CRITICAL EXAMINATION OF THE INSTITUTIONAL FRAMEWORK ON MORTGAGE TRANSACTION IN NIGERIA

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Abstract

Mortgage transaction is an indispensable practice in modern day business activities. In Nigeria however mortgage is regulated by the legal framework provided by the Land Use Act, 1978 as amended. The study critically analyses the below mentioned institutional framework, the Constitution of the Federal Republic of Nigeria, 1999 as Amended, Federal Ministry of Lands, Housing and Urban Development, Land Use and Allocation Committee 1978, Judiciary, Surveys, Housing and Urban Planning, Federal Government Regulation Unit, Corporate Affairs Commission, Federal Inland Revenue Service and State Inland Revenue Service (Lagos State Inland Revenue Service) The provision of the Act is legally inadequate, and its interpretation often generates controversies in some respects. Since the Land Use Act was intended to ensure citizens have access to land and to open up frontiers for development, it therefore follows that there is a serious need to revisit the Act with a view to making useful amendments to accommodate the stakeholders interest especially into the Land Use Act for it to serve the desired purpose. The objective of the study is to critically assessed the standing legislation, agencies regulatory bodies governing the operation and termination of mortgage transactions in Nigeria. The study provides a veritable tool for the exposition, evaluation and criticism of the Act as it affects mortgages, with a view of promoting the institutional framework that would guarantee a more efficient operation of mortgages in Nigeria. The study made recommendations that will accommodate the interest of critical stakeholders and operators of the sector.

Keywords: Mortgage Transactions, Legislations, and Regulations.

1. Introduction

The legal infrastructure of mortgage business in Nigeria is presently enmeshed in a complex web of mostly obsolete and insidious personal and real estate laws, not to mention the fact that most, if not all, are adoptions from a seeming bygone era of English legal system of mortgage, which itself was over many decades ago poignantly described as a complex and difficult English doctrine that defies easy understanding. Worse still, no review or reformation effort has been made in a large part of the several geographically distinct jurisdictions to which each of the law operate exclusive of the others. Thus, these laws, for the most part, have been retained and operated in their original state within their independent spheres of geographical jurisdiction. Upon this fact therefore, the Lagos State mortgage jurisdiction stands out; and as have been noted earlier, represent one of the far reaching and encouraging efforts in recent times.[1]

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[1] Theoretically, Nigeria is today often divided by many writers into three jurisdictions for the purpose of determining the modes of creating a valid mortgage, based on the three major laws applicable to these

It is noteworthy that prior to this balkanization induced by these statutes in Nigeria, the common law which is a joint benefactor with equity and statute in the development of mortgages and which remain part of the corpus juris of Nigeria had established the fact that a mortgage can be created either as a legal or equitable instrument and that its creation in either respect is determined by the applicable law and the nature of the property interest mortgaged. In the case of a legal mortgage, the common law had clearly demarcated between creating a mortgage upon a freehold interest by conveyance of the fee simple estate; connoting the total transfer of the mortgagor's entire estate to the mortgagee defeasible only on redemption, and creating a mortgage upon a leasehold interest which can be done by assignment of the unexpired interest of the term of lease, subject to the proviso for reassignment to the mortgagor on redemption; or by a sub demise for a term of years marginally shorter than the residue of the mortgagor's term.

By reason of the Land Use Act which has ousted fee simple interest in Nigeria's land ownership policy, the creation of mortgage by conveyance of fee simple interest no longer is permissible under the Nigeria law. However, the two later modes described in relation to the mortgage of leasehold interests, namely, assignment and sub demise; either of which the security of a leasehold interest can be made, still subsist and in fact are the major method by which mortgages are created in the Conveyancing Act jurisdictions, otherwise called Conveyancing Act States. It is useful to also add that these common law modes were in fact what were applicable to the whole of Nigeria before 1958. But, the promulgation of the Registration of Title Law in 1958 and the Property and Conveyancing Law in 1959 changed the entire legal landscape of how mortgages became created in certain way in one State and not so in another State.

In the light of the above, Nigeria, by the account of many writers – wrongly or rightly – is with respect to how legal mortgages are created, believed to be divided into the Property and Conveyancing Law States made up of Ekiti, Osun, Ondo, Oyo, Ogun, Delta and Edo (found within the old Western Region of Nigeria); the Conveyancing Act states made up of parts of Lagos State and the entire Northern and old Eastern Region of Nigeria; and the Registration of Title Law jurisdiction comprising Victoria Island, Ikoyi, Ebuta-Metta and Lagos Island areas of Lagos State specifically designated as Registration Districts and thus not governed by the Conveyancing Act.
It has been stated rather erroneously by Imhanobe, Nebedum and others, that save for the common law modes already described above, there is no statutory provision on the mode of creating legal mortgage in the states governed by the Conveyancing Act and thus in that respect, the applicable modes are those provided by the common law subject to the modifications imposed by the Land Use Act 1978. This statement only holds to be true in part in so far as the common law modes of creating mortgage of leasehold interests through sub demise and assignment are the methods popularly associated with the Conveyancing Act States. But it must be noted that there is a third mode by which a mortgage can be created in the Conveyancing Act states which is in fact a statutory provision: By virtue of *section 26(1)* of the Conveyancing Act, a legal mortgage can be created by deed expressed by way of statutory mortgage. By this section, such a mortgage must

jurisdictions, viz.; the *Conveyancing Act 1881 ('CA');* the Property and *Conveyancing Law 1959 ('PCL')* and the Registration of Title Law (RTL).

be in the form provided in part 1 of the Third Schedule to the Act, with only necessary variations to be made as situation may demand.

