup>26</sup>

## 5. Distinction Between Legal and Equitable Mortgage

There are two major types of interest that arise in a property namely - legal interest and equitable interest.<sup>27</sup> Legal interest is backed by documentary evidence of ownership of the property whilst the equitable interest can be derived from implied right of occupation and use.<sup>28</sup> It is these two types of rights that determine the nature of mortgage in most circumstances. In *Cityland and Property (Holdings Ltd) v Dabrah*,<sup>29</sup> the Court held that a legal charge is created by simple words showing an intention that the land is to be mortgaged

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<sup>18</sup> *Igbum v Yimusa*(2001) 9 WRN 15 at p. 19.

<sup>19</sup> *Lewis v Bankole*(1909) 1 NLR 82

<sup>20</sup> *Dawodu v Dawodu* (1958) 3 FSC 46

<sup>21</sup> *Oso v O/ay/oye*(1966) 1 NMLR 329; *Cokerv. Animashaun* (1960) LLR 71

<sup>22</sup> *Okoroafor v Abaworonini* (1996) 2 NWLR (Pt. 430) 278.

<sup>23</sup> *Akingbade v Elemosho*(1964) ANLR 146 at 149

<sup>24</sup> *Echi v Nnamani*(2000) 5 S.C.T 62.

<sup>25</sup> CAP L5 LFN 2004

<sup>26</sup> *Eshilonu v Emereonyekwe*(2002) 10 NWLR (Pt. 776) 634 at 638

<sup>27</sup> S. A. Osamolu S.A, O.T Oduwole, C. O Oba. *Real Property Law and Conveyancing Practice in Nigeria*, (Abuja: Law Lords Publications, 2008).

<sup>28</sup> A. Obi Okoye. 'Creation of Legal Mortgages in Nigeria: A Critique'. 2018, *Journal of Law, Policy and Globalization* Vol.73. 56-63

<sup>29</sup> [1968]Ch 166

with the repayment of a loan. There does not need to be an express mention of a legal charge. On the other hand, in *Grand Junction Co Ltd v Bates*,<sup>30</sup> it was stated that, the creation of a 'first protection legal mortgage' of a qualifying estate means the property will then be required to be registered. A 'protected' legal mortgage is one which is protected by the deposit of documents relating to the estate such as the title Deeds.<sup>31</sup> Therefore, to create a legal mortgage, the parties must undertake a written agreement to that effect.<sup>32</sup> In *Walsh v Lonsdale*,<sup>33</sup> the Court clarified that equitable mortgage is different; it flows from the maxim which states that, "equity regards as done that which ought to be done". This principle thrives where there has been a contract to create a legal mortgage but has not yet been executed as a Deed.<sup>34</sup> This will give rise to an equitable mortgage from the date the contract is formed. The same will apply to a legal mortgage which has not been properly executed. However, the remedy of specific performance will only be available if the mortgage money has been advanced to the mortgagor.<sup>35</sup> For instance, Section 18(1) of the Mortgage and Property Law of Lagos State 2010 provides that the two ways of creating a mortgage are: By an agreement to create a legal mortgage and by a mortgage of equitable interest.<sup>36</sup> The equitable mortgage therefore becomes active where a mortgagor only has an equitable interest in a property.<sup>37</sup> Thus, he can only create an equitable mortgage such as a mortgage by a beneficiary under a trust.<sup>38</sup> To clarify the distinctions, in *George Akande Nig. Ltd. & Anor. v Enterprise Bank Ltd. & Anor*,<sup>39</sup> and in *Okuneye v FBN Plc*,<sup>40</sup> the Court explained *inter alia*:

*There is in fact a distinction between a legal mortgage and an equitable mortgage. A legal mortgage transfers title in the property to the mortgagee and the term of the mortgage may give right of sale to the mortgagee without a Court Order. However, an equitable mortgage, by way of deposit of Title Deed, does not transfer title in the property to the mortgagee and the equitable mortgagee can only enforce his right of sale*

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<sup>30</sup> [1954] 2 QB 160

<sup>31</sup> All Answers Ltd, 'Mortgages Land Law Lecture' (LawTeacher.net, September 2022) <<https://www.lawteacher.net/lectures/land-law/mortgages/creation-of-a-mortgage/?vref=1>> accessed 28 September 2022

<sup>32</sup> F. J. Oniekoro. *Mortgages in Nigeria: Law and Practice*, (Enugu: Chenglo Publications, 2007) (1882) 21 ChD 9

<sup>34</sup> J. Omotola, *The Law of Secured Credit*, (Ibadan: Evans Brothers, 2006).

