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CREATION OF MORTGAGES ON LAND IN NIGERIA: ISSUES AND CHALLENGES

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Abstract

The creation of legal mortgages is made complex by the existence of plural legislation¹ in the Nigerian legal system. This study conducted an overview of the creation of legal mortgage in Nigeria. It also evaluated challenges posed to it under the Land Use Act 1978. The doctrinal research method was adopted, using primary and secondary sources. The primary source included legislation such as Conveyancing Act 1881, Property Conveyancing Act 1959 and Mortgages and Property Law 2012 and case law. The secondary source included textbooks, journal articles, conference proceedings and the internet. The data collected were subjected to content analysis. It was revealed that plural legislations and inconsistent judicial decisions made the process of creating a legal mortgage cumbersome for the stakeholders. It was equally found that apart from obsolete provisions in the mortgage statutes like Conveyancing Act 1881 and Property and Conveyancing Law 1959, they had some irreconcilable provisions with the Land Use Act 1978. It was recommended that all the mortgage statutes should be harmonized to a single legislation applicable throughout the federation and the consent provision of the Land Use Act should be expunged and replaced by a faster method under which the Governor could be compelled to act as soon as the grantee fulfils all conditions.

Key Words: Certificate of Occupancy, Consent Provisions, Leasehold, Legal Mortgage.

1.0 Introduction

Many options were explored for securing loans in traditional communities. This included pawn, guarantee and pledge. A mortgage is a complex devise which transfers the interest for the payment of a debt or the satisfaction of some obligation.¹ The borrower is the mortgagor while the lender is the mortgagee. A mortgage passes legal or equitable title depending on its type.

Mortgage contracts on land in Nigeria are regulated by received laws. The foremost law on land is the Land Use Act 1978 (LUA).² The Act, like no other, provides policies, rules and guidelines for land management and control in Nigeria. It remains the only law in property management in Nigeria which unites all previous land tenures and attempts to provide uniform land practices. The aim of this paper is to examine the creation of legal mortgages in Nigeria. The objectives are to conduct an overview of the creation of legal mortgages and evaluate challenges posed to it under the Land Use Act 1978.

All mortgages on land must comply with the mandatory provisions of this law. Although with few amendments introduced by local legislation, Received English law of estates still regulate mortgage practice in Nigeria.³ These Received and domestic laws include Conveyancing Act 1881⁴ (CA), Property and Conveyancing Law 1959⁵ (PCL) and the Lagos Mortgage and Property Law 2012⁶ (MPL). Some of the laws have irreconcilable contradictions with the LUA which make the creation of the legal mortgage difficult. These laws pose serious challenges to the creation of mortgages.

Nigerian banks as mortgagees in lending transactions bear the effects of the legislative and judicial contradictions arising from the creation of mortgages. Although many studies have

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¹F.J. Oniekoro, *Mortgages in Nigeria: Law and Practice* (Chenglo Ltd, 2007).

² Cap L5, Law of the Federation of Nigeria (LFN) 2004.

³Conveyancing Act 1881 (CA); Property and Conveyancing Law (PCL), Cap 100 Laws of Western Nigeria 1959; Mortgages and Property Law of Lagos State 2012 (As Amended 2015); Mortgage and Foreclosure Law 2020 (MFL), Ekiti state; Land Use Act 1978 (LUA), Cap C5 LFN 2004.

⁴ Law of England.

⁵ Cap 100, Law of Western Region.

⁶ (As Amended) Law of Lagos State.

been conducted on the inherent contradictions of the LUA, few of these have considered the impacts of these on the creation of mortgages over land. Conducting this study will promote the understanding of legal mines which the borrowers and lenders go through in perfecting the mortgage contracts. It will provide information on the current state of law on the creation of legal mortgages in Nigeria.

The aim of this paper is to examine the creation of legal mortgages in Nigeria. The objectives are to conduct an overview of the creation of legal mortgages and evaluate challenges posed to it under the Land Use Act 1978 and suggest was forward.

The paper adopts doctrinal research methods which rely on primary and secondary sources. The primary source includes legislation such as the Land Use Act 1978, Conveyancing Act 1881, Property Conveyancing Law 1959, Mortgage and Property Law 2012 and the case law. The secondary source includes textbooks and journal articles, conferencing proceedings and internet sources. Data obtained will be subjected to analysis.

The paper is structured in five sections. The first section is the introductory part, The second section is the overview of the creation of legal mortgages in Nigeria. The second section three evaluates the challenges to the creation of legal mortgages under the Land Use Act. The fourth section is the way forward while the fifth section is the conclusion, comprising the summary and the recommendations.

2.0 Nature of Mortgage

Mortgage is a difficult concept to define because of its different conception across disciplines and complexity of its origin. The classic definition of Lord Lindley in *Santley v Wilde* is the most widely accepted judicial definition, It states that ‘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’⁷ This common law definition was received as part of the English law in Nigeria. Its emphasis is on the conveyancing of the security to the lender. With the development of statutory law on mortgages in Nigeria, other definitions emerged which followed the common law definition of mortgage. The Property and Conveyancing (PCL) defines mortgage as a concept which ‘includes any charge or lien on any property for securing

⁷ (1899) 2 Ch. 474 (CA).

money or money's worth.'⁸ The PCL's definition of mortgage does not analyse the concept of mortgage but merely mentions what it includes or forms a part of, having stated that that a charge and a lien forms part of a mortgage.

A comprehensive definition of a mortgage is given by the Mortgages and Property Law (MPL) when it states that a mortgage:

Means a transfer of interest in specific movable and immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing future debt or the performance of an engagement which may give rise to pecuniary liability, and it includes any charge or lien on any property for securing money or money's worth"

This definition is detailed and appears to be more succinct to Nigerian situation because a mortgage of land operates more as a legal charge because the interest of the chargee is debt repayment. It takes into consideration the right of occupancy under the LUA as not being an ownership right because the land title resides in the Governor,⁹ while the mortgagor conveys his interest as the grantee who has only usufructuary rights subject to the consent of the Governor.¹⁰ It also iterates the fact that both chattel and immovable property such as land and buildings can be used as security. Furthermore, it indicates that charge and lien which do not transfer any property at all qualify as mortgages. Another statute on mortgage, Mortgages and Foreclosure Law (MFL), follows the same pattern and accepts charge as part of mortgage but it excludes a lien.¹¹ Compared to the judicial definition, the MPL definition which has been followed by MFL appears more robust and comprehensive. However, a look at the conception of mortgage in another jurisdiction, Ghana, reveals that:

A mortgage for the purposes of this Decree is a contract charging immovable property as security for the due payment of a debt and interest accruing thereon or for

⁸ PCL, S2.