Accordingly, the point that is stressed here is that the modes of creating legal mortgages in the Conveyancing Act States as identified above, is a joint product of common law and the statute (Conveyancing Act). This is however in contrast to the Property and Conveyancing Law State where the source of the modes of mortgage creation is the Statute (Property and Conveyancing Law) to the exclusion of the common law. Under the Property and Conveyancing Law (and by implication in the Property and Conveyancing Law States) there is no room to look outside the statutory provisions to find the modes of creating mortgage security as everything is self-contained in the Property and Conveyancing Law. By the provisions of the Property and Conveyancing Law, the conveyance of an estate in fee simple by way of mortgage is not permissible. Instead, "an estate in fee simple can only be mortgaged either by a demise for a term of years' absolute subject to a provision for cesser on redemption, or by a charge by deed expressed to be by way of legal mortgage." The obvious implication for the former is that unlike the conveyance method (permitted under the common law) the demise for a term of years' absolute under the Property and Conveyancing Law allows the mortgaging of only a limited period of three thousand years in the case of a first mortgage and a day longer than three thousand years for a second and every subsequent mortgage of the same secured property.

In respect of mortgaging leaseholds, the Property and Conveyancing Law clearly provided for two methods, namely; "by sub demise for a term of years' absolute, less by one day at least than the term vested in the mortgagor and subject to a provision for cesser on redemption, or by a charge by deed expressed to be by way of legal mortgage." By this provision, the Property and Conveyancing Law obviously excluded the creation of mortgages by way of assignment used in the Conveyancing Act states, but provided that any purported assignment of a leasehold by way of mortgage made after the commencement of the law shall operate as a sub demise of the leasehold land to the mortgagee; which term shall be ten days less than the term expressed to be assigned. Thus, allowing the mortgagor the leverage of creating successive legal mortgages on the land, each being one day longer than the preceding one.

In the areas covered by the Registration of Title Law, the mortgage of both freehold and leasehold registered land took the form of a charge created in compliance with the manner prescribed in the First Schedule of the law with necessary and permissible modifications to be made as occasion demands. Basically the creation of security out of a leasehold or freehold estate in this jurisdiction does not admit of any other mode except by the said charge which shall then be registered as an encumbrance in favour of the chargee.

Undoubtedly, these modes are said to possess certain advantages over each other. For instance, while assignment of a leasehold in Conveyancing Act States is unattractive because it is laced with privity of estate and mortgagees' unavoidable liability to covenants and conditions in a head lease'; the advantage is that no reversionary interest is created for the mortgagor and a default by him empowers the mortgagee to sell the property to a purchaser unhindered. Conversely, under the sub demise method, almost uniformly applicable to both Conveyancing Act and PCL States, there

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is neither privity of estate or privity of contract between the mortgagee and the head lessor. The unattractiveness however lies in the fact that the mortgagee in the Conveyancing Act States is incapable of selling the reversionary interest created therein upon a mortgagor's default, except by the special insertion of a 'Declaration of Trust' or 'Power of Attorney' clause. However, in the Property and Conveyancing Law States, the mortgagee under the sub demise method can sell the reversionary interest upon the mortgagor's default by virtue of *section 112* of the Property and Conveyancing Law.

The point that the legal system does not provide for a uniform regime of legal rules of mortgage creation in all parts of Nigeria and that the entire legal infrastructure relies on State based laws in many respects tampered by federal law(s); and which therefore makes a mortgage that is valid in one state not valid in another, is by now well made. What however is hard to agree with in the light of the several legal developments in many states in Nigeria presently is the continued partitioning of Nigeria into three jurisdictions as Conveyancing Act States, Property and Conveyancing Law States and, the 'Registration of Title Law areas' of Lagos State for the purpose of understanding the modes of creating valid mortgage in Nigeria's legal literature. This is because a painstaking look at the legal developments that has taken place in some of the young states in today's Southern Nigeria, and indeed several others show that the whole tradition of lumping States as just Conveyancing Act and Property and Conveyancing Law states, and Registration of Title Law area of Lagos in many academic works is outdated and untenable. First, Lagos State has by the Lagos State Lands Registration Law 2015 repealed the Registration of Title Law hence there is no longer Registration of Title Law areas (jurisdiction) of Lagos State. Second, some States in the part of Nigeria which should be properly referred to as Southern Nigeria (or even South-South and not Eastern Nigeria) like Cross Rivers and Bayelsa States presently have their Registration of Title Laws and Property Laws which cardinally deals with the legal issues in the Conveyancing Act 1881.

The point has been very well made that beside the common law and statutes, equity can very much lay claim to a significant role in the development of mortgage. Equity effectively intervened to mitigate the strictness of a common law rule of legal mortgage which literally made a mortgagor an immediate 'tenant at will' in his estate upon entering a mortgage transaction. Instead, equity created an equitable estate which is reposed on the mortgagor as soon as a mortgage is created, and which can in turn be conveyed, devised, transmitted or disposed by the mortgagor in favour of another.

Thus, equity jurisprudence has come to recognize and establish that equitable mortgages can be created in a number of ways, which mainly include: by deposit of title deeds with clear intention that it be used as security for loan; by an agreement to create a legal mortgage; and by mortgage of an equitable interest. Since equity looks at the intent and not the form; and deems that has done which ought to be done, where a person intentionally deposits his title deeds of land as security for a loan, even when not accompanied by a memorandum of deposit in compliance with the statute of Fraud, an equitable mortgage is said to have been created under the equitable jurisdiction of the court. It is instructive to note that as long as the intention that the title deed be used as security can be proved by parole evidence or inferred from surrounding circumstances, the

requirement of an accompanying memorandum is not sacrosanct. It is also instructive to note that the deposit of a title deed which created an equitable mortgage does not detract the legal title or interest that from the onset rests on the depositor (mortgagor). However, in practice, the lender/custodian of title deed should equally take a memorandum in writing signed by the borrower/depositor, advisedly under seal, evidencing the borrower/depositor's avowed intention to create a security with such deposit.

