

EVALUATION OF RIGHTS OF PARTIES IN LEGAL MORTGAGE UNDER THE NIGERIAN LAND JURISPRUDENCE

By

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Abstract

The author focuses on evaluating the rights of parties in legal mortgage under Nigerian land jurisprudence, aimed at a critical examination of the significance of legal mortgage as applicable to Nigerian land law. The specific objectives are an analysis of the conceptual foundation of mortgage, to examine the legal framework of mortgage, and to assess the impacts of legal mortgage in Nigerian land law. These also defined the scope and limitation of the study. The research design and methodology adopt the doctrinal approach, using analytical and descriptive research methodology. The main sources of data collection were primary and secondary sources from physical and e-library. The author found among others that legal mortgage involves execution under seal and the transfer of the legal title from the mortgagor to the mortgagee subject to the mortgagor's right of redemption which is a right to a reconveyance on payment of the mortgage monies in accordance with the covenants in the mortgage. Sequel to these, the author recommended among others that the Land Use Act should be amended to cover the loopholes for clarity on the meaning of a Right of Occupancy. This would effectively protect the rights of the parties.

Keywords: Land, Mortgage, Nigeria, Parties, and Rights

1.0 Introduction

The Land Use Act, 1978¹ is a primary legislation with regards to the administration and management of Land in the various territories of Nigeria. The Land Use Act has therefore regulated, administered, and managed how the land within the territories of Nigeria is to be used as a security for mortgage. There is the famous rule of the book given to bankers or mortgage institutions by lawyers. The rule states: "do not disburse funds until you perfect your security." This is a regular admonition in mortgage transactions. The idea behind this that borrowers now have wider alternative of banks or other financial institutions to approach, if some appear to be unduly slow in making loans available, or if their loan terms are considerably onerous.

Furthermore, issues in mortgages arise when the borrower has agreed to charge his property as security for repayment of loans and credit facilities. In other words, both lender and borrower have mutually agreed to create the mortgage. However, this is pursuant to the Land Use Act where the consent of a third party that is the governor of the state is required. Additionally, there is the problem of the procedural delays in obtaining the governor's consent. This encumbrance is always so inconvenient to the borrower who needs the loan funds urgently. This situation leads to a chain problem of inflation.

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¹ Laws of Federation of Nigeria, 2004, Cap L.5.

Thus, with the inflationary trends, delays in obtaining project loans on target dates are likely to lead to escalation of the erstwhile estimated project costs during waiting period.

Also, there is the problem arising from the mortgagor where the mortgagor has collected the money, deposited the deeds, and executed the mortgaged documents with the expectation that he will apply for the consent of the governor, but alleges that consent was not obtained or frustrates the grant of consent. Basically, the requirement of consent of the governor in mortgages under the Land Use Act was probably intended as a mere formality to symbolize and acknowledge the governor as holder of the paramount title. On the other hand, this intention of the Act has turned out to be a bottleneck in mortgage transaction.

These and many other problems have propelled this article to probe the fundamental question: What is the right of parties in legal mortgage under the Nigerian land law?

2.0 Conceptual Analysis

2.1 Mortgage

A mortgage is a security interest in real property held by a lender as a security for a debt, usually a loan of money. A mortgage in itself is not a debt. It is the lender's security for a debt. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower. The word is a legal French term meaning "dead pledge," originally only referring to the Welsh mortgage, but in the later Middle Ages was applied to all ages and reinterpreted by folk etymology to mean that the pledge ends (dies) either when the obligation is fulfilled or the property is taken through foreclosure.²

A mortgage is a conveyance of land or an assignment of chattel as a security for the repayment of a debt or discharge of other obligation for which it is given, with a provision for redemption on repayment of the loan or discharge of such other obligation.³ According to Megary and Wade,⁴ in the Law of Real Property, the essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property, with a provision for redemption, that is, that upon repayment of a loan or performance of some other obligation, the conveyance shall become void or the interest shall be re-conveyed.