<sup>35</sup> O. J. AOlulana. *The Law and Practice of Banking, Collateral Securities and Mortgages*, (Lagos: Diversities Enterprises Publishers, 2000).

<sup>36</sup> Y. Y D. Dadem. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009).

<sup>37</sup> E. Chianu. *Law of Securities for Bank Advances (Mortgage of land)*, (Edo: Ambik Press, 2000).

<sup>38</sup> F. Eimunjeze. *Real Property Law and Practice in Nigeria* (Malthouse Press Ltd 2014) 158.

<sup>39</sup> Per Ndukwe-Anyanwu, JCA, (2017) LPELR-43819 CA

<sup>40</sup> (1996) 6 NWLR (Pt.457) 749

upon an Order of Court.

Similarly, in *Adetono & Anor. v Zenith International Bank Plc*<sup>41</sup> the Supreme Court held *inter alia*:

*... in a proper mortgage, the title to the property must have been transferred to the mortgagee, subject to the provision mortgaged property being re-conveyed by the mortgagee to the mortgagor, upon performing the condition stipulated in the mortgage deed and invariably, upon payment of the debt at the time so stipulated in the deed of Mortgage. The Mortgagor is liable to repay the loan as stipulated otherwise the mortgaged property is foreclosed. It is settled that by a legal mortgage the mortgagee becomes the legal owner of the property although the mortgagor may be left in actual possession/occupation of the mortgaged property, but because the mortgagee is entitled to enter into possession, immediately upon the execution of the mortgage, he has a right to immediate possession...*

Explaining the concept of legal mortgage, the Court in the case of *Suberu v A.I.S.L Ltd.*<sup>42</sup> said of a legal mortgage: "A conveyance of land or an assignment of chattels as security for the payment of a debt or discharge of some other obligation for which it is given. The security is redeemable on payment or discharge of such debt or obligation..."<sup>43</sup>

## 6. Overview of Equitable Mortgage

An Equitable Mortgage does not involve much convention and procedures. It does not essentially require the consent of the State Governor and no need for registration of same.<sup>44</sup> By contrast to the construction of a legal mortgage which differs based on the location of the property, there is no disparity amongst the States in Nigeria as to the formation of equitable mortgages. The principles and methods of creating equitable mortgages are similar across

<sup>41</sup> (2011) LPELR-8237 (SC)

<sup>42</sup> 2007) 10 NWLR (Pt. 1043) 590

<sup>43</sup> K. I Igweike, *Law of Banking and Negotiable Instruments*, (Onitsha-Nigeria: Africana First Publishers Limited, 2005).

<sup>44</sup> F.J. Oniekoro. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 20.

<sup>45</sup> O. I Imala. 'The Debt Dilemma in the Nigerian Banking Industry: Trends and Implications for the Economy.' (delivered 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, M. Ogubunka, A. Anameje, C. Ughelie, T. Ige (eds), (Lagos: The CIBN Press Limited 2005).