As noted above, equitable mortgage can also be created by an agreement to create a legal mortgage. An equitable mortgage created in this sense, shall by law empower the lender/custodian of title deed to secure an order of specific performance compelling the borrower/depositor to execute the deed or in an extreme case, move the court to direct an officer of the court to validly execute a deed conferring a legal estate to a purchaser in the event of the refusal of the depositor to fulfill his obligation.

Also, an equitable mortgage can be said to arise under two other separate circumstances: first, a holder of legal estate who creates a legal mortgage, under the Conveyancing Act jurisdiction for instance, is automatically left with an equitable estate (equity of redemption) which itself is capable of being mortgaged. Second, an instrument org act which purports to create legal mortgage but turns out to be imperfect or insufficient to confer a legal estate, but which, being founded on a valuable consideration, shows the intention of the parties to create a security, or in other words, evidences a contract to do so is an equitable mortgage.

At this point, what is left to be said is that if the law of mortgage as received from English law and as Lord Macnaghten has remarked is incapable of easy understanding by mere mortals, its later fragmentation and structural framework in Nigeria from 1958, as revealed above, up to the promulgation of the Land Use Decree in 1978 made it all the more obscure and complex.

2. The Land Use Act 1978 as Amended

The Act[2] is clearly the most significant development affecting mortgage security in Nigeria since the reception of the Conveyancing Act of 1881 as a statute of general application and the passage into law of the Property and Conveyancing Law by the erstwhile Western Regional Parliament in 1959. Since then, the effects of the Land Use Act and the judicial attitude following it have drawn more commentaries than any other single subject in the development of property law in Nigeria. 43 years after, the dust it raised on virtually every subject it covers, not least on mortgage is yet to die down; thus, this has elicited the ire and very passionate and sophisticated commentaries from every renowned scholar of property law and secured credit.

As we highlighted in the preceding chapter, up until 1978 there was no equivocation as to the nature and quality of estate that a person can transfer and mortgage in any part of Nigeria pursuant to the Conveyancing Act, Property and Conveyancing Law and even the Registration of Title Law. Indeed, there was also no dispute as to the meaning and scope of applicable concepts of English doctrine of estate received and operational in Nigeria's property law. During this period of pre-

[2]The Land Use Act (LUA) 1978

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1978, transfers and mortgages of freehold or leasehold interests was validly done almost as a private commercial transaction between a mortgagor and a mortgagee unhindered by any formal requirement for official approval (except perhaps in the Northern part of Nigeria). However, the provision of the Act[3] effectively subordinates the Conveyancing Act and the Property and Conveyancing Law, and every other existing law relating to the transfer or mortgage of any interest in land to itself; and in so doing, fundamentally diminished and re-characterized the highest quality of estate capable of being transferred and mortgaged in Nigeria from fee simple estate to what is christened 'Right of Occupancy'. Thus, it is said that the former fee simple largest estate which an intending mortgagor of land had prior to 1978 became abolished, sweeping away with it all the pre-existing unlimited rights of the mortgagor thereof.

Arising from this is the development that only a Right of Occupancy which may either take the form of a granted/deemed statutory right of occupancy or granted/deemed customary right of occupancy is available to a mortgagor as an estate in land for securing credit under the Land Use Act. Interestingly, among its several revolutionary land policy provisions that tended to modify the concept of land ownership and incontrovertibly converted old forms of estate into one called Right of Occupancy, there is no express provision as to the specifics modes of mortgaging the Right of Occupation under the Land Use Act. Nonetheless, by virtue of section 48 which literally is to the effect that the determination of the modes of mortgage creations in the states of Nigeria continues to lie in the *Conveyancing Act 1881; the Property and Conveyancing Law 1959*; the *Mortgage and Property Law 2010* of Lagos State; the Law of Property Law of Cross Rivers State and any other existing law making provision for mortgaging, the Land Use Act rather than solve a problem created more frenzy amongst scholars as to whether a Right of Occupancy can be equated to a leasehold or not for all purposes, including mortgage.

Clearly, there are two shades of thoughts on the status of Right of Occupancy as an interest or estate in land. The first, perhaps led by Omotola, is of the view that a Right of Occupancy is strictly not a lease but a kind of hybrid form of right existing between personal and proprietary right. For this reason, Omotola poignantly maintained that any effort at alluding that a Right of Occupancy is another form of leasehold known to the doctrine of estate must be rejected because in reality. its salient feature suggests the contrary. According to him, the Right of Occupancy introduced under the Land Use Act is a new form of right not coming within any form of rights known to property law. The second shade presented by Osimiri, and canvassed by many before him, holds that a Right of Occupancy by its very nature is in substance a lease; or as Osimiri himself put it, is 'at least a form of statutorily created lease peculiar to Nigeria alone' despite the fact its attributes does not strictly conform to the rigid features of orthodox English common law lease. Essien clearly shared this view as he pointed out with detailed illustrations that although a thorough juxtaposition of the Right of Occupancy under the Land Use Act and the conventional lease under the Common law shows how disparate their attributes and nature of rights embedded in them are; in terms of certainty of term, exclusive right of possession and rent reservation still, since the provisions of the Land Use Act generally give the Right of Occupancy ample resemblance with a common law lease, it is therefore safe to conclude that Right of Occupancy is a 'statutory lease'.