It may also be rightly described as a charge that a borrower gives to a lender upon a part or the whole of his property to guarantee the repayment of a loan. Our attention in this discussion will be focused more on land than chattels; this is because land is more reliable than chattels as security. You can investigate the title of land by conducting a search at the Lands Registry, to ascertain its genuineness. In most jurisdictions mortgages are strongly associated with loans secured on real estate rather than on

² E Coke, "Commentaries on the Laws of England" https://en.wikipedia.org/wiki/mortgage_law accessed 9th August, 2024.

³ *Suberu v Aisl Ltd* (2007) 10 NWLR (Pt 1043) 590; *Santley v Wilde* (1899) 2 CH. 474; and *Olowu v Miller Brothers (Liverpool) Ltd* (1922) 13 NLR 110 at page 111.

⁴ E Folarin, "The Law of Real Property" http://www.google.com/mortgages_thelawofrealproperty_serkgkhoe65r8// accessed 9th August, 2024.

other property (such as ships) and in some jurisdictions only land may be mortgaged. A mortgage is the standard method by which individuals and businesses can purchase real estate without the need to pay the full value immediately from their own resources.

2.2 Lender and Mortgagee

A mortgage lender is an investor that lends money secured by a mortgage on real estate. In today's world, most lenders sell the loans they write on the secondary mortgage market. When they sell the mortgage, they earn revenue called Service Release Premium. Typically, the purpose of the loan is for the borrower to purchase that same real estate. As the mortgagee, the lender has the right to sell the property to pay off the loan if the borrower fails to pay.

The mortgage runs with the land, so even if the borrower transfers the property to someone else, the mortgagee still has the right to sell it if the borrower fails to pay off the loan. So that a buyer cannot unwittingly buy property subject to a mortgage, mortgages are registered or recorded against the title with a government office, as a public record. The borrower has the right to have the mortgage discharged from the title once the debt is paid.

2.3 Borrower and Mortgagor

A mortgagor is the borrower in a mortgage. He owes the obligation secured by the mortgage. Generally, the borrower must meet the conditions of the underlying loan or other obligation in order to redeem the mortgage. If the borrower fails to meet these conditions, the mortgagee may foreclose to recover the outstanding loan. Typically, the borrowers will be the individual homeowners, landlords, or businesses who are purchasing their property by way of a loan.

2.4 Mortgage Security

Mortgage is defined as conveyance of Land or assignment of chattel as a security for the repayment of a debt or discharge of other obligation for which it is given, with a provision for redemption on repayment of the loan or discharge of such obligation. Types of security for loan include debenture, insurance securities, guarantees, stock and shares, charge over fixed deposit account, trust receipts, bill of sale, letter of set-off, and trust deed.

Mortgage security is one of the major ingredients in understanding mortgage transaction. Other ingredients include: existence of an obligation, the transaction must arise from the agreement of the party, proviso for ceaser upon redemption, transfer of interest, and it must be clearly stated that the transfer of interest is for the purpose of securing the performance of the obligation.

3.0 Creation of Statutory Mortgage

A mortgage created pursuant to statutory provisions is usually by Deed. There are three operative laws regulating the creation of legal mortgages in Nigeria, namely, The *Conveyancing Act*, 1881 (for States created from the old Northern and Eastern regions and some parts of Lagos), *Property & Conveyancing Law*, 1959 (for the States created from the old Western and Midwestern regions,) and the *Registration of Titles Law*, Cap R4 Laws of Lagos State 2003, (for some parts of Lagos, especially Victoria Island, Ikoyi and Surulere, Lagos Island, Yaba, Bariga, Somolu, Apapa, Oyingbo, Badagry).

The form and contents of the instrument creating such a mortgage are prescribed by law, and non-compliance with the law may be fatal to the entire transaction. Subject to the relevant laws and due execution, a legal mortgage conveys the legal estate of the mortgagor over the property to the mortgagee as security for a loan on the condition that the mortgagor is entitled to redeem the mortgage property upon fulfilment of his obligations under the mortgage.⁵ The location of the property determines the mode of creation and the law(s) applicable. The mode of creation of a legal Mortgage depends on jurisdiction, so the location of the property determines the mode of creation and the laws applicable.