Nigeria.<sup>45</sup> One common principle that gives rise to the equitable mortgage is where the mortgagee lacks the legal estate in the property which is the subject of the mortgage but procures an equitable interest in the property.<sup>46</sup> Secondly, where the instrument creating the mortgage fails to meet all the necessities of the Law and/or where the instrument of the mortgage fails to meet prescribed requirements for a legal mortgage, it becomes an equitable mortgage.<sup>47</sup> In *Russel v Russel*,<sup>48</sup> the Court held that an equitable mortgage could be made by the deposit of the title deeds with the intention of creating a security over a specified property. Therefore, it is not obligatory that all the anticipated title deeds be submitted hence, at least one factual document integrating what is essentially deposited and the particulars of others deemed to be deposited will avail.<sup>49</sup> This buttresses the fact that an equitable mortgage can be created by the simple process of tendering a deed of title in property to a financial institution or to a lender in exchange for a loan, so far as there is a written evidence of the transaction.<sup>50</sup> Thus, the lender acquires equitable mortgage over the property specified by the deed of title. By the same perspective, beneficiaries of a trust property acquire equitable rights of the trust property even when such property becomes a subject of a mortgage.<sup>51</sup> This was explicitly explained in the case of *Yaro v Arewa Construction Ltd & ORS*,<sup>52</sup> as follows:

*An equitable mortgage is an agreement that has arisen out of the deposit of the mortgagor's title deed with the mortgagee for a loan as security. The essence of an equitable mortgage by deposit of title deeds is an agreement between parties concerned, followed by an act of part performance. Where a party pursuant to an oral agreement deposits his title deeds with a bank as here, the act of depositing the title deed is regarded as part performance of an agreement, which removes the transaction from the provision of the Statute of*

<sup>46</sup> M. Robert M., W. William, h. Charles, B. Stuart, J. D Martin. Megarry & Wade: *The Law of Real Property* (8<sup>th</sup> Edition, United Kingdom: Sweet & Maxwell, 2012).

<sup>47</sup> *Ibid.* p. 212

<sup>48</sup> (1783) 1 Bro. C.C. 269.

<sup>49</sup> Re Daintry and Ryle, Re Ravenscroft, Exp. Arkwright (1843), 3 Mont. D & De G. 129; Exp. Wetherell (1805), 11 in: Olulana, O.J.A. *The Law and Practice of Banking, Collateral Securities and Mortgages*, (Lagos: Diversities Enterprises Publishers, 2000) 268.

<sup>50</sup> J. Omotola. *The Law of Secured Credit*, (Ibadan: Evans Brothers, 2006).

<sup>51</sup> O.J.A Olulana. *The Law and Practice of Banking, Collateral Securities and Mortgages*, (Lagos: Diversities Enterprises Publishers, 2000).

<sup>52</sup> 2007 SC.213/2000

<sup>53</sup> According to S. O. Abayomi. An Appraisal of the Legal Framework Regulating Mortgage of Landed Property as Security for Loans from Banks in Nigeria (September 19, 2017). Available at SSRN: <https://ssrn.com/abstract=3039309> or <http://dx.doi.org/10.2139/ssrn.3039309> "It is noteworthy that under the Statute of Frauds, any transaction involving land, including mortgage of Land, must be in writing. However, this is not without some stipulated exceptions. One of such exceptions is where it involves a transaction where part performance has been made. This therefore provides the legal basis for the existence of equitable



*Frauds.*<sup>53</sup>

One of the challenges of the equitable mortgage is that it cannot be registered hence, relies on the doctrine of equity for effective enforcement. For example, in *Barclays Bank D.C.O v. Gulu Millers Ltd*,<sup>54</sup> the Court held that the law applicable to equitable mortgages is to be found in the doctrines of Equity. This implies that the mortgagor goes through additional proof hurdle to enforce the rights of recovering the outstanding mortgage debts.<sup>55</sup>

## 7. The Challenges to Equitable Mortgage in Nigeria

Despite the contributions of mortgage transactions to financial undertakings in Nigeria, there are few legal challenges in the enforcement models, especially with regard to the social efficiency of equitable mortgages.

### (a) The hurdles of Equitable Redemption in Equitable Mortgages

The essence of equitable intervention is to prevent unconscionable behavior in mortgage transactions.<sup>56</sup> Hence, there are two pivotal stands by which a mortgage revolves: The first is the Principle of law which states that the mortgagor shall retain the title of the property whether the mortgage was fraudulently obtained or not as illustrated in *Halifax BS v Thomas*.<sup>57</sup> The second fulcrum is that which sustains the Common Law principle formulated in several cases such as *Thornborough v Baker*<sup>58</sup> and *Pawlett v Attorney General*<sup>59</sup> where the Courts held that, "in an equitable mortgage, where the legal estate has been transferred to the mortgagee, the mortgagor owns the 'equity of redemption',<sup>60</sup> this must be distinguished from the equitable right to redeem<sup>61</sup> - if you are faced with a question in relation to an equitable redemption, ensure to use this-terminology.<sup>62</sup> This refers to the mortgagor's equitable interest in the property, which is an interest in land.<sup>63</sup> "The mortgagor has the right to redemption under the equitable mortgage