[3] *sections 47, 48 and 1,* the Land Use Act 1978

Interestingly, the second shade like the first seemed to have earned judicial validation when in *Savannah Bank Ltd. v. Ajilo*[4] the court held that "to the extent that it can only be granted for specific term under *section 8* of the Act, it has the semblance of a lease. Also to the extent that a holder has the sole right to and absolute possession of all the improvements on the land during the term of a statutory right of occupancy, a holder does not enjoy more rights than a lessee under common law". This present research study aligns itself to the reasoning in the latter shade since no matter the minute differences of the common law lease from a Right of Occupancy under the Land Use Act, it will hardly be mistaken that the legislative intention of creating a Right of Occupancy is born out of the view that a holder of land intending a mortgage cannot create one that will be lengthier than his statutory lease.

As straight forward as the above may seem, there is yet the need to point out that there has been some confusion as to the quality of estate which the distinct holders of what Essien has described as the four categories of Right of Occupancy, to wit, granted statutory right of occupancy, deemed statutory right of occupancy, granted customary right of occupancy and deemed customary right of occupancy pursuant to the Land Use Act,[5] can actually mortgage as security. This is founded on the polemics that safe for the first category – that is, the statutory right of occupancy granted by a Governor pursuant to *section 5(1)(a)* – the other three by the spirit of *sections 34(2), 6(1)(a) and 36(2)(4)* confer an unlimited interest in land on their holders which, unless the holders apply for a formal grant appear to evince a freehold estate. On this score, it is fervently argued that both *sections 34(2) and 36(2)(4)* of the Land Use Act dealing with the deemed statutory/customary rights of occupancy respectively, undeniably preserved the pre-1978 interests/estate of land owing citizens of Nigeria despite the exclusion of the use of the term fee simple in favour of 'right of occupancy'. In other words, it is said that though in mere form, the Land Use Act insist on the use of the terminology 'right of occupancy' instead of fee simple, nevertheless the Land Use Act under *sections.34 and 36* retained in substance the seeming fee simple interest of land holders covered by the two sections, subject however to the Governor's right in *section 14* and power of revocation pursuant to *section 28*. The straight justification for this conception is that save for limiting the size of undeveloped land deemed to be vested in a holder under Land Use Act[6] clearly refrained from limiting the interests of extant deemed holders to a term of years certain and/or to definite period. On the above premises, perhaps, Oniekoro has argued that the old mode of mortgaging freeholds or estate in fee simple by conveyance remains applicable in the Conveyancing Act States since in is view, the deemed holders of occupancy continue to have unlimited interest in their land analogous to freeholds, though subject to the statutory powers of the Governor. In effect, he argued that for all practical purpose, a deemed statutory right holder who has not applied for formal grant (certificate of occupancy), and who is not compelled to do so by either the provisions[7] of the Act enjoys an unlimited interest with which he can apply for a loan and thereby convey to the mortgagee the whole or part of his unlimited interest as security. The plainness of this proposition ignores the technicality that the sections dealing with the rights of deemed holders under the Land Use Act evoke.

[4] Ibid
[5] *sections 5(1)(a), 6(1)(a) 34(2) and 36(2)(4)*
[6] *section 34 (5)(a)(6)(a), it (Land Use Act)*
[7] *section 34(3) or section 36(3)*

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This present study considers Oniekoro's propositions as fallacious and flawed. This is because, as generally agreed, the Land Use Act without a doubt has abolished the fee simple estate, converting and/or reducing all existing interests to right of occupancy that is lease-like. And having abolished fee simple estate under all existing law it cannot be logically said to have retained 'conveyance' which is a mode reserved exclusively for mortgaging fee simple estates under the Conveyancing Act, regardless of whatever implicit technicalities that appear to give the interest of deemed holders of land, customary or statutory, a colouration of fee simple interest. Moreover, from the Supreme Court's pronouncement, it should be crystal clear by now that the distinction between an actual grant and a deemed grant is artificial and academic, since deemed grants are subject to the same legal controls as if granted by the Governor.

Flowing from the above, this present study makes bold to say as one Writer put it 'that with the apparent abolition of the fee simple estate by *Land Use Act 1978* and since no other type of estate can exist, leasehold is the obvious alternative'. And the modes of creating mortgages security under the Land Use Act dispensation, contrary to Oniekoro view, cannot be any other than those meant for creating leasehold mortgage under the laws applicable in the various jurisdictions. Unfortunately, most writers, even those who hold that a right of occupancy by its very nature is in substance a lease, have been less than clear and decent on the exact methods of creating mortgage after the emergence of the Land Use Act. They often appear to complicate what should ordinarily be straight forward. Here, it is posited that under Land Use Act, the extant modes of mortgaging leaseholds in each of the jurisdiction has not changed, except as to certain modifications either by way of addition, omission or alteration in nomenclatures that will bring them in conformity with the Land Use Act.

In any case, a mortgage effected by any of the mode highlighted above cannot, irrespective of the jurisdiction, be said to be validly made unless the Governor's consent is first had and obtained in respect of statutory right of occupancy granted by the Governor or without the approval of the appropriate local government authority of the area in which a land subject to a customary right of occupancy is located, or the consent of the Governor in respect of where the customary right of occupancy is one to be sold by a court order. Despite the view that the wordings of the consent provisions[8] as argued in some quarters, appeared to have excused or offered immunity to the holder of a deemed statutory right over a developed land from needing the Governor's consent when transferring his interest, it is audaciously asserted here that the consent rule is of general application to alienation in all cases, including mortgaging of improvements made on land or any interest in a right of occupancy deemed or actual grant. This assertion is held against the backdrop that the Supreme Court had pointedly held that to exclude a holder of a deemed grant of statutory right of occupancy from obtaining consent of the Governor would defeat the purpose of the Act particularly the provision of *section 22*. However, these consent provisions have long been adjudged as a needless inhibition to mortgage as a credit transaction.