3.1 The Conveyancing Act, 1881 (CA) States

Under the Conveyancing Act, there are two Methods/modes of creating a legal mortgage.

3.1.1 By Assignment of the Unexpired Residue of the Mortgagor's Leasehold Interest with a Proviso for Ceaser or Reassignment upon Redemption

One major feature of this is that the mortgagor transfers the entire unexpired residue of his leasehold interest to the mortgagee. There is no reversionary interest in the mortgagor, hence in the event of default, the mortgagee can pass the mortgagor's entire interest to a purchaser without any problems. Again, even though there is no privity of contract between the Governor/Head-lessor and the mortgagee, there is privity of estate. Therefore, the mortgagee is bound to observe and perform all restrictive covenants that run with the land. This though creates some difficulty/problems as in the case of *Samuel v Jarrah*.⁶

3.1.2 Sub-demise of the Unexpired Residue less few days with a Proviso for Ceaser upon Redemption

Unlike in assignment, the mortgagor here has a reversionary interest in the mortgage property. The main advantages of this mode are:

- a) There is neither privity of contract nor privity of estate between the Governor/head-lessor and the mortgagee;
- b) There is uniformity, as this mode is applicable under the Conveyancing Act as well as under the Property and Conveyancing Law. This makes it attractive to banks.

3.2 Property and Conveyancing Law (P & CL) States

Under the P & CL, there are two methods/modes of creating a legal mortgage.

3.2.1 Sub Demise for a Term of Years Absolute, Less at Least One Day than the term vested in the Mortgagor and Subject to Provision for Ceaser on Redemption

The same rules as explained earlier apply here, except that under the PC & L, there is no need for the drafting devices to ensure conveyance of the totality of the mortgagor's interest in the property. The law already makes provisions for them. S. 112, P & CL.

⁵ C McNall, "Mortgage: English Common law" In S N Katz, *Oxford International Encyclopedia of Legal History* (2) (Oxford University Press, 2009) 57.

⁶ *Samuel v Jarrah* (1904) AC 323, at 274.

3.2.2 A Charge by Deed Expressed to be by way of Legal Mortgage

This charge confers in the mortgagee all the powers and privileges of a legal mortgagee, even though it creates no legal interest. The advantages of this type of creation are as follows:

- a) Since no interest is passed to the mortgagee, it is no breach of the covenant against sub-letting. S. 22, Land Use Act
- b) It is shorter and simpler to create, and
- c) It is easily discharged by a statutory receipt.
- d) This mode is most appropriate where the mortgagor is charging several properties. If the mortgages were by assignment/sub-demise, each of the properties would have to be conveyed by a separate instrument.

One obstacle with this mode is that statutory receipt is not a registrable instrument, with the effect that at the discharge of the mortgage (the creation of which is registrable), the mortgage can still be found on the Register.

3.3 Creation of Legal Mortgage under the Registration of Title Law, Lagos

This law regulates creation of mortgage in the Registration District of Lagos. There is only one method of creating mortgage under this Law, and that is by a Charge using Form 5⁷.

3.4 The Land Use Act

The Land Use Act does not define mortgage or land. While land was defined by the Interpretation Act as “land and everything attached to the earth and all chattels”.⁸ Mortgage is defined by Omotola as a non-possessory proprietary security interest in which ownership interest in secured property is transferred by the debtor to the creditor in support of the performance of an obligation owed to the creditor.⁹ This means that the debtor (also known as mortgagor) transfers certain non-possessory ownership rights in his land to the creditor (also known as mortgagee, usually a bank) as collateral (security), to be held and re-transferred back dependent on the fulfilment of an obligation owed to the creditor (usually the payment of principal sum and interest).

There is no gainsaying that definitions in law are never adequate, hence, the above are working definitions but the crux of the matter is that the Land Use Act has made specific provision in relation to mortgage by way of procedure through which the back and forth transfer will occur. For ease of reference, the Act provides that:

21. *It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever –*
 - (a) *Without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable Sheriffs and Civil Process Law; or*

⁷ S. 21, RTL, 2003.