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mortgages. Thus, by the depositing of title deeds with the mortgagee, with the intention to create a mortgage, there is already a mortgage agreement, however, this lies only within the purview of equity. It is noteworthy that there must be a mutual intention and agreement to create a mortgage as the mere depositing of title deed in the mortgagee's safe box will not qualify for as a mortgage transaction."

<sup>54</sup> [1959] EA 540

<sup>55</sup> E. Chianu. *Law of Securities for Bank Advances* (Mortgage of land), (Edo: Ambik Press, 2000).

<sup>56</sup> *Okonkwo v. CCB* (2003) 8 NWLR (pt. 822) 347; *U.B.A. v. Okeke* (2004) 7 NWLR (pt. 872) 393

<sup>57</sup> [1996]Ch217

<sup>58</sup> 27 Car.2, 1675.1 Ca. in Cha.283; 2 Freem. 143.

<sup>59</sup> (1667) Hardres465.

<sup>60</sup> *Yaro v. Arewa Construction Ltd* (2006) ALL FWLR (Pt. 400) 602

<sup>61</sup> *Viatomu v. Odutayo* (1950) NLR P. 119

<sup>62</sup> *Carter v Wake* ((1877) 4 CH.D 605.

<sup>63</sup> *Ogundiani v Araba* 1 LRN 280

<sup>64</sup> (1745) 3 Atk 261

transaction. This was illustrated in *Toomes v Conset*,<sup>64</sup> where the Court stated that, any provision in an equitable mortgage instrument which prevents a mortgagor from redeeming it will be void. It should be noted that an equitable right to redeem is the right which arises after the legal date for redemption has elapsed.<sup>65</sup> However, across Nigeria, irrespective of the governing law of the jurisdictions,<sup>66</sup> the legal rights of redemption empowers the mortgagor to recover his property as the owner upon discharging his obligations under the mortgage.<sup>67</sup> Nonetheless, there is a complex aspect of the rule which requires that the mortgagor can only exercise this right, if he complies with the obligation to make full repayment on a fixed date.<sup>68</sup> The agreed fixed date for redemption is usually short because it is to the advantage of the mortgagee to place the mortgagor in default as soon as possible.<sup>69</sup>

The mortgagor's rights to redemption in Nigeria are sometimes hampered by legal obstructions and restraints. In the words of Lord Macnaghten in the case of *Samuel v Jarrah Timber*,<sup>66</sup> the right to equitable redemption is based on "sentiment rather than principle." This is because, the rule that emphasizes on strict compliance with final repayment date provision in the mortgage instrument deprives the mortgagor the opportunity to purchase back his property therefore potentially obstructs full and free redemption.<sup>71</sup> The principle of strict compliance with the deadlines of final payment is also seen as being "overt hostility to a rigid approach that struck down fair and reasonable bargains."<sup>72</sup>

### **(b) Disjointed Applicability of the Doctrine of *Lis Pendens* in Equitable Mortgages**

The doctrine of *Lis Pendens* is one of the notable drawbacks that is hampering the effectiveness of mortgage securities in Nigeria. *Lis Pendens* is a legal doctrine under which one purchasing an interest in property involved in a pending suit does

<sup>65</sup>This is because, "the financing agreement will provide a maturity date for repayment of the mortgage debt by the borrower (mortgagor). If the mortgagor fails to repay on or before the maturity date, his legal right to redeem the mortgaged property will be extinguished on that date, and his equitable right of redemption is activated and extinguished upon foreclosure." (Adapted from OlubukolaSeun-Oguntuga. Nigeria: Taking Security: A Review of Mortgage Creation under Nigerian Law, Online at: <https://www.mondaq.com/nigeria/...> Accessed 10 August 2022)