[8] *sections 21, 22 and 34(7)*

Of importance also is the hazardous effect of *section 51* on the mortgage vis-à-vis mortgagor (holder) in the event of revocation and compensation for unexhausted improvements of a mortgage property and, the dangerous provision of *section 29* which completely devalues undeveloped/vacant land to a commercially worthless asset to a mortgage transaction in the event of revocation and compensation under the Land Use Act. This study does not intend an exhaustive discussion on these issues as such has been done elsewhere. But suffice it to say that on the first issue, *section 51* of the Act expressly excluded a mortgagee from the meaning of a holder under the Act with the implicit consequence that where (before a mortgagee exercises his power of sale/foreclosure) the right of occupancy of a mortgaged land with unexhausted improvements is revoked/compulsorily acquired by the Governor pursuant to *section 28*, the mortgagee to whom the legal title of land has been transferred in the mortgage transaction would apparently not be entitled to be paid the compensation made by the government. Although an eminent writer have on the strength of a number of pre-1978 case laws and a community reading of some relevant sections of the Land Use Act[9] argued that it could not have possibly been the intendment of the Act to frustrate or destroy a transaction (mortgage) of immense commercial value for an economy by disqualifying a mortgagee from being subrogated to the position of the mortgagor in the event of a conversion of the mortgaged property to compensation payable on revocation of the right of occupancy by the Governor, this study holds that the express intention of the Land Use Act per *section 51* which need no other interpretation other than a literal one is that a mortgagee is not a holder. And this fact not only jeopardizes the place of the mortgagee in certain cases but also lowers the value of a right of occupancy as security for mortgaging.

3. **Federal Ministry of Lands, Housing and Urban Development**

They are saddled with the responsibility of preparing and submitting from time to time, proposals for National lands and housing as well as urban development programmes and plans. They review all existing legislature in the lands and housing as well as urban development sectors with the aim of achieving the goal of adequate housing for all Nigerians in a conducive and habitable environment. They also supervise the activities of the Federal Housing Authority, Federal Mortgage Bank of Nigeria and registration boards of relevant professional bodies.[10]

4. **Land Use and Allocation Committee 1978**

The Land Use and Allocation Committee came into existence with the creation of Decree No.6 published in the Federal Republic of Nigeria official Gazette No. 14, Volume 65, Government Notice No. 272 of 29th March, 1978. The committee which was established in each state was charged with the sole responsibility of advising the Governor on land administration and Management Matters. It vested the power to administer, manage and control state land in the Governor of the state. The Land Use and Allocation Committee treat and co-ordinate all matters that border on the followings: land allocation at various existing schemes in the state to the public, processing and issuance of certificate of occupancy, management of all existing schemes in the state, administering ground rent and computation of demand notice, management of government leases, technical committee on excision matters, creation and management of residential and

[9] *sections 15(6) 21, 22 and 50)*

[10] Joshua N., Lands and housing, http://www.landandhouding.gov.ng/index.php/about.us/our-structure. Accessed on 2-2-2020

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industrial schemes, dispute resolution on land matters, regularization of federal government grants, renewal of leases, processing deemed grant consent, other duties as may be assigned by his excellency, the governor.[11]

5. Judiciary

The customary court, magistrate court and State High court have jurisdiction over real estate disputes in Nigeria. The customary court has jurisdiction where the land has a customary right of occupancy granted in its favour or deemed granted by a local government including matters for the declaration of title to a customary right of occupancy. Depending on the provisions of the magistrates' court law of the state, a magistrate court has jurisdiction in proceedings for the recovery of rent not exceeding ten million naira per annum. The State High Court has unlimited jurisdiction in respect of matters relating to any land where a statutory right of occupancy has been granted or deemed granted by the governor, including matters for declaration of title, trespass to land or property and recovery of rent where the sum exceeds the jurisdictional limit of the magistrate court.[12]

Nigerian case law, which comprises both the ratio decidendi and obiter dicta of courts, has become an important source of Nigerian law. This point assumes its rightful significance when it is recalled that the bulk of Nigerian land law was initially based on customs which, as we have stated above, are regarded as questions of fact until proved and upheld by the court. This means that customary law depends on case law for a declaration of its validity. Customary laws are therefore to be found in judicial precedents. Judicial precedents have also provided invaluable sources for interpretation of provisions of the Land Use Act which currently regulates all land rights in Nigeria.

The operation of the doctrine of judicial precedent presupposes the pre-existence of a settled and accepted hierarchy of courts as well as authoritative and easily accessible law reports. It is only under this condition that judges of lower courts can know of and follow the decisions of courts higher up in the judicial hierarchy in line with the principle of *stare decisis.* The hierarchy of courts in Nigeria is very settled and clear out. Starting from the apex, and in descending order, the hierarchy comprises the Supreme Court, the Court of Appeal, the Customary Court of Appeal and Sharia Court of Appeal, the Federal High Court and the State High Courts. These are all superior courts of record. Below them are the Magistrates' Courts and the Customary/Native Courts, in that order, which are inferior courts of record.

The decisions of the Supreme Court bind all the other courts in the judicial hierarchy, except the customary and Native Courts. The reason for this exception will be given shortly. The Supreme Court is itself not bound by its previous decisions and may in fact depart from them when necessary. The Court of Appeal is bound by its own decisions of the Supreme Court[13]. However, where there are two or more conflicting decisions of the Supreme Court the Court of Appeal is free to choose which of the conflicting decision to follow. The Customary Court of Appeal considers appeals on customary (non-muslim) matters while the Sharia Court of Appeal hears

[11] Ibid
[12] *Section 251, Constitution Federal Republic of Nigeria, 1999 as Amended.*
[13] *Thomas v. Olufosoye* (1985) 3 N.W.L.R (Pt. 13) 523

appeals on Muslim matters. These two courts are bound by the decisions of the Supreme Court. The Federal High Court and the State High Court are of the equal status, except that the jurisdiction of the Federal High Court is limited to federal revenue matters. The two are not bound by their own or each other's previous judgments, but are bound by the judgments of the courts above them in the hierarchy.