⁸ S. 3, LUA, 1978.

⁹ J Omotola, *The Law of Secured Credit* (Evans Brothers Nigeria Ltd, 2006) 32.

(b) in other cases, without the approval of the appropriate Local Government.

22. It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, **mortgage**, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained:

(1) Provided that the consent of the Governor-

(a) shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor:

(b) shall not be required to the reconveyance or release by a mortgage to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged and that mortgage with the consent of the Governor:

(c) to the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sub-lease containing an option to renew the same.

(2) The Governor when giving his consent to an assignment mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) may be signified by endorsement thereon (emphasis mine).¹⁰

The operative word in the above provision is ‘alienation’ which is same as transfer or conveyance. The law intends to strictly monitor how land moves from one person to another. In the case of mortgage as against sale, the movement of the land is conditional in the sense that the owner of the mortgage property becomes divested of the right to dispose of the property until he has secured a release of it from the mortgagee.¹¹ While in sale, the conveyance is total, out and out or permanent. Legal mortgage is one of the transactions required to be created by deed and signed sealed and delivered.¹² Aside from these, the transaction according to the above provisions must be consented to by the governor in case of states and the minister of FCT in case of the Federal Capital Territory, Abuja having being delegated to so do by the president of the Federation.¹³

¹⁰ SS.21; 22 LUA, 1978.

¹¹ *Bank of the North Limited v Bello* [2000] 7 NWLR (Pt. 664) 2442.

¹² Y Y Dadem, *Property Law Practice in Nigeria* (2nd Edition, Jos University Press, 2012).

¹³ CFRN, 1999, S. 302.

The above provision also noted that some conveyance do not require the consent of the governor including the re-conveyance back to the mortgagor. This is quite reasonable to cut out expenses, however, a wise mortgagor should ensure that a proper deed of release is nevertheless executed and where possible get it registered so as to remove the blemish from the property for any subsequent prospective buyer. The Act actually envisaged efficiency with the movement of property. However, in practice; it is not so smooth as various transactions have over the years manifested the lacunas and inefficiencies of the law relating to mortgage under the Land Use Act.

4.0 Assessment of Rights of Parties in Legal Mortgage

4.1 Mortgagor's Right

In *Ndaba Nig. Ltd v UBN*¹⁴, the court held thus:

The right to redeem a mortgaged property is so inseparable an incident of mortgage that it cannot be taken away either expressly or by implication, nor can such redemption be limited to time or particular persons. The right of equity of redemption continues until the mortgagor's title is extinguished or the interest destroyed by sale either under the process of court or by the mortgagee.

Thus, courts of equity will not allow the mortgagee to take any undue advantage of the mortgagor. Equity will not give effect to any clause in a mortgage deed that is a clog to the mortgagor's right to redeem. This principle has been extended to include any clause that delays redemption¹⁵. Hence the maxim "once a mortgage, always a mortgage, there must be no clog on the equity of redemption" In *Ejikeme v Okonkwo*¹⁶, the Supreme Court held, *inter alia*, thus:

*It is a settled rule of equity that any agreement, which directly bars the mortgagor's right of redemption is ineffectual. Similarly, stipulations, which, even indirectly tend to have the effect of making a mortgage irredeemable, are equally void and unenforceable as clogging the equity of redemption.*¹⁷

This principle does not mean that the court will unduly interfere with the genuine bargain of the parties; but where the circumstance is such that the agreement of the parties is so oppressive and unconscionable that the mortgagor's right to redeem is rendered nugatory, the court of equity will intervene on the ground that the clause is unreasonable and a clog to the mortgagor's right of redemption. There is no general rule to determine when a clause in a mortgage instrument will be held to be oppressive and unconscionable. The court will usually look at other extraneous factors such as:

- a) The bargaining power of the mortgagor, and
- b) The length of time for which the contractual right to redeem is postponed.

¹⁴ (2007) NWLR (pt 1040) 439.

¹⁵ *Morgan v Jefferys* (1910) 1 Ch. 620.

¹⁶ (1994) 8 NWLR (pt 362) 266.