⁹ibid; Essien Enefiok, *Law of Credit and Security in Nigeria* (Toplaw Publishments, 2000) 68

¹⁰ LUA, s22.

¹¹ (2020)], Law of Ekiti State.

the performance of some other obligation for which it is given, in accordance with the terms of the contract.¹²

Although the definition in the Ghanaian Decree is direct and focused on the land mortgage, its conception of mortgage of land is relevant to the Nigerian situation where the ownership of land resides the eminent domain.¹³ It does not address the use of movable items as security, neither does it envisage the lien as a mortgage. The concept of mortgage under the Decree has been extended to include pledge.¹⁴

The definitions in *Santley v Wilde*¹⁵ and MPL converge on the assertion that a mortgage is for the purpose of the payment of a loan or the fulfilment of an obligation. In addition, all the definitions agree that the redemption of the security upon the repayment of the loan and the interest is central to a conception of mortgage in law.¹⁶ However, the definition of the mortgage in the Ghanaian law appears more appropriate to describe the mortgages of land in Nigeria, under the Land Use Act, which does not, and cannot convey the title of ownership on the principle of ‘quod non habet.’¹⁷ Hence, ‘conveyance’ as it refers to title to land is inappropriate in a definition of mortgage in Nigeria, because what the holder has in land is a mere usufructuary right, including any improvement on it.¹⁸

Despite the definitions of the concept by the common law jurists and various statutes and judicial authorities, it is still an area of law that has received little attention in Nigeria. This could be attributed to the nature of the subject matter which has been described as difficult by Lord Macnaghten who stated that: ‘No one ---by the light of nature ever understood English mortgage of real estate.’¹⁹ Another reason is that unlike pledge, mortgage is of English origin and is therefore, a developing area in the Nigerian economy.²⁰ The law on mortgage in Nigeria is as stated in Conveyancing Act (CA) 1881, Property and Conveyancing Act 1959(PCL),²¹

¹² s 1(1).

¹³ LUA, s1.

¹⁴ Mortgages (Amendment) Decree 1979. S1.

¹⁵ n 7.

¹⁶ MPL, s.67; MFL, s98; Mortgages Decree, s 1(1).

¹⁷ This means a person cannot give what he does not have.

¹⁸ Ennefiok Essien, *Law of Credit and Security in Nigeria* (Second Edition, Toplaw Publishments Ltd.,2012), 69.

¹⁹ See *Samuel v Jarrah Timber and Wood Paving Corporation* (1904) A.C. 323 at 326.

²⁰ Essien (n 18).

²¹ Law of Western Region.

Mortgages and Property Law 2012 (MPL),²² Mortgages and Foreclosure Law (MFL) 2020²³ and the LUA 1978. Hence, the received mortgage laws still govern mortgage transaction subject to the provisions of the LUA.

Various definitions considered in this section reveal that mortgage is a consensual relationship, made by Deed and must be in writing. They also further reveal that it contains certain implied and express terms which stipulate the powers of the parties and the limitations of the contract. The definitions indicate that the purpose of a mortgage is to transfer a property (movable or immovable) to secure a debt or for the promise to perform a duty or fulfil an obligation. It is, therefore, not in contention that the mortgage is not only to secure a debt, but it may also be to fulfil a financial promise or the performance of financial obligation.

3.0 Overview of Legal Mortgage on Land

Modern mortgage practices in Nigerian are hinged on Received English laws and local statutes. Local statutes which regulate the subject matter have grown in volume in recent times. These include CA, PCL, Registered Titles Law (RTL),²⁴ Stamp Duties Act,²⁵ Land Instrument Registration Law (LIRL),²⁶ Land Instrument Registration Act (LIRA),²⁷ Illiterate Protection Law,²⁸ Statute of Frauds 1677,²⁹ Law Reform Contract Law,³⁰ Companies and Allied Matters Act 2020 (CAMA),³¹ Mortgage and Property Law 2012³² and Infant Relief Act 1874,³³ among others. The enactment of Land Use Act 1978 has introduced revolutionary changes to the law of mortgage in Nigeria.

3(a) Conveyancing Act 1881 Law

²² Lagos State.

²³ Ekiti State.

²⁴ Cap R4 2003, Law of Lagos State.

²⁵ Cap S8, LFN 2010.

²⁶ Cap L58, Laws of Lagos State.

²⁷ Cap 62 LFN 1959.

²⁸ Cap 14, Law of Lagos, Nigeria 2015.

²⁹ Law of England.

³⁰ Cap 114, Law of Lagos State 1994.

³¹ Cap C20, LFN 2010.

³² (As Amended in 2015).