A Magistrates Court's decision binds neither the Magistrate's court not the court below it in the hierarchy, i.e., the customary and native courts;[14] but the Magistrates Court is bound by the decisions of all the courts above it.[15] The Customary and Native Courts do not administer common law, and are in fact generally presided over by laymen. They do not follow precedent but decide cases in line with custom, justice and equity, without undue regard to technicality. The point should be made that of all the courts, the Federal High Court does not entertain matters relating to land or title to land, and the Magistrate's Court has no original jurisdiction in such matters; it can only hear it by way of appeal from the customary courts. In any case, Magistrates' Courts are inferior courts and their judgments are generally not reported, possibly because the judgments and decisions do not bind any court. The decisions of this court and of the Federal High Court do not therefore constitute a source of Nigerian land law.

The fact that juristic opinions are a source of Nigerian law was recently stated by the Supreme Court in the case of *Osafile v. Odi (No. 1)* when the Supreme Court said that "the old practice whereby the opinion of a writer could be adopted in court only long after his death is no longer the vogue particularly in the appellate courts. Juristic opinion had earlier been relied upon in the land case of *Amao v. Adigun*[16] on the point of accountability of a pledgee for his possession of a pledged shop. The authority relied upon by the court in that case was Mr. Elias,[17] then a Senior Simon Research Fellow in the University of Manchester. As Stuart, J. put it: The wide research and deep learning of Mr. T.O. Elias entitled his views to the greatest respect, and I regard him as an authority.[18]

We have seen that the various state High Courts Laws and the Evidence Act allow the application of customary law even after the reception of English law. There is thus a co-existence and concurrent operation of received English law with customary law. The resulting legal pluralism demands that s system be worked out for deciding which law governs particular issues. To address the choice of law problem, the High Court Laws of all the states make very similar provisions. By way of illustration, we may take the High Court of Lagos Act which provides:

> *Section 27 (2)* Any such law or custom shall be deemed applicable in causes or matters where the parties thereto are natives and also in causes and matters between natives and non-relatives, where it may appear to the court that substantial injustice would be done to either part by a strict adherence to any rules of law which would

[14] Customary courts exist in the Southern part of Nigeria, while Native Courts exist in the North.
[15] *Board of Customs and Excise v. Bolarinwa (1968) N.M.L.R 350*
[16] (1957) W. N. L. R 55
[17] He later became Dr. Elias, and much later, the Federal Attorney General in Nigeria and subsequently a kudge at the International Court at The Hague.
[18] *Ibid*

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> otherwise be applicable. *(3)* no party shall be entitled to claim the benefit of any native law or custom, if it shall appear either from the express contract from the arisen that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by native law and custom or that such transactions are transactions unknown to native law and custom.

The first arm of the provision deals with causes or matters in court between natives and non-natives. The second arm of the provision deals with the transaction itself and the applicable law; it acted as a qualification to the first arm of the provision by stating when customary law may not apply even where the parties are natives.

From this statutory provision, the following summary may be made:

a. Where both parties are natives, the choice of law is based on their status i.e, the fact that they are natives, and so customary law applies. This is only a presumption which may be displaced by the parties' express agreement on the choice of law.[19] The statutory basis for this is explained in 3 below. However, saying that customary law applies in this instance may not solve the whole problem, for the question may still be asked, which customary law? For our present purpose, however, the applicable customary laws are the same and so it suffices to know simply that it is customary law, not English law, which applies in the circumstances.
b. English law, i.e., "any other rules of law, "is assumed to apply where one or some of the parties are non-relatives. In such cases customary law only applies as an exception; it applies "where it may appear to the court that substantial injustice would be done to either party" by applying the "other rules of law." This provision means that where, for instance, a native pledges land to a non-native, a subsequent dispute between the pledgor and the pledgee concerning the land will *prima facie* be determined in accordance with English law, but where it appears that substantial injustice would be done to either party, then customary law applies so as to avoid the injustice. It is not clear what happens where, e.g., in a dispute between A and B, substantial injustice is caused to A by applying English law, and to B by applying customary law. It may be thought that in such case English law should apply since the alternative application of customary law would not achieve the intended avoidance of substantial injustice to "either party." The clear words of the statue quoted above do not, however, support this view. The provision simply directs that English law should not apply. As it is, the law does not permit a further recourse to English law even if the alternative application of customary law occasions injustice. Thus, in the hypothetical case of a pledge given above, thought English law is the *prima facie* applicable law, it being a case between a native and a non-native, it would not be applied because it would cause substantial injustice to one of the parties. To apply English law in such case would certainly cause substantial injustice to a party who had entered into a customary law transaction expecting it to be governed by customary law.

[19] *Ezeani v. Njidike (1965) NMLR 95 (1964] 1 All N.L.R 402,* the choice of law was settled by the parties' express agreement: English law applied (on the issue of fixtures). If they had not agreed on the choice of law, customary law would, presumably have been the applicable law since they were all natives and the transaction was not uncustomary.

c. English law applies where the parties have impliedly agreed that it should be the applicable law. This is borne out of *section 27(3)* quoted above that the nature of the transaction may lead to the conclusion that the transaction was intended to be regulated otherwise than by customary law. Such implied agreement is also inferred where the transaction is unknown to customary law. Thus, for instance, where A who holds land under customary law leases and mortgages it to B, a subsequent dispute concerning the lease or mortgage transaction will be governed by common ("English") law since leases and mortgages are common law interests and are unknown to customary law. In such cases, English law applies on two bases, firstly because the transaction is unknown to customary law, and secondly because the parties by entering into a transaction which is unknown to customary law thus impliedly agreed that customary law should not apply.