¹⁷ *Ejikeme v Okonkwo* (1994) 8 NWLR (pt 362) 266.

However, every case should be treated on its merit. In *Fairclough v Swan Brewery Company*¹⁸, where in a mortgage of a lease of twenty years the contractual right to redeem was postponed until six weeks before expiration. The Privy Council held that the provision for redemption is nugatory. Upon creation of a valid mortgage, legal or equitable, a mortgagor possesses three distinct potential rights to redeem the mortgaged property. One of these rights is in law while the other two are rights in equity. That is, equitable right to redeem and equity of redemption.

Legal right to redeem is specifically reserved for the mortgagor to recover his property as the owner upon discharging his obligations under the mortgage. But, the mortgagor to be entitled to exercise this right must comply punctiliously with the proviso for redemption. Thus a mortgage to secure money loan ordinarily fixes a definite date for repayment and at law, repayment must be made precisely on that date for the mortgagor to be entitled to exercise this very right.

Generally, the date for repayment may be suspended for any period, but in practice, the date for redemption is usually short because it is an advantage to the mortgagee to place the mortgagor in default as soon as possible. However, in *Twentieth Century Banking Corporation Ltd v Wilkinson*¹⁹, the danger of fixing a date too far in the future for the redemption of a mortgage was highlighted, as the mortgagee was refused the right to enforce his security until the legal due date (which in that case was fixed at thirteen years) had arisen. It has therefore become acceptable at common law to fix a shorter date for redemption.

However, a mortgage transaction is between the mortgagor and the mortgagee and it is the mortgagor that is supposed to transfer his title to the mortgagee.²⁰ In this case, the property was part of family land which was held by a domestic servant of the family. The servant, by a deed of gift, purported to convey it to his son. The son, on his part, by a deed of mortgage purported to mortgage it to the mortgagee. The plaintiff bought and obtained the conveyance of the property from the defendant who was also the mortgagee. An action of the plaintiff to obtain possession of the property failed because the family said it was their family land, and by the principle of inalienability of family land; except it has been partitioned, one cannot sell or transfer. Before a bank will accept a property for mortgage, there is need for proper valuation to ensure that current values leave a margin between the debt and value of the property in favour of the mortgagee.

4.1.1 Right of Injunction against Sale

Though the mortgagor's power of sale will not generally be restrained by injunction, in deserving circumstances the mortgagee may be restrained from exercising the power of sale. The mortgage can be restrained in the following situations:

- a) Where the right of sale has not arisen;
- b) Where the parties agreed to a different mode of sale
- c) Where the mortgagor can validly rely on plea of estoppel
- d) Where the mortgage is a fraud on the mortgagor

¹⁸ (1912) AC 565.

¹⁹ (1977) Ch 99.

²⁰ *B. Erikotola v A. S. Ali* (1941/1942) 16 NLR 565.

- e) Where the mortgagor pays the whole outstanding sum and interest into court before the sale

4.2 Mortgagee's Rights

These are means by which the mortgagee may enforce the security so as to recover the loan. There are basically four of such rights:

- a) Statutory power of sale
- b) Foreclosure
- c) Taking possession and
- d) Appointment of Receivers.

4.2.1 Statutory Power of Sale

Under sections 19 (1) of the CA and 123 (1) of the P & CL, every mortgagee (legal or equitable) whose mortgage is created by Deed may enforce its/his security after the legal due date by sale of the mortgaged property. Power of sale here is automatic; the mortgagee does not require a court order before he/it can sell. However, for the mortgagee to be entitled to exercise its power of sale, the power must HAVE ARISEN and become EXERCISABLE. For the power of sale to arise the following three conditions must exist:

- a) The mortgage must have been created by a deed;
- b) There must be no contrary intention against sale in the mortgage deed; and
- c) The legal due date, which is the date of redemption of the mortgage must have passed.