<sup>66</sup>*Ihekwoaba v. 406(1998) 10 NWLR (pt. 571) 590*

<sup>67</sup>*Bank of the North Limited v Chief David A. Akintoye* CA/IL/17/99

<sup>68</sup>*Suberuv A.I.S. & L Ltd.* (2007) ALLFWLR (Pt. 380) 1512 at 1526 Paras. B - C (CA)

<sup>69</sup>OlubukolaSeun-Oguntuga. 'Nigeria: Taking Security: A Review of Mortgage Creation under Nigerian Law,' Online at: <https://www.mondaq.com/nigeria/...> Accessed 10 August 2022)

<sup>70</sup>[1904] UKHL 2; [1904] AC 323

<sup>71</sup>*Jones v Morgan* [2002] 1 EGLR 125; *Lewis v Frank Love* [1961] 1 WLR 261; *Reeve v Lisle* [1902] AC 461

<sup>72</sup>*Kreglinger v New Patagonia Meat & Cold Storage* [1914] AC 25

<sup>73</sup>"Lispendens." *Merriam-Webster.com Legal Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/legal/lis%20pendens>.

so subject to the adjudication of the rights of the parties to the suit.<sup>73</sup> In some unavoidable circumstances, landed properties used in a mortgage transaction becomes complicated when the land is under dispute. Nonetheless, it is not uncommon to find scenarios where the mortgagor presents a property that is subject to litigation to the mortgagee as security for loan. It therefore becomes a tragedy for the mortgagee in respect of the property and the loan. Although, legal respite is always available, but the colossal amount of money spent on litigation would have overall been avoided.<sup>74</sup>

In Nigeria, most prospective mortgagees are reluctant to enter into equitable mortgage transaction where the subject of the transaction (land) is subject to a *lis pendens* whereby the mortgagor's valid title is in anticipation of a positive litigation outcome.<sup>75</sup> "The rationale for this is that the title is held in abeyance and is only determinable upon the conclusion of the matter."<sup>76</sup> This was clarified by the Court in ***Omeile & Anor. v Total Nig. Ltd*** where the Court explained that:

*For the doctrine of lis pendens to apply, it is necessary to establish that, (a) at the time of the sale of the property the suit regarding the dispute about the said property was already pending, (b) that the action was in respect of real property; it does not apply to personal property, (c) that the object of the action was to recover title to a specific real property; that is to say, an action in a subject-matter adverse to the owner in respect of some substantive right which is proprietary in nature and (d) that the other party had been served with the originating process in the pending action; these conditions are expected to coexist before the doctrine can successfully be invoked.*

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Accessed 3 Oct. 2022.

<sup>74</sup> O. Sanni, 'An Appraisal of the Legal Framework Regulating Mortgage of Landed Property as Security for Loans from Banks in Nigeria' (September 19, 2017).

Available at SSRN: <https://ssrn.com/abstract=3039309> or <http://dx.doi.org/10.2139/ssrn.3039309> Accessed 3/10/2022

<sup>75</sup> *Osagie v. Oyeyinka*(1987) 3 NWLR 144; *Ebueku v. Amola*(1988) 2 NWLR (pt. 75) 128.

<sup>76</sup> [N. 74] 4

<sup>77</sup> Adapted from Awojobi Adetoro, A Legal Practitioner and Property Consultant. Source: Facebook legal. It is important to note that: "A "lispendens notice" is a notice recorded in a real property's chain of title and is designed to enable interested third parties to discover the existence and scope of pending litigation affecting the title to or asserting a mortgage, lien, security interest, or other interest in real property."