The same result is achieved where land held under customary law is transferred by a conveyance in English form, say in fee simple. Here, the reference to a "fee simple"- an interest not known to customary law, indicates an implied agreement to apply English law. Such conveyance in English form has the effect of converting the tenure of the land concerned from customary to English law.[20] However, the mere use of the term "fee simple" is not enough to irrebuttably converting the tenure of the land concerned from customary to English Law; it is necessary to discover the intention of the parties by considering a combination of other factors like the fact that the transaction is by deed using words of limitation (e.g., "fee simple absolute") and words which are used in English law to denote covenants for title (e.g., conveying as "beneficial owner") which have significance not in customary but in English law.

The point is worth making that though a transaction, say a mortgage, is governed by English law for the reasons stated above, the right of the mortgagor prior (but relating) to the mortgage could be governed by customary law. For example, where the head of a family mortgages family land, the question of his right to single-handedly grant the mortgage (which may ultimately affect the validity of the mortgage) is governed by customary law, though the mortgage itself is governed by English law.

6. **Surveys, Housing and Urban Planning**

Every State in Nigeria has the ministry of lands, surveys, housing and urban development. The State ministries are responsible for the execution of government policy in the Housing and Urban development sector. The areas of responsibilities include but not limited to;

a. Land policy and land matters such as land use, allocation, survey services, acquisition of land for state purposes, compensation for acquired lands, servicing and monitoring of land use and allocation committee and lands Registry (administration control)

b. Ensure proper development through preparation and monitoring of development through preparation and developers scheme, develop master and district plans for urban centers, urban renewal programmes, approval of building plans and layout and statutory and regional planning.

[20] *Coker v. Animashawn [1960] L.L.R 71.*

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c. Collection of Neighborhood improvement charge and preparation and sale of model building plans.
d. Site selection for government and other institutions supervision of the capital territory development authority[21]

7. Federal Government Regulation Unit

The unit was established in October 2007 and charged with responsibility of processing applications for the regularization of title to properties granted by the federal government and performs the under listed job descriptions.

a. Site inspection on all applications received and preparation of survey plan for the Surveyor-General's signature
b. Production of composite plan for the legal unit of the Bureau
c. Emplacement and re-establishment of beacons within all schemes being managed by the Land Use and Allocation Committee as the need arise.
d. Creation of a parcel fabric on all applications that is regularization, deemed grant being processed by the Bureau to be determined overlaps, hence preventing multiple title issuance and registration on a single parcel.
e. Verification of parcel ownership by using observed geo-spatial information and relating same with the existing base map at the planning unit.[53]

8. Federal Inland Revenue Service

The Federal Inland Revenue Service is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name. The service is charge with the power of assessment, collection of, and accounting for revenue accruable to the federal Government of the federations and for related matters.

The object of the service shall be to control and administer the different taxes and laws specified in the first schedule or other laws made or to be made from time to time, by the National Assembly and to account for all taxes collected for the Government of the federation. Some of the key function of the service among others includes:

The assessment of persons and companies, enterprises chargeable with tax, assets collection, accounts and enforces payment of taxes as may be due to government or any of its agencies. It also collects and recovers and pays to the designated account, any tax under any provision of the act, or any other enactment or law.

In collaboration with the relevant law enforcement agencies carry out the examination and investigation with the act. It equally adopts measures to identify, trace, freeze, confiscate or seize proceeds derived from tax fraud or evasion.

[21] Joshua N., *op cit.*
[53] J.O. Ihioma, Imo State Ministry of lands, surveys housing and urban development: http://www.imostate.gov.ng>ministries. Accessed on 2-2-2020.

With respect to mortgage transactions involving corporate bodies, mortgage document (deeds of legal mortgage) are to be assessed and stamped at the office of the federal Inland Revenue service across the state indicating evidence of payment imposed by the Stamp Duties Act.

9. **State Inland Revenue Service (Lagos State Inland Revenue Service)**

The Lagos State Inland Revenue Service was revised in May 2006, through Lagos state Revenue Administration Law. It established the Lagos Board of Internal Revenue Service a body corporate with perpetual succession and a common seal capable of suing and be sued in its own name. The powers and duties of the board are conferred on it by Lagos State Revenue Administration law or any other law.

Among others the Board shall be responsible for providing general policy guidelines regarding the function of the Internal Revenue Service and Supervising the implementation of such policies. Also to ensure optimum collection of all revenue including levies and penalties due to the State Government under the relevant Federal and State Law. The Board is equally responsible for accounting for all amounts so collected in a manner to be prescribed by the Governor. The Board equally makes recommendations where appropriate to the joint tax Board on policy, tax reforms, tax registration, tax trusties and exemptions as may be required from time to time.

Like the federal Inland Revenue Service, mortgage documents, deeds of legal mortgage are required to be stamped as evidence of payment of stamp duties as per stamp duties Act of Lagos State. The duty paid is ad valorem that is according to the value of the transactions. These documents of mortgage are for individuals and not corporate bodies which are within the purview of Federal Inland Revenue Service.

10. Conclusion

This study concludes that lending and secured financing in Nigeria can only thrive when there are good laws that will protect both the lenders and the borrowers. But that the present state of less than one percent of three hundred Nigerian firms having access to credit according to a survey cites in this work, under 'summary of related literature, 'is a logical outcome of the unsatisfactory legal framework of secured lending in Nigeria-typified by the mortgage laws of Rivers State and in some respects of Lagos State.