Even where power of sale has arisen, the mortgagee is still NOT entitled to sell the mortgaged property unless and until the power has become exercisable. The power becomes exercisable when ANY of the three conditions is satisfied, which is that:

- i. *Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors and default has been made in payment of the mortgage money or part thereof for three months after service of such notice/letter; or*
- ii. *Some interest under the mortgage is in arrears and unpaid for at least two months after becoming due; or*
- iii. *There has been a breach of some provision contained in the mortgage deed or in the Act/Law and on the part of the mortgagor or of some person concurring in making the mortgage to be observed or performed other than and beside a covenant for payment of the mortgage money or interest thereon.*²¹

This means that when the power has arisen, the occurrence of any of the above three factors will give the mortgagee absolute power to exercise his power of sale. The requirement of notice to the mortgagor includes notice to persons deriving title through him, for example, where there is a subsequent mortgage. The notice need not fix the time of repayment. It is sufficient if it requested that the

²¹ S. 20, CA, 1881; S. 125 P & CL.

mortgagor should pay the loan. The date of the service of the notice is excluded in the computation of time for this purpose.

Where the mortgagor is in default of payment of any instalment or interest is in arrears, it is not a defence that substantial part of the loan has been paid. Thus, in *Okafor & Sons v NHDS Ltd*²², it was held:

*Where under the terms of a mortgage deed the mortgage money is to be advanced not as a lump sum but in instalments, the mortgagee has a right to exercise his statutory power of sale under Section 19 of the Conveyancing Act, 1881 if the mortgagor is in default as to the payment of interest, even if the principal sum has not been advanced in full.*²³

Note that where the power of sale has not arisen, the mortgagee/lender has no right to sell but if it sells after the power has arisen but not yet exercisable, it may pass good title.

4.2.2 Protection of Innocent Purchasers

Section 21(2) of the CA, which is similar to section 126(1) of the P & CL, provides that:

*Where a conveyance is made in exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeached on the ground that no case has arisen to authorise the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised but any person indemnified by an unauthorised or importer or irregular exercise of the power shall have his remedy in damages against the person exercising the power.*²⁴

Therefore, where a prospective purchaser is investigating the title of the mortgagee to sell, he is only bound to inquire whether the power of sale has arisen; he needs not concern himself with whether or not the power has become exercisable. Note that this protection is available only to a purchaser for value acting in good faith. Where the purchaser has actual notice that the power of sale is not exercisable or of any fact or circumstances that is improper or irregular, the exercise of the power of sale of the property to him will be defeated because equity will not allow him to benefit from his fraud. Otherwise, the purchaser takes free of the mortgagor's interest.

The sale extinguishes the mortgagor's equity of redemption. The mortgagor's remedy in such a situation is in damages against the mortgagee. The purchaser takes a good title, provided he a bona fide purchaser for value without notice.

4.2.3 Protection of Rights in Conduct of Sale

Usually, it will be by public auction. Where a mortgagee's power of sale has arisen and become exercisable, he is not a trustee of the mortgagor in conducting the sale. He is, therefore, not bound to

²² (1972) NHJSCC 271.

²³ *Okafor & Sons v NHDS Ltd* (1972) NHJSCC 271.

²⁴ S. 21(2) of the CA, 1881.

sell at a particular price provided he (the mortgagee) acts in good faith. A sale at undervalue is not proof of bad faith unless the mortgagee sells to himself and to his nominee or his agent. In that case, the court can infer bad faith. In *Eka-Eteh v Nhds Ltd and Anor*²⁵ where it was held thus:

*Undervalue alone is not sufficient to vitiate the exercise of a mortgagee's power of sale; it must be shown that the same was made at a fraudulent or gross undervalue. Also, if having regard to the circumstances of the particular case, a mortgagee exercises his power of sale in good faith his conduct cannot be impeached. So since there is no evidence of mala fides or collusion on the part of the defendants, the second defendant is entitled to the statutory protection afforded a bona fide purchaser by Section 126(2) of the P & CL and the sale to him cannot be set aside.*²⁶

In *Kennedy v Trafford*²⁷, the court held that a mortgagee discharges his duty towards the mortgagor if he exercises his power of sale in good faith. But if he wilfully and recklessly deals with the property in such a manner as to sacrifice the interests of the mortgagor, he cannot be said to have exercised his power of sale in good faith.