³³ 1874 (English) 1

The CA does not stipulate a specific mode of creating legal mortgage. Hence methods relied upon to create legal mortgages under it are those applicable at common law are applicable, subject to modifications introduced to land management and control in Nigeria by the Land Use Act 1978³⁴. Since the inception of the Act in 1978, freehold, fee simple and other absolute transfers of interests which were recognized in common law are no longer possible because all interests in land have been converted to a right of occupancy.³⁵The LUA provides that

Subject to the provisions of this Act, all land comprised in each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

Hence, legal mortgage is created under CA, using common law method as follows:

3(a)(i) By assignment

This transfers the unexpired right of the mortgagor with a promise of a reconveyance upon the redemption of the mortgage.³⁶ In using this method, both the mortgagee and the overlord of the estate have privity of estate, the implication of which is that the mortgagee has responsibility to honour all the encumbrances in the headlease.³⁷ A legal mortgage by assignment is similar to the relationship which exists between the Governor and the grantee under LUA.³⁸ The mortgagee must contend with all covenants, conditions and other incumbrances that go with such transfer under the LUA.³⁹ This is a major setback for this method. Compliance with previous covenants on the land is not peculiar to LUA: it is inherited from the concept of assignment at common law where the mortgagee must comply with covenants in the headlease to which he was not a party.⁴⁰

The question is what are the effects of using this method on the mortgagor? A mortgagor who assigns his interest may not be able to create subsequent legal mortgages on the same property.⁴¹ However, the mortgagor may create equitable mortgage(s) subsequently.⁴² The

³⁴ Cap L5 Law of the Federal Republic of Nigeria 2004

³⁵ S. 5, LUA

³⁶ Y.Y. Dadem, *Property Law Practice in Nigeria*, (3rd Edition Jos, Jos Plateau Press, 2015).

³⁷ *ibid*

³⁸ LUA, s.5(1).

³⁹ *Ibid*, ss 9; 10.

⁴⁰ R.Megarry, *Manual of Law of Property*, (5th edition Sweet & Maxwell, 2002), 495.

⁴¹ *ibid*.

method of discharging it is cumbersome and riddled with formalities as deed of re-conveyance would have to be executed.⁴³ The major benefit of this method is that the whole remainder in value of the security could be conveyed to a subsequent purchaser.⁴⁴ This is because the mortgagee has possessory title that could be parted with easily the moment the mortgagor fails to honour the promise to pay. Mortgage by assignment is therefore easy to enforce by the power of sale upon default.

3(a) (ii) *Sub-lease/Sub-demise*

This is a form of mortgage with a duration is a day less than the original lease.⁴⁵ Under this arrangement, the mortgagor has reversionary interest of at least a day, in case of default. The critical feature of this method is that there is neither a privity of contract nor privity of estate between the head lessor (in the case of LUA, the Governor) and the mortgagee.⁴⁶ The above feature makes the method alluring to mortgagees (banks and other financial institutions) because covenants and conditions which run with land do not affect their interests.⁴⁷

The reversionary interest could not be sold upon default.⁴⁸ This is a major disadvantage because a purchaser may not want to buy subject to its encumbrance on the land. This limitation may be overcome by the use of remedial devices to transfer the reversion to the mortgagee. These are the Power of Attorney and the Declaration of Trusts. The Power of Attorney appoints the mortgagee to dispose of the property by sale, including the reversionary interest,⁴⁹ while the Declaration of Trust is a devise in which the mortgagor declares that the property, including the reversionary interest, is held as a trustee of the mortgagee.⁵⁰ In case of default, sale of the property could be used to repay the loan. Both devices could be used to overcome challenges posed by the necessity of obtaining Governor's consent to a mortgage.⁵¹

3(a) (iii) *Deed of Statutory Mortgage*

⁴²A.O. Okoye, 'Creation of Legal Mortgages in Nigeria: A Critique,' *Journal of Law, Policy and Globalization*(2018) (73)56.

⁴³*Tulk v Moxhay*41 E.R. 1143

⁴⁴ Dadem (n 36)

⁴⁵ S.A.Osamolu, O.T. Oduwoleand C.O. Oba, *Real Property Law and Conveyancing Practice in Nigeria*. (Abuja, Lawlord's Publications, 2008).

⁴⁶ Dadem (n 36).

⁴⁷*ibid.*

⁴⁸*ibid.*

⁴⁹*ibid*, 153.

⁵⁰ Y.Y. Dadem (n 36).

⁵¹*ibid.*

This is also known as charge by deed expressed to be by way of statutory mortgage. CA 1881, Section 26 makes provision for a statutory mortgage by stating:

A mortgage of freehold or leasehold land may be made by a deed expressed to be by way of statutory mortgage, being the form given in Part 1 of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and this provision of this section shall apply thereto.

The form may be modified to accommodate situational circumstances. This method is advantageous because its creation and discharge are easier and simpler. It is capable of being discharged with a transactional receipt. The advantage of simplicity of creation could pose a serious disadvantage because the receipt cannot be registered under existing Registration statutes.⁵² As such, the land register will continue to reflect in the mortgage record with the implication that long after the discharge, the encumbrance may still exist in the books at the land registry.

3(b) Property and Conveyancing Law (PCL)

PCL 1959⁵³ was enacted to govern property management and control in the Western Region. The law still operates and governs property relationship in states of old Western Region, except Ekiti and Lagos States. Its sections 108 and 109 provide a guide on mortgage creation in the affected states.

3(b) (i) Demise

A mortgage of an estate in fee simple is made by a demise for a term of years' absolute, subject to the provision for cesser upon redemption when the loan has been paid and the obligation fulfilled.⁵⁴ Mortgage by demise is possible at common law and under the PCL which have provisions for absolute ownership of land. Any transfer of a fee simple through mortgage is a demise. This method is outdated because of its inconsistency with the provisions of the LUA.⁵⁵ Hence, mortgage by demise is no longer applicable because nobody holds a fee simple estate as

⁵² Registration of Titles Law of Lagos State 1994 (now cap R4, Laws of Lagos State, 2003).

⁵³ Cap 100 LWN 1959.

⁵⁴ *ibid*, S. 108(1)

⁵⁵ LUA, s.5(1).

from the commencement of the LUA.⁵⁶ The right of occupancy is the highest land right possible under the LUA, while its duration is a term of years granted by the Governor or Local Government.⁵⁷

The demise mortgage at common law conveys the mortgagor's unlimited and indeterminable interest in land. This was codified, by the foreign⁵⁸ and local statutes,⁵⁹ with a maximum of 3000 years duration.⁶⁰

There have, however, been contentions on whether a deemed grantee has unlimited interest on the land which can be transferred to a mortgagee. According to the learned commentator, Oniekoro,⁶¹ a deemed grantee holds an undeterminable interest which is not subject to section 8 of LUA. The learned author contended further that a deemed grantee could create a demise of years' absolute in favour of the mortgagee. Another writer, Okoye,⁶² differed from this position, arguing that LUA has never contemplated the creation of a freehold estate or a title that is unlimited or indeterminable in favour of any Nigerian.⁶³

A mortgage by demise is obsolete in Nigeria because of its noncompliance with LUA.⁶⁴ Hence, the position canvassed by Okoye⁶⁵ and supported by Obaseki JSC in *Savannah Bank v Ajilo*⁶⁶ that the creation of a mortgage made by demise is not contemplated by the LUA. There is thus the need for reform of PCL to clearly reflect the true position of things as the law is obsolete and due for review. The same is true of CA which has similar provision for the creation of mortgage by demise.