In *Adaran Ogundiani v. O. A. L. Araba & Anor*<sup>78</sup> the Court stated that, "the doctrine of *lis pendens* prevents the effective transfer of right in any property which is the subject matter of an action pending in Court during the pendency in Court of the action. In its application against any purchaser of such property the doctrine is not founded on the equitable doctrine of notice - actual or constructive - but upon the fact that the law does not allow litigant parties or give to them, during the currency of the litigation involving any property, rights in such property (that is, the property in dispute) so as to prejudice any of the litigating parties."<sup>79</sup>

**(c) The Limited Effects of Equitable Mortgage by Way of Charge**

The complexities of an Equitable Mortgage was succinctly laid out in *Adaran Ogundiani v O. A. L Araba & Anor*<sup>80</sup> as follows: An Equitable Mortgage is created by mere equitable Charge of the mortgagor's property. This implies that the mortgage is by way of charge, and not by conveyance, therefore, the mortgagee does not take any property at the point of undertaking the transaction but he has largely accepted an equitable interest on the property to be enforced by sale upon an Order of the Court. Simply put, the equitable charge only guarantees a right to payment out of the property but does not automatically confer a legal mortgage rights.<sup>81</sup> A charge on the mortgagor's property therefore, can be enforced by sale or by nomination of a receiver upon the express Order of Court of competent jurisdiction.<sup>82</sup> A charge cannot be invoked as a right to foreclosure.<sup>83</sup> However, where an equitable mortgage was undertaken and the parties agreed to construct a legal mortgage, but short of doing so by the inchoate nature of the formalities which, authorizes the equitable mortgagee to somewhat extra to mere charges on the property mortgaged and can be construed in such a way that his remedies correspond as nearly as possible with those of the legal mortgagee.<sup>84</sup> The Court may

<sup>78</sup> (1978)LCN/2044(SC)

<sup>79</sup> C. C Soludo. Macroeconomic, 'Monetary and Financial Sector Developments on Financial and Payment System Reforms in the Country'. (2007) Economic and Financial Review Central Bank of Nigeria. 30(1): 32-69.

<sup>80</sup> (1978)LCN/2044(SC)

<sup>81</sup> S. Malpezzi. 'Economic Analysis of housing markets in developing and transition economies' (1999). In: Cheshire, P. and Mills, E.D. (eds) *Handbook of Regional and Urban Economics Applied Urban Economics*, 3, 1791-1864

<sup>82</sup> Theo Bala Maiyaki. *A Handbook on Mortgage Law and Banking in Nigeria*. Author House UK Sep 5, 2012

<sup>83</sup> A. O Ojo. 'The Role of Secondary Mortgage Facility in Expanding the Availability of Funds for Mortgage Finance in Nigeria. Unpublished M. Sc thesis, Royal Institute of Technology (KTH), Sweden, 2009.

<sup>84</sup> I. A Okidim. & G. O Ellah. 'Enhancement of Economic Growth through Mortgage Financing and Capitalization'. (2013) *Global Journal of Commerce and Management Perspective*, 2(5): 8-11

<sup>85</sup> C. C Nwamara & C. O Aronu. 'The Impact of Economic Development on Land Mortgage Financing in Nigeria'. *Open Science Journal of Mathematics and Application*, 2014) 2(3) 26-32.

<sup>86</sup> (1873)LR. 16E. 153

in exceptional circumstances order the execution of a legal mortgage by granting the order of specific performance in favour of the mortgagee.<sup>85</sup>

**(d) The Legal Uncertainties of Foreclosure on Equitable Mortgage**

Flowing from the reasoning and principles established in the cases of *James v James*<sup>86</sup> and *Pryce v Bury*,<sup>87</sup> it would be appropriate to aver that the latitude of the rights of an equitable mortgagee with the exception of equitable mortgage by way of charge, it is crucial to note that the general rule is that foreclosure (excluding sale) is the appropriate remedy for the equitable mortgagee.<sup>88</sup> This principle underlined the Court decision in *Adaran Ogundiani v O. A. L. Araba & Anor*,<sup>89</sup> where the Court said:

*... When an equitable mortgagee by deposit of title deeds and agreement to give a legal mortgage if called upon to do so takes foreclosure proceedings to enforce his security, the Court usually decrees that the deposit operates as a mortgage and that in default of payments due under the mortgage the mortgagor is Trustee of the legal estate for the mortgagee and that he must convey that estate to him.*<sup>90</sup>

In view of the foregoing quotation, it is therefore, an axiomatic point of law that the right of foreclosure has been recognized as a remedy by which the equitable mortgagee and the merchant who acquires a legal estate with notice of an equitable mortgage can seek from the Court.