4.3 Parties' Rights in the Proceed of Sale

Though the mortgagee is not a trustee of the mortgagor for the conduct of the sale, he is a trustee for the proceeds of sale.²⁸ Section 21(3) of the Conveyancing Act and section 127 of the P & CL regulate distribution of the proceeds of sale. Before order of distribution of the proceeds of the sale is made, there should be that any pending encumbrances are discharged/settled; accountability of charges and expenses properly incurred in the sale; mortgage sum and interest will be paid; and the balance will be paid to the mortgagor. If there is no balance, the mortgagee is still entitled to demand for the remaining unpaid balance.²⁹

5.0 Evaluation of the Significance of Legal Mortgage in the Nigerian Land Jurisprudence

Legal mortgage is more secured against fraud than equitable mortgage. It is easier to commit fraud in the case of equitable mortgage than in legal mortgage; the borrower who has deposited the original title deeds with a bank may obtain a certified true copy of the Deed from the Registry for other fraudulent purposes.

- a) It is easier to enforce a legal mortgage. The equitable mortgagee must obtain a court order before he can sell or take possession of the property or foreclose or appoint a receiver/manager ranks higher than equitable mortgage in order of priority
- b) The mortgagee is entitled to the title document
- c) Can be used for small, medium and large loans

²⁵ (1973) ALL NLR 555.

²⁶ *Eka-Eteh v NHDS Ltd and Anor* (1973) ALL NLR 555.

²⁷ (1897) AC 180.

²⁸ S. 21(3)C A; S. 127 P & CL.

²⁹ *Visioni v National Bank* (1975) 1 NMLR 8.

- d) A legal mortgagee without notice of the equitable mortgage takes priority over the equitable mortgagee.

However, legal mortgage is not easily created or formed. Also, it is not uniform in all jurisdictions and it could be affected by covenants in the head lease, especially where it is created by an assignment. Where loan is for little amount of money, legal mortgage fails to apply. On the other hand, where the period of repayment is short, it cannot be applied. Furthermore, it is affected by the covenant in the head lease and creation of successive equitable mortgages is not possible.

In contrast with equitable mortgage, equitable mortgage applies in the following ways:

- a) Where loan is for little amount of money
- b) Where the period of repayment is short
- c) It is easier to create than legal mortgage
- d) It is not affected by the covenant in the head lease.
- e) Creation of Successive equitable mortgages are possible
- f) It encourages uniformity in the CA and the P & CL States.³⁰

Thus, the aspects of departures between legal mortgage and equitable mortgage are as follows:

- a) Unless where the two or any of the remedial devices of declaration of trust or creation of power of attorney are inserted, the mortgagee in equitable mortgage has difficulty in transferring/selling legal mortgage to third party.
- b) The mortgagee is not entitled to the title documents in equitable mortgage.
- c) Unlike the legal mortgage, the mortgagee in equitable mortgage is not entitled to the benefits of the covenants in the head lease and there is no privity of estate between the head-lessor and the mortgagee.
- d) In the equitable mortgage, the power of sale of the mortgagee can only be exercised by the mortgagee upon a court order
- e) There is no priority over a legal mortgage as it is in equitable mortgage.
- f) There is no legal protection of mortgagee's interest in the equitable mortgage.³¹

An equitable mortgage is a type of mortgage that confers equitable interest on the mortgage. The essence of an equitable mortgage is to effect an agreement to enter into a legal mortgage. The modes of creating equitable mortgage in Lagos under S. 18 of Mortgages and property law (Lagos State) as amended are:

- a) By deposit of title documents accompanied by agreement to create legal mortgage
- b) Charge of an equitable interest accompanied by an agreement to create a legal mortgage
- c) Assignment of an equitable interest with a proviso for cesser on redemption.

Subsequently, the provision of S. 18 of Mortgage Property Law does not exclude other methods of creating an equitable mortgage such as:

- a) Inchoate legal mortgage (unperfected legal mortgage)³²

³⁰ A O Alubo, *Contemporary Nigerian Land Law* (3rd Edition, Mono Expressions Ltd., 2016).