3(b) (ii) Sub-demise

This form of mortgage is a shorter duration than the lease for at least a day.⁶⁷ Its major advantage is that it permits the mortgagor to create subsequent mortgages on the lease. It also affords the mortgagor the opportunity to raise additional funds using the same security provided

⁵⁶ Land Use Act 1978, Cap L5, LFN 2004, s 1.

⁵⁷ *ibid*, ss. 5(1); 6(1).

⁵⁸ Law of Property Act, Law of England, s. 85(1).

⁵⁹ Mortgage and Property Law of Lagos 2012 (As Amended, 2015).

⁶⁰ PCL, 1959, s 108(1).

⁶¹ Oniekoro (n 1).

⁶² Okoye, (n 42) 56.

⁶³ *ibid*.

⁶⁴ *ibid*.

⁶⁵ *ibid*.

⁶⁶ *Savannah Bank v Ajilo* (1989) 1 NWLR (Pt 97), 305. Per Obaseki JSC.

⁶⁷ PCL, s 109(1).

the value of the property could accommodate same. The first mortgagee has the advantage of being in possession of documents as if the mortgage is by assignment.⁶⁸

However, the mortgage is not subjected to the limitation of sub demise/sub-lease under CA, namely the privity of estate with the head lessor or the governor under the LUA. A sub-demise created under PCL requires no remedial devices because the law empowers the mortgagee to embark on the sale of the security with the mortgagor's reversionary interest upon default.⁶⁹

In PCL states, therefore, a sub-demise is a mortgage of leasehold, which conforms with sub-demise at common law operated in CA states, subject to the important difference that the reversionary interest is disposable by sale upon default under PCL while in CA states, remedial devices are employed to affect the sale. This makes it easy for the mortgagee to exercise the mortgagee's power of sale (MPoS) without any fear of the reversionary interest of the mortgagor.

3(b) (iii) Legal Charge

A legal mortgage may arise by a charge by deed expressed to be by way of a legal mortgage.⁷⁰ This mortgage has the same protection, powers, and remedies as a legal mortgage. The charge should, however, be by deed, and not in writing. The advantage of this is that in law, a charge under this arrangement has the same rights and powers of enforcement as a legal mortgagee.

This form of a legal mortgage has advantages over assignment and sub-demise as forms of mortgage transactions. Its form is simple and short and can be easily filled. Also, it does not transfer any estate; rather it only gives rights to the chargee. Hence, the consent under LUA is not applicable to a legal charge. It may be discharged by the issuance of a statutory receipt. Hence, it does not require the complex process of processing a deed of release. Additionally, legal charge is an effective method to mortgage both freeholds and leaseholds. The items used as security are presented in a schedule with an accompanying statement.⁷¹

⁶⁸ PCL, proviso to S. 109 (1),

⁶⁹ PCL, s 112 (1).

⁷⁰ *ibid*, s 110 (1).

⁷¹ Oniekoro, (note 1).

The simple and easy way of discharge is an advantage which becomes a disadvantage. While the legal charge is registrable, discharge of the charge by statutory receipt is not registrable.⁷² Thus, the encumbrance created by the charge on the property still exists in the register long after its discharge. Its other disadvantage is that it has no proviso for re-conveyance or redemption.⁷³ This is understandable because it does not transfer any interest to the mortgagee.

3(c) *Mortgage and Property Law (MPL)*⁷⁴

Prior to the passage of this law, the RTL⁷⁵ was the law regulating legal mortgages in Lagos State. It is created by charge as provided in section 18 of the law. The Form can be adapted by the draft's person in accordance with the circumstance of the transaction. A mortgagee under RTL had the same rights, powers, protection and obligations as those under PCL.⁷⁶ The MPL builds on the existing laws such as CA, PCL and RTL. Ways of creating mortgage under MPL depend on the nature of the title held, whether the legal interest is a right of occupancy or a leasehold interest.⁷⁷ The methods are:

3(c) (i) *Mortgage of Right of Occupancy*

The highest right an individual can hold in land under the LUA is the right of occupancy. A holder of right of occupancy under the law may create a legal mortgage in three ways.⁷⁸

3(c) (i)(i) *By Demise*

This is a mortgage by demise, and it is for years indeterminable relating to a right of occupancy.⁷⁹ However, the term “demise” used in this section is confusing in the sense that it relates to the creation of the mortgage of an indefinite term.⁸⁰ The maximum quantum of interest that can be passed to a third party by a grantee is a sub-lease.⁸¹ Hence, a grantee is not in a

⁷²Osamolu; Odunola and Oba (n 45).

⁷³ Dadem, (n 36).

⁷⁴ (As Amended, 2015) Law of Lagos State.

⁷⁵ Cap R4, Laws of Lagos State, 2003 (now repealed).

⁷⁶ibid, S. 22.

⁷⁷ Dadem (n 36).

⁷⁸ MPL, s. 15(1).

⁷⁹ibid s. 15(1).

⁸⁰ Okoye, (n 42) 56.