**(e) The Effects of Notice on the Purchaser of an Equitable Mortgage**

In *Kingnorth v Tizard*,<sup>91</sup> the Court explained that the general rule is that an equitable interest is enforceable against the whole world except to a *bonafide* purchaser for value without notice. The law protects the *bonafide* purchaser for value without notice. This is because, the legal principle of *Nemodat quod Non Habet* states that, no one can give what he does not have.<sup>92</sup> Therefore, a person who is not the rightful

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<sup>87</sup> 1852P15a

<sup>88</sup> E. S Shaw. *Financial Deepening in Economic Development*. New York; Oxford University Press. Sheppard 1999

<sup>89</sup> (1978)LCN/2044(SC)

<sup>90</sup> Agosto & Co. Nigerian Mortgage Banking Industry Report Industry Report. Retrieved from:

<http://www.agusto.com/africa/kenya/researchreports.php?id=12> accessed 12 August 2022

<sup>91</sup> [1986] 1 WLR 783

<sup>92</sup> A. A. Akinwunmi. 'An Investigation into Factors affecting Housing Finance Supply in Emerging Economies: A Case Study of Nigeria' Unpublished PhD Thesis, University of Wolverhampton, 2009.

owner of a property cannot in all conscience transfer, alienate or assign the title thereof, except that an innocent purchaser who acquired the property in good faith is a *bonafide* purchaser for value without notice.<sup>93</sup> Likewise, the "notice" therefore, determines the extent of an equitable interest. A *bonafide* purchaser of property for value without notice is any person who buys a property in good faith without the knowledge of any prior claims or encumbrances on it.<sup>94</sup> However, the purchaser or the mortgagee may not be excused by the operation of law where there is evidence of actual notice and constructive notice.<sup>95</sup> Actual notice is where the purchaser or the mortgagee was knowingly conscious of the presence of the equitable interest and did obtain the information from reliable sources and could have discovered the truth if diligent enquiry was undertaken.<sup>96</sup> Similarly, constructive notice is mostly about the discoveries that the purchaser or the mortgagee would have gathered through meticulous and reasonable inquiries.<sup>97</sup> Therefore, the extant laws contemplate that constructive notice offers that a mortgagee or a purchaser of property will be construed to have been fixed with notice if it is within his own knowledge or would have been within his knowledge if he was diligent in making the necessary investigations.<sup>98</sup>

**(f) Protracted Litigation Time Frame in Land Adjudication Process**

Nigeria's judicial system is troubled by several challenges. One of such notable problems is the length of time it takes for cases especially, land case to be decided and concluded. Lawyers are part of the problems. There are instances where lawyers espouse diverse delay tactics to frustrate the case.<sup>99</sup> The utmost delay scheme is the filing of primary objections challenging the jurisdiction of the trial court. Sometimes, lawyers plead irregularity and also contend the rationality of a

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<sup>93</sup> A. Hassan and M. T Javed. 'An empirical investigation of the causal relationship among monetary variables and equity market returns' (2009), *The Lahore Journal of Economics*. Vol. 14, No. 1, pp. 115-137.

<sup>94</sup> S. Walley. "Expanding Housing Finance in Nigeria", Paper presented at the 7th International Housing Financial Workshop, Lagos, August 2011,

<sup>95</sup> Z. A Ghani. 'Primary Mortgage Institutions Challenges For Financing Housing Development In Nigeria.' *Int. J. Res. Granthaalayah* [Internet]. 2021 Feb. 26 [cited 2022 Oct.4] 9(2):127-3. Available from: [https://www.granthaalayahpublication.org/journals/granthaalayah/article/view/IJRG21\\_A01\\_5061](https://www.granthaalayahpublication.org/journals/granthaalayah/article/view/IJRG21_A01_5061) Accessed 21 September 2022

<sup>96</sup> D. R Ward. "Product Differentiation and Consumption Efficiency in Mortgage Markets", (2009), *Journal of Business Research*, Vol. 62, pp. 805-809.