And until the legal framework as it stands in Nigeria is overhauled and streamed-lined to drive economic activities and allow MSME's the benefit of borrowing with their movable assets, including after-acquired or future assets in line with global trends (without the normal pressure of producing real property) Nigeria will remain in the muck and mire of unsatisfactory and deficient secured lending system.

11. Recommendations

In the light of the foregoing, the following recommendations are offered as solutions to the festering challenges confronting the advancement of mortgage transactions in Nigeria.

a. The study recommends that the Act which has caused more pains to mortgages following its suffocating provisions and a hydra of court judgments pointing in many directions

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requires fundamental amendments. But first, there is the need to extricate the Act from the stronghold of the Constitution of the Federal Republic of Nigeria, 1999 which by virtue of *sections 315(5) and 9(2)* fastens the amendment or alteration of the Act to a rigid constitutional amendment procedure. When this is achieved, it is expected that the National Assembly will be positioned to consider and alter with less effort provisions such as the 'consent,' 'revocation and compensation provisions which has brought hardship, complexities and cost implications upon parties to mortgage lending transactions. It is proposed that any amendment done on Land Use Act must be premised on the clear consideration of mortgage lending being an economic tool that should not be unreasonably gagged by government interference and control through laws that increase the legal risks in such transactions.

b. The study recommends secured lending laws in Nigeria such as the Conveyancing Act 1881 and the Bills of Sale laws should remain streamlined as they are presently according to real and personal property. However, it is proposed that States like Rivers State must repeal the secured-lending laws on real and personal property, specifically the *Conveyancing Act 1881 and the Bill of Sales Law of Rivers State* 1999 to meet emerging complex property rights and interest, by replacing them with modern and well-developed body of commercially-minded law which provisions will be harmonized with a federal law on the subject where one already exist. What is being proposed here should be similar with the operations of the Article 9-UCC in the US; contrary to the misconception that the existence of the Article 9-UCC is a federal US law that meant the absence of local state laws on moveable property in the US. It is misconceived to consider the Article 9-UCC as a federal law and product of the US Congress mandatorily applicable in all the States of the US. In reality, the Article 9-UCC is a product of the National Conference of Commissioners on Uniform State Laws, American Bar Association and the American Law Institute. The code becomes law only in States that first adopted its provision and then formally enacts it as State laws. Instructively, whereas generally all fifty states in the US have adopted and enacted Article 9-UCC as State laws, some state enacted only parts or sections of it as law.

c. The establishment of the National Collateral Registry for moveable properties under the STMAA is indeed a wonderful idea good for secured lending transactions in Nigeria. This is particularly because the NCR is expected to operate an automated system capable of interfacing with other registries established by the National Assembly for the purpose of ensuring and guaranteeing that those registries is made accessible through, by, and from the NCR. Hence, it is proposed that in enacting a modern personal property law as suggested in recommendation No. 2 above, states should equally establish a state-based automated personal property registry that can leverage from the interface platform of the NCR. If the establishment and link-up is done by every State, Nigeria would achieve a near-comprehensive personal properties public recording system that will enable real-time electronic search of the register of one State from another. In respect of real property, it is suggested that since it may be difficult for now to achieve a single registry for all lands in Nigeria, mainly due to the complex land tenure systems and the equivocal provisions of Land Use Act in respect of deemed rights for instance, states governments are advised to establish reliable electronic database of landed properties within its territory that can be accessed from anywhere in the world at a minimum cost. Undoubtedly, the longtime economic benefits of such registries for States will surpass any investment to establish such

registries; and the net effect of this would, logically, be a reliable and more secured business environment capable of supporting the sought-after economic diversification of Nigeria.

d. This study establishes that the cost of perfecting a mortgage from obtaining consent to registration, from paying consent fees, land taxes to personal income tax, from official payments to kickbacks are enormous, and have rather than make mortgage a useful tool for driving economic development, arrested its development. Therefore, it is recommended that the application of stringent measures with all manners of transactional costs which focuses more on raising revenue for State government than facilitating commercial deals that encourages and grows economy should be discarded. It is envisioned that such state of affairs will reduce the risks associated with mortgages, reduce the cost of credit pricing and potentially increase access to debt capital for businesses; both small and large.

e. A legal system which, besides a number of other statutory enforcement components, does not allow for the judicial enforcement of security interests and resolution of disputes in a timely manner is likely to produce an arrested economy of apprehensive or unwilling lenders and stranded potential borrowers. Drawing from the innovative provisions of the MPL 2010, it is suggested that similar to the current Electoral (Amendment) act, 2010 the legal process for the adjudication of a mortgage matter should be statutorily time bound. In other words, the judiciary should be further mandated through mortgage laws to adjudicate on mortgage issues within a set time. This definitely will invoke a legal process that is expedient; cost effective; less likely to be tainted with corruption; bound to drastically reduce enforcement risks usually associated with credit transactions in Nigeria and bound to increase lenders confidence in issuing credits. In the same vein, settlement of mortgage disputes by means other than court adjudications in commercial relationship deserves full legislative approval in Nigeria. Thus, this research commends the MPL 2010 provision for mediation and arbitration (predicated upon court referral) to all the secured transaction laws in Nigeria already identified as deserving reviews and amendments. However, it is suggested that these laws should move further to expressly provide for alternative means of dispute settlement, particularly arbitration, which can be activated without a court referral system. This should be geared towards meeting the sociological essence of mortgage laws that will sustain mortgagor-commercial relationship even after a dispute. It is believed that arbitration enjoy the advantage of not only circumventing the time-wasting processes and high cost of prosecution associated with adjudications in law courts, but importantly also circumvents the bitter legal duel or disputations that ensue between parties in court suits and the consequent disaster of destroying commercial relationship built over-time.

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