⁸¹ LUA, ss. 21 & 22(1).

position to give what he does not have. Therefore, he has no necessary capacity to create a mortgage by ‘demise’.⁸²

The mortgagor can only alienate his interest by means of sub-demise which is only for a period of years determinable.⁸³ Section 15 of the MPL conflicts with provisions of LUA while Section 16 appears to have corrected this contradiction by introducing ‘sub-demise’. Consequently, Section 15 of the law appears unnecessary and is, therefore, recommended for excision. This is because to the extent of its inconsistency with LUA which has constitutional flavour it is void.⁸⁴

3(c) (i) (ii) Charge by Deed Expressed to be by Way of Legal Mortgage

A legal charge by deed expressed to be by way of legal mortgage operates with all the legal mortgagee’s powers and duties.⁸⁵ Just like other charges, no estate is given to the chargee. Rather, it confers the right on the charge to attach the property for the purpose of repayment of the debt. Its major advantage is that it is easy to create. It may be settled by issuance of a simple receipt. Its creation does not require Governor’s consent. However, in order to realise the mortgage by power of sale, the consent has to be procured.⁸⁶ However, just as the use of receipt is an advantage, it constitutes a disadvantage too, because it is not registrable. Hence, the charge will appear in the property register as encumbrance against the property.⁸⁷

3 (c) (i)(iii) A Charge by Deed Expressed to be by Way of Statutory Mortgage

This is by way of statutory mortgage.⁸⁸ It is created by filling out the appropriate forms in the Law itself. The form may be adapted for use to accommodate various instances. The mortgagee has the similar protection, powers and remedies as legal mortgagee.⁸⁹ It also has the advantage of being easy to create and being dischargeable by simple receipt, which have been shown to constitute a disadvantage also.⁹⁰ As a charge, it does not require Governor or local

⁸² Okoye, (n 42) 56.

⁸³ LUA, s. 21 & 22(1 s. 21 & 22(1).

⁸⁴ 1999 Constitution of Federal Republic of Nigeria (As Amended), Cap C23 LFN 2004 s 315.

⁸⁵ MPL 2012 (As Amended, 2015), S. 15(1)

⁸⁶ MPL, s. 19 (1).

⁸⁷ YY Dadem(n 36) 156.

⁸⁸ 2012 (As Amended 2015), S. 15(1).

⁸⁹ ibid.

⁹⁰ Dadem (n 36)156.

government consent under LUA to create. This is because it transfers no interest in land. However, it requires consent to transfer interest to purchaser in case of default.⁹¹

3(c) (ii) Mortgage of Leasehold

This may also be done in three ways.

3(c) (ii) (i) By Sub-Demise

A sub-demise mortgage in MPL is similar to the one under PCL because it operates to transfer the reversionary interest in the mortgagor to the mortgagee,⁹² unless specifically exempted. In case of the failure to pay the outstanding indebtedness, the mortgagee is at liberty to embark on power of sale without the use of remedial devices as it is the case in CA states.

3(c) (ii) (ii) Charge by Deed Expressed to be by Way of Legal Mortgage

This includes rights to commence action for possession from those who received rents and profits illegally. As a charge, it does not transfer any right and does not need consent under LUA. All other advantages and disadvantages of a legal charge under CA and PCL are applicable. It must be by deed, and not merely in writing. Its enforcement powers are the same as a legal mortgage.

3(c) (ii) (iii) Charge by Deed Expressed to be by Way of Statutory Mortgage

This is a legal charge which is created by deed with the aid of forms provided in the statute. Forms⁹³ provided under MPL may be adopted or adapted for use. All the conditions for a legal charge apply. It is noteworthy to observe that MPL adopted the position of Registration of Titles Law⁹⁴ (now repealed) and Property and Conveyancing Law in its creation of charges and mortgages by sub-demise respectively.

3(d) Mortgages and Foreclosure Law (MFL) 2020⁹⁵

The law was passed to replace the use of PCL as a major statute governing mortgage transactions on land in the State. It offers a complete guide for the administration and control of land used as mortgages in the state.

⁹¹ MPL, s 19(1).

⁹² MPL, s.20(1)(a).

⁹³ MPL, section 16(1).

⁹⁴ Cap R4, Laws of Lagos State 1964, Ss. 18-22.

⁹⁵ No. 17, Ekiti state.

Compared to the MPL to the seven-man mortgage board of the MPL,⁹⁶ the law has introduced innovations that could re-position mortgage of land for commercial developments. These innovations are identified in this paragraph. First, it makes the provision for the composition of a mortgage board that could solve some of the problems confronting the industry.⁹⁷ The Board includes the Attorney General of the State, the Commissioner of Finance, Registrar of Titles of the Land Registry Compared and a non-official ‘with a minimum of fifteen (15) years cognate experience in estate surveying and valuation (Registered Estate Surveyors and Valuer)’ MFL⁹⁸ makes provision for an eight-member board. The unique feature of MFL is that out of the eight members of its board, three of them are delegated the right to authorise consent by the Governor.⁹⁹ Section 23(2) of the law clearly delegates the power to consent to members of the board who are commissioners in the State. MFL identifies these to include attorney general, commissioners for finance, and lands and housing.¹⁰⁰ In addition, the consent to transfer of land should not be delayed beyond 40 days.¹⁰¹

The law further provides for the fast-tracking of double consent stipulated for mortgages.¹⁰² Where it is mandatory to obtain (a) registration of interests and (b) mortgage consent, the two are to be processed at the same time and not later than 60 working days since the transaction first commenced.¹⁰³

Due to its recency, the unique provisions of MFL have not been put to judicial test. But it is the humble believed that if the problem of Governor’s consent could be uniquely solved by the three key provisions of the law namely: the delegation of the three commissioners in the mortgage board as authorities to grant consent; the grant of consent within 40 working days and double consent within 60 working days, the type of delays which marred the procurement of consent for mortgages would become a thing of the past.¹⁰⁴ Hence, the enforcement by sale would be less stressful for the mortgagee.

⁹⁶ MPL, s. 2.

⁹⁷ MFL,3(1).

⁹⁸ MFL, s. 3.

⁹⁹ibid.

¹⁰⁰ibid, s. 3(a), (b), (c).

¹⁰¹ibid.

¹⁰²ibid, s. 23(1).

¹⁰³ibid, s 24 (2) (b).

¹⁰⁴*Awojugbagbe Light Industries Ltd v Chinukwe& Anor* (1995) 4 SCNJ 162.