<sup>97</sup> S. S Poshakwale and B. Qian "Competitiveness and Efficiency of the Banking Sector and Economic Growth in Egypt", (2011), *African Development Review*, Vol. 23, No. 1, pp. 99-120.

<sup>98</sup> B. Oyalowo. "Housing market constraints in the West African Region" (2012), *Mediterranean Journal of Social Sciences*, Vol. 3, No. 11, pp. 241 -252.

<sup>99</sup> Joan Monye, Patience Obiagbaoso, Richard Obidegwu. 'Where are we in Curbing Delays in Administration of Justice in Nigeria?' <https://punuka.com/where-are-we-in-curbing-delays-in-administration-of-justice-in-nigeria/> Accessed 12 September 2022

suit on the flimsy ground of perceived defects in the court processes thus, seeks and obtains giddy " adjournments" ".<sup>100</sup>

Delays in reaching conclusion on cases in Nigeria are perennial in land matters. For example, the case of *Ariori v Elemo*<sup>101</sup> was concluded after 22 years and a few months; the case of *Union Bank Nigeria Plc v Ayodare and Sons (Nig.) Limited*<sup>102</sup> took 18 years to resolve; the case of *Adisa v Oyinwola*<sup>103</sup> was in Court for about 15 years. The uncertainty over the duration of Court Resolutions discourages the litigants therefore, constitutes substantial barriers to mortgage administration in Nigeria.<sup>104</sup> The manifest barriers to the Court Decisions on land matters create reluctance among prospective mortgagors in offering mortgages of equitable nature.<sup>105</sup>

## 8. Conclusion and Recommendations

This article has contributed to knowledge and literature on the subject-matter of equitable mortgage. It affirms the legal notion that it is impeccably adequate for a party to create a second mortgage over a property that is in dispute in the sense that the title deed of the property in dispute is already in the hands of the mortgagee. In which case, that the second mortgage could be held under the equity of redemption which implies that the equitable mortgage subsists to such duration that the first mortgage is redeemed. The article evaluated the legal lapses in the laws which consistently affect the full efficiency of the rights of equitable redemption. The legal uncertainties of foreclosure of equitable mortgage have been succinctly explained. It is thus, concluded that, where adequately possible, an equitable mortgage should be avoided by all parties. The preferred mode of creating a mortgage over a property should be by completion of all necessary formalities of a legal mortgage to avoid complications that may arise from an equitable mortgage.

In view of the points raised and discussed in this article, it is therefore recommended as follows:

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<sup>100</sup> *Imprest Bakolori Pic v. Abdulazez* [2003] 1 NWLR (Pt. 834) 307

<sup>101</sup> (1983) 1 SC 13

<sup>102</sup> [2007] 13 NWLR (Pt. 1052) 567

<sup>103</sup> [2000] 10 NWLR (Pt. 674) 116

<sup>104</sup> L. Fertila. "Examining Alternative Building Systems and Processes in Providing Affordable Housing in Nigeria" Paper presented at the 7th International Housing Financial Workshop, Lagos, August (2011)

<sup>105</sup> M. Adebambo; L. Oduwaye and O. S Oduwaye, Problems Mitigating Housing Finance through Primary Mortgage Institutions in Lagos. (2012) *International Business and Management*.-Vol. 4, No. 1. pp. 126-134.

- a) The Federal Government should create special Courts for mortgage, secured lending businesses and land matters. The special courts should have their own rules and procedures.
- b) There should be mortgage recapitalization for reinforcement of the mortgage sub-sector through continuing funding and the establishment of sustainable regulations tailored towards the protection of investors in the estate and property sectors.
- c) There should be an amalgamation and decrease of the existing expensive land charges across all jurisdictions, to inspire land title aptness, and to improve the procedures of sustaining land and mortgage markets.

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<sup>106</sup> Olayinka Aileru, 'Preventing Delay Tactics in Criminal Trials in Nigeria' (Punch Newspapers, 2020) <<https://punchng.com/preventing-delay-tactics-in-criminal-trials-in-nigeria/>> Accessed 21 September 2022