³¹ Alubo (n 30), 98-9.

³² LUA 1978, SS. 22 & 26.

- b) Where the rule in *Walsh v Lonsdale* applied (Agreement to create a legal mortgage)
- c) Creation of mortgage over an equitable interest.

Property and Conveyance Law jurisdiction are the same as the mode of creating it in Conveyance Act jurisdiction. These are as follows:

- a) Deposit of title document accompanied by a memorandum of deposit
- b) The rule in *Walsh v Lonsdale*
- c) Inchoate Legal Mortgage
- d) Creation of Mortgage over an equitable interest
- e) Equitable charge
- f) An agreement to create legal mortgage.

It is worth noting that an equitable mortgagee cannot exercise the power of sale without an order of a court. For an equitable mortgagee to be able to exercise power of sale over the mortgage property without recourse to court order, the following conditions must be satisfied:

- a) The equitable mortgage must be by deed
- b) The equitable mortgage must contain any of the remedial devices; and
- c) There must be no contrary intention in the mortgage deed. A contrary intention could be the provision of another remedy in the mortgage deed such as an increased interest rate as penalty or other remedy which will show that the parties did not intend a sale.³³

In the absence of these conditions, an equitable mortgagee cannot sell the mortgage property without an order of court.

6.0 Recommendations

Based on the foregoing, the researcher makes the following recommendations, suggesting solutions to the problems identified, describing the ways in which the Land Use Act can be made effective in legal mortgage:

- a) There is need for clarity on the meaning of a Right of Occupancy, especially as this is the ultimate right which an individual can have in land and therefore the highest land right which a secured creditor can encumber. Therefore, the Land Use Act should be amended to cover this loophole.
- b) The fact that the Certificate of Occupancy is merely evidence, rather than proof, of the Right makes it unattractive to legal mortgages as a document of title, and the corollary that it is liable to be set aside in favour of a proven prior better right. Therefore, the legislation on legal mortgage from different the states of the Federation should be conscious of this fact in enacting any related law.
- c) While the consent provisions may be required as a means of keeping record of land transactions, the procedure for granting it should remain purely administrative at minimum costs and within a specified time frame.
- d) The Land Use Act should generally be amended to provide for payment of compensation to the persons interested in order of priority. That way, the mortgagee will have a prior right to the

³³ E Oluwasola, *Property Law Practice: Mortgages* (Oakland Publishers, 2015).

- compensation money. In the absence of legislation, it is advisable the mortgagee ensures that a covenant is included in the mortgage deed.
- e) Parties to legal mortgage should always consult legal practitioner with estate agent in contracting the mortgage transaction.
 - f) Mortgage arbitration centres, in the form Multi-door Courtroom (ADR), should be created by every state government for quick settlement of mortgage related disputes.
 - g) Mortgage institutions should embark on extensive seminars, symposium, public lectures, and mass media sensitizations on legal mortgage under the Nigerian land law.

7.0 Conclusion

This article has examined in detail the use and effectiveness of Legal mortgage and the rights of parties under the Nigerian land jurisprudence as security for loan transactions in Nigeria. The problems in the pre-Act land laws and tenure necessitated the promulgation of the Land Use Act in 1978. The pre-Act land tenure policies were not satisfactory because of their attendant problems, such as insecurity of title, land litigations, fragmentation of holdings, difficulty in acquisition and alienation of land. All these contributed to housing problems, slum development and general lack of infrastructural developments in Nigeria.

With the Act in place, these various pre-Act land laws and land tenure policies were largely done away with, but the principles of those pre-Act laws which are in conformity with the spirit and general intendment of the Act are preserved.³⁴ An analysis of judicial opinions in this article has shown that the Act by its policy objectives has improved land tenure and administration in Nigeria. The Act has unified land policy, ensured equitable redistribution of land among the citizens without discrimination on ground of state origin and facilitated both governments and private industrialists' quick access to land needed for developments. Notwithstanding the foregoing positive impacts of the Act, this paper has figured out the inherent problems in the Act as it concerns mortgage transactions.

³⁴ LUA 1978, SS. 4 & 48.