The law provides that a party could form a legal hypothecation by demise, sub-demise, charge, and a statutory mortgage on a registrable interest. These modes of creating legal mortgage are like that of leasehold property under MPL.¹⁰⁵ But the innovation introduced by MFL is that it defines a registrable interest to include statutory right; customary right; sub-division in a Strata Development and leasehold interest.¹⁰⁶

MFL provides for legal mortgage creation on Strata Title and goes ahead to enunciate property that could be subdivided into Strata Development. Ample directions on this area are given to the mortgagors of the existing rights to mortgage Strata Titles. Strata Title mortgaged could be disposed of through sale.

Provisions of MFL on the creation of legal mortgages appear more comprehensive. They provide directions on speedy authorization of consent, innovative inclusion of Strata Title as subject on which legal mortgage could be granted; compliance with LUA's policies and principles.

4 .0 Challenges to Legal Mortgage Under the Land Use Act

Apart from the provisions stated under the CA, PCL, and MPL already identified, the legal mortgage cannot be created if the principle of the LUA has not been complied with. These principles are the eminent domain of the Governor;¹⁰⁷ the nature of right of occupancy;¹⁰⁸ definite duration of the term held by the grantee;¹⁰⁹ differences between the two rights of occupancy (SRO);¹¹⁰ nature of the deemed grant;¹¹¹ half hectare rule;¹¹² certificate of occupancy;¹¹³ consent;¹¹⁴ revocation¹¹⁵ and compensation rules,¹¹⁶ among others. Though introduced as an Act that would unify all land tenure practices in Nigeria, change conveyancing

¹⁰⁵ MPL, s 16.

¹⁰⁶ MFL s27.

¹⁰⁷ LUA, s1.

¹⁰⁸ *ibid*, s 51(1).

¹⁰⁹ *ibid*, s8.

¹¹⁰ *ibid*, ss 5 & 6.

¹¹¹ *ibid*, ss 34 & 36.

¹¹² *ibid*, s 34 (5).

¹¹³ *ibid*, s 9.

¹¹⁴ *ibid*, ss 21 & 22.

¹¹⁵ *ibid*, s 28.

¹¹⁶ *ibid*, s 29

practices and make land available for accelerated economic development, some of its provisions highlighted above, make conveyancing difficult.

The LUA governs the creation, the operation, and the realisation of any conveyance in Nigeria, including mortgage. A legal mortgagee must be diligent in creating the mortgage, so that its enforcement remedies, especially, the power of sale, would not be caught up by non-compliance with the complex rules of the LUA.¹¹⁷ The mortgagee must, therefore, ensure that the land for the mortgage complies with the delineation of land into rural and urban lands;¹¹⁸ that requisite consent be obtained by the appropriate authorities;¹¹⁹ that such consent must be from proper authority.¹²⁰ Having declared the Governor's consent invalid in *Ajilo's* case, the Supreme Court held that the consent should be obtained from the proper custody. Furthermore, the half hectare rule for the undeveloped urban land and the 500/5000-hectare rules for farming and grazing land should be strictly adhered to. Also important are the nature of a deemed grant (under statutory/customary occupation) and certificate of occupancy. These rules are set to ensure that transparency, accountability, and due process are introduced to land management and control in Nigeria. Hence, the LUA created the dominion of the Governor over all lands in his domain.

4 (a) Nature of Certificate of Occupancy (C of O)

A Certificate of Occupancy (C of O) is a document issued by the Governor in three circumstances under section 9(1)(a)-(c), namely as evidence a statutory right; on the application of customary right holders and occupiers, and to previous holders under the received law deemed entitled to it.

Parties to mortgage must ensure the validity of the C of O.¹²¹ The mortgagee should ensure that the C of O is properly issued and signed by the appropriate public officer on behalf of the Governor. The grantee must have also paid for the unexhausted improvement on the land he is allocated.¹²² In addition, a mortgagee should look out for controversial terms and conditions

¹¹⁷*ibid*, ss5(1),6(1), 21 (1),22.

¹¹⁸*ibid*, s3.

¹¹⁹*ibid*, ss21(1), 22.

¹²⁰*Savannah Bank v Ajilo*(1989) 1 NWLR (Pt 97) 305.

¹²¹ I.O. Smith, *Practical Approach to Law of Real Property in Nigeria*(Revised Edition, Ecowatch Publications,2013)509.

¹²²LUA, S. 10(a).

which fetter the rights of the holders and equally limit the use of land as mortgage security.¹²³ The mortgagee, in taking land as security, should ensure that covenants such as term of years, payment of rents and taxes and other conditions are met by the mortgagor. All these are dangerous mines for the financial interest of the mortgagee, and the overall future of real property mortgages in Nigeria.

The priority of the C of O arises when two adverse claimants had valid certificates issued as evidence of respective rights of occupancy on the same land. This issue was resolved at the apex court in *Dantsoho v Mohammed*¹²⁴ and *Ibrahim v Mohammed*.¹²⁵ It was decided that when two parties were in contest over the title of the land and both possessed the certificates as evidence, the first in time prevailed, provided that the interest issued from the same grantor. In the two cases, the Governor was the common grantor. The Governor, having parted with the title to the first party earlier, had nothing left for the latter grantee. A mortgagee who relies on the C of O as signifying legal title may simply lose out in the contest for the possession of the mortgaged property.

The above issues require meticulous consideration by the mortgagee because the issuance of the certificate does not confer any title. Hence, it raises a rebuttable presumption of a right upon which it is issued.¹²⁶ However, where the C of O is impeached, the loan it secures would be left without a valuable security and becomes unsecured.

In order to overcome these pitfalls and similar ones raised, a mortgagee must do proper investigation of the title of the mortgagor outside the C of O which is not 'a conclusive proof of title' because the Act itself does not make it so.¹²⁷ Reasons are simple: the Act fails to mandate a person with CRO to obtain a certificate or to register his/her interest, unless where such is registrable.¹²⁸ Also, the right conferred by the C of O is rebuttable and as such can be easily defeated by the proof of a better claim.¹²⁹ There are many parties vested with land before the Act

¹²³ I.O. Smith, (n 121) 501.

¹²⁴ (2003) 6 NWLR (Pt. 817) 457.

¹²⁵ (2003) 6 NWLR (Pt 817) 615.

¹²⁶ *Ogunleye v Oni* (1990) 2 NWLR (Pt. 135) 745; *Adedeji v Williams* (1989), 1 NWLR (Pt. 99) 611, *Osho v Foreign Finance Corporation* (1991) 4 NWLR (Pt. 184) 157.

¹²⁷ *Oniekoro* (n 1) 93.

¹²⁸ *ibid*.

¹²⁹ *Dantsoho v Mohammed* (2003) 6 NWLR (Pt. 817) 457; *Ibrahim v Mohammed* (2003) 6 NWLR (Pt. 827) 615

commenced, whose interests are neither documented nor registered for the simple reason that the Act makes application for C of O optional. This makes the position of a mortgagee precarious.

4(b) Consent for Mortgages

The consent provision under the LUA has exhausted much judicial ink. Right from the seminal decision in *Savannah Bank v Ajilo*¹³⁰ to *Okuneye v FBN*¹³¹ conflicting decisions were made that make alienation of land very difficult.

Consent provisions of the LUA are in sections 21 and 22. Section 21 states:

It shall not be lawful for a customary right of occupancy or any part of it to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise however—

- (a) without the consent of the Governor in case where the property is to be sold or under the order of any court under the provisions of the applicable Sheriffs and Civil Process Law, or
- (b) in other cases, without the approval of the appropriate Local Government.

The above section requires consent of the Governor in alienation of land for which the court has ordered judicial sale of the Customary Right of Occupancy (CRO), while for others Local Government is needed.

Section 22 gives conditions for the disposal of a statutory right of occupancy (SRO). This is the land designated as urban.

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. Provided that the consent of the Governor-

¹³⁰ (1989) 1 NWLR (Pt. 97) 305.

¹³¹ (1996) 6 NWLR (Pt. 457) 749

- (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 conveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged to the mortgagee with the consent of the Governor.

The provisos to section 22 (a) and (b) are central to the mortgage of land. First, they involve transfer of land rights, legal or equitable. They also govern the transfer when conditions have been fulfilled. Furthermore, they determine the capacity of the mortgagor to convey a valid title to the mortgagee at the creation of the mortgage.

Both sections 21 and 22 remain the most controversial parts of the LUA. Consent of the Governor is one of the prerequisites of a valid mortgage. The LUA forbids the transfer of a statutory grant or any part of it without consent. The consent is also required under the LUA for the conveyance of customary right of occupancy. It is also mandatory for judicial sale of property held under the CRO.¹³² The appropriate local government gives the approval for the alienation of CRO in all other situations, it has been obtained.¹³³ A legal mortgage requires consent of the Governor unless where in creating an equitable mortgage.¹³⁴ The reconveyance of a security does not require any consent, if it had been mortgaged upon Governor's approval.

However, decisions in this area of law have not been consistent. Other decisions have affirmed the judgement in *Ajilo* that exempted the mortgagor from bearing the responsibilities of the incompetent consents procured.¹³⁵

The next question is when a valid consent of the Governor is not obtained by the party whose duty is to obtain it, who suffers? This matter has engaged the judicial attention as from

¹³² S. 21 LUA

¹³³ *ibid*

¹³⁴ *ibid* S. 22 (a) LUA

¹³⁵ *Union Bank of Nigeria Plc v Ayodare* (2007) 13 NWLR (Pt. 1052) 567

Savannah Bank v Ajilo.¹³⁶ Subsequent decisions in *Ugochukwu v Co-operative Commerce Bank Plc*¹³⁷ and *Awojugbagbe Light Industry v Chinukwe*¹³⁸ had supported the equitable stance that the mortgagor/grantor was to procure consent. It was further contended that the mortgagor who sought the approval should not be permitted to make profit from his own wrongdoing when the consent turned out to be invalid. But the Supreme Court had overturned those decisions in *UBN Plc & Anor v Ayodare & Sons*.¹³⁹ The judgement in *Savannah Bank v Ajilo*¹⁴⁰ was followed when the apex court allowed the mortgagor to avoid the transaction by preventing its sale. The Deed of Legal Mortgage was executed in 1980 over two properties in urban and rural areas respectively. The approvals for the alienation of the properties were signed by Ag. Chief Lands Officers instead of the appropriate public officers to whom powers to give consents were appropriately delegated. After the defendant/appellant demanded for the payment without success, it resolved to enforce through sale. The properties were advertised by the Public Auctioneer. In reaction, plaintiffs/respondents commenced a suit against the defendants/appellants to invalidate consents covering the two mortgaged properties because neither the Governor nor the Local Government consented to them. In other words, they claimed that the persons who purportedly gave consents to the plaintiffs/respondents were not appropriate and, as a result, the mortgaged transactions were illegal. The trial court affirmed the argument of the plaintiffs/respondents.

The verdict of the High Court was confirmed at the appeal. At the highest court, issues for determination were: (1) whether the Mortgage Deeds were void, because it relied on consents endorsed by the Ag. Chief Lands Officer for Permanent Secretary and Acting Chief Lands Officer State Ministry of Lands and Housing respectively, who did not derive their delegation from the Governor; and (2) whether it was inequitable to allow the plaintiffs/respondents who had procured invalid consents to benefit from the supposed irregularity. On the question of validity of the deeds of mortgage, having been based on the consents signed by the inappropriate officers, the apex court declared the approvals invalid. They were declared invalid as a violation of the rule, *delegatus non potest delegare*.¹⁴¹

¹³⁶ibid

¹³⁷ (1996) LLJR-SC.

¹³⁸ (1993) 1 NWLR (Pt 270) 485.

¹³⁹(2007) 13 NWLR (pt. 1052) 567.

¹⁴⁰(1989) 1 NWLR (pt. 97) 305.

¹⁴¹ Meaning that a delegate cannot further delegate duties assigned.

On the question whether it was inequitable to allow the respondents who had procured invalid consents to benefit from it, the Court followed *Ajilo's*¹⁴² case and held that the irregularities in procuring the approvals rendered them invalid despite the fact that it was the mortgagor who obtained them. Like its previous decision relied upon, the court failed to apply the equitable principle enunciated in *Bucknor-Mclean v Inlaks Ltd*¹⁴³. This decision has been criticised by Smith¹⁴⁴ who opined that in taking the decision, the court overlooked the fundamental principle of equity which was applied by the same court in its earlier decisions¹⁴⁵ as basis to hold that, since the holder was the appropriate person to apply for consent in mortgage transactions, the person should not have been allowed to benefit from the outcome of the invalid consents.

However, it was noted¹⁴⁶ that *Ayodare*¹⁴⁷ is distinguishable from *Ajilo*¹⁴⁸ at least in one respect. In *Ajilo*, the crux of the matter was the application of the LUA was whether the consent provisions in section 22 of a deemed grantee under section 34. It was never before the court whether a mortgagor who applied for a consent which was later found to be invalid could thereafter make use of the initial wrong to call for the declaration of the mortgage as illegal which was before the court in *Ayodare*. Hence, Smith¹⁴⁹ observed that the Court's pronouncement in *Ajilo* that "express provisions of Land Use Act make it undesirable to invoke the maxim, *ex turpi causa non oritur actio* and the equitable principle enshrined in *Buknor – Mclean v Inlaks Ltd...*' was made *obiter* and, therefore, could not have bound the court in *Ayodare*. However, the decision in *Ayodare*, remains the current authority on consent provisions, despite its much criticism.¹⁵⁰ In the same vein, a learned commentator, Taiwo¹⁵¹ argued that the Supreme Court ought not to have used technicalities it used in refusing an equitable point, *suo motu*.

¹⁴²n 120.

¹⁴³(1980) 8-11 SC 1

¹⁴⁴Smith (n 121).

¹⁴⁵*Ugochukwu v Commerce and Cooperative Bank; Awojugbagbe Light Industries v Chinukwe* (1993) 1 NWLR (Pt 270) 485.

¹⁴⁶Smith (n 121)19

¹⁴⁷(2007) 13 NWLR (pt. 1052) 381

¹⁴⁸(1989) 1 NWLR (pt.97)381

¹⁴⁹Smith (n 121) 518

¹⁵⁰I.O. Smith, 'Statutory Requirement of Consent in Mortgage Transactions as an Instrument of Fraud in Nigeria.', *Journal of Public and Private Law*, (2008-2009), 28.

¹⁵¹Adewale Taiwo, *Nigeria Land Law*, (Ababa Press Ltd. 2011) 225.

Based on the above, it is submitted that the decision in *Ayodare* appears to have created more problems for mortgagees in realising it through sale. First, the use of technicalities to defeat the legitimate interest of the mortgagee when the consent is procured by the mortgagor appears inequitable and against the commercial interest of the mortgagee. Also, the decision, if not overturned, is capable of discouraging mortgagees to continue to accept land as securities for loans in Nigeria. This will surely affect the use of land in commercial transactions. It is advocated that the judicial attitude to the interpretation of sections 22 and 26 on the validity of consent obtained needs to be reconsidered and the decision in *Ayodare* revisited. Both sections 21 and 22 of the LUA also require amendments in a way to clearly state that the holder is the party who is to apply for consent and that is the holder that should be apportioned penalty upon the failure to obtain a valid one.

Also, the time spent in processing consent is rather too long. It is suggested that adequate administrative guidelines should be issued by states in this regard. The cumbersome process of securing consent of the Governor in land transaction has contributed to the fraud being perpetrated by the operators who often backdate documents to avoid them.¹⁵²

5.0 Conclusion

This paper undertook an overview of the creation of legal mortgages in Nigeria. It looked at the methods of creating of mortgages under various Nigeria statutes. It also appraised the challenges posed to the creation of legal mortgage by the LUA. Methods of creating legal mortgages under the PCL, MPL and MFL were elaborately discussed. Areas of similarities and differences were also discussed. The emphasis under various statutes was the extent of conformity with the LUA for sustainable use of land as mortgage security.

Challenges to the creation, operation, and enforcement of legal mortgages under the LUA are many and pose serious threats to commercial use of land in Nigeria. These include uncertainty of title, nature of Certificate of Occupancy, consent requirement, among others. These challenges have engaged the attention of courts in recent years.¹⁵³ Furthermore, it was found that some of the mortgage statutes such as the CA, PCL and PCL contained provisions on the mortgage of freehold properties through demise which were inconsistent with the LUA.

¹⁵²Ekpu, A.O.O., Making the Land Use Act, Work (1993), 2(1), *Edo State University Law Journal*, 25-35

¹⁵³ *Savannah Bank v Ajilo* (n 120); *Awojugbagbe Light Industries v Chinukwe*(n 104).

6.0 Recommendations

Based on the above and to reposition land resources for economic development, the following recommendations are made:

i) *Amendments of the LUA on Certainty of Title*

LUA should be amended to promote clarity and certainty of title. First, the nature of the right of occupancy and certificate of occupancy introduced by Sections 5, 6, 9 and 10 of the LUA are clumsy and therefore should be amended.

ii) *Amendment of the Consent Clause*

Sections 9, 21 and 22 of the LUA should also be amended to reduce current uncertainty and delays in obtaining Governor's consent which makes the lending industry reluctant to accept land security.

iii) *Multiplicity and Complexity of the Mortgage Statutes*

The mortgage statutes in operation in parts of Nigeria are many. They should be harmonised into a single statute to govern mortgage transactions for ease of operation. In that wise, the MFL of Ekiti State is recommended as a model because it comprehensive and modern provisions.

iv) *Good Root of Title*

A mortgagee must do proper investigation of the title of the mortgagor outside the C of O.

v) *Use of Land for Economic Development*

The economic use of land as security requires an understanding of its principles of management and control, It is recommended that lenders develop capacities to monitor developments on land in their areas of operation to assess their risks in accepting land for mortgage.