INTERROGATING THE CHALLENGES OF REAL ESTATE DEVELOPMENT AND SECURED CREDIT FINANCING IN NIGERIA[1]

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Abstract

This paper examined indicators of non performance of the real estate sector of the Nigerian economy and tied it closely to the challenges of secured credit financing in Nigeria. The persistent rises in the cost of housing in most of Nigeria's urban centres necessitated this inquiry.. It is the position of this paper that the Nigerian real estate sector has not witnessed appreciable growth due majorly to poor financing, anachronistic and unfavourable legal regimes. The paper argued that appreciable growth in real estate development cannot be divorced from the business of lending and borrowing on agreed terms and as regulated by law. It stated further that answers to queries on the non performance in the public housing projects of both the Federal and State governments in Nigeria can be gleaned from the extent and rate of movement of credit within critical players in the real estate sector. The paper therefore examined the current challenges facing real estate development in Nigeria as well as the reasons secured credit systems of mortgages and charges have not been able to assist growth in the sector unlike what is obtainable in most parts of the western world. It concluded that real estate development in Nigeria can be improved by proper credit financing strategies; and therefore recommended the amendment of relevant laws such as the Land Use Act 1978 to encourage banks and other financial institutions to become the real drivers of real estate development through the grant of better credit facilities.

Keywords: *Real Estate; Development, Secured credits, Credit Financing and Nigeria*

1. Introduction

Nations of the world have at various times and stages of political and economic development had to grapple with issues of statehood which of course embodies very germane economic concerns of sustainability of the available human and natural resources which make claims to nationhood a reality. The Nigerian nation has had its share of economic programmes plausibly targeted at galvanizing the economy to be more

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productive and independent of external forces so as to sustain the nation's teeming and still growing population. The hue and cry of over dependence of the Nigerian economy on one major product (crude oil) which is substantially managed and controlled by expatriates have led to the setting up of various committees and agencies to explore alternatives to drive the Nigerian economy. Efforts of government at the State and Federal levels to encourage better and active private sector participation in government economic policies all underscore the need for a stronger national economic base.[2]

The private sector initiatives and support of public institutions in different sectors especially the real estate sector of the Nigerian economy is rife. Private companies have become involved in road constructions and maintenance, building of bridges, hospitals, schools, rural electrification, manpower development through the award of scholarships etcetera. How have they fared in real estate development? Underlying the capacity of these corporate entities to support the nation's economic growth and recovery is the capital base and financial strength of the various organizations. This situation was aptly captured by Halliday[3], who making a case for enforcement of proprietary security in Nigeria stated that translating the country's economic policies to reality, companies incorporated and doing business in Nigeria regardless of their nature and size and who ordinarily would be unable to compete with foreign companies be encouraged to achieve optimally through adequate financing and opportunities for credit facilities in form of debt capital.

The above realities make issues of secured credit financing indispensable in discussions on the nation's economic recovery and growth. How thriving are secured credit financing systems in Nigeria? Do the medium and small scale enterprises have easy access to credit facilities from banks and other financial institutions? Are the interest rates prohibitive or do they encourage borrowing and lending? It is trite that different government policies ranging from several tax regimes sometimes amounting to double taxation, extant laws of property ownership and rights of alienation have somewhat posed a challenge to capital growth and the development of the economy. To properly harness the potentials of the country's banking sector for sustainable growth as noted by Awah,[4] the indices

[2]KazeemAremu, 'Leveraging Nigeria's Pension Assets to Bridge Infrastructural Gap' (2016)(12)(4) *ZEQ*, 36-37

[3]Chidi E. Halliday, 'Reforming Receivership as Mechanism for Enforcement of Proprietary Security in Nigeria'(2017) (6) (1) *The Journal of Property Law and Contemporary Issues*, 112

[4] Animi Esther Awah, *Harnessing Nigeria's Banking System: Potentials for Sustainable Development* (Inaugural Lecture Series 2014, Nigerian Institute of Advance Legal Studies, Lagos)98-100

discouraging banks and other financial institutions from providing lending and credit facilities should be speedily addressed.

This paper therefore interrogates challenges facing the real estate in Nigeria; it discusses secured credit financing systems in Nigeria specifically, mortgages and charges by examining relevant legal and institutional frameworks, and their *modus operandi* as well possible challenges to the proper utilization of credit systems to grow the Nigerian economy through real sector development and the proper harnessing of the nation's economic potentials through properly guided lending and borrowing as veritable tools of investments.

1.1 The Concept of Real Estate Development

Real estate development concerns land and the deployment of land to create wealth and further wealth for the holder of the land, the financial investor in the land in question who may be an individual or a corporate entity, for the various actors involved in the deployment, the government and the nation at large. Land therefore becomes the tripod on which societal development hinges as no meaningful progress can be made in any sphere of the economy whether agriculture, health, education, religious, financial and entrepreneurial endeavours outside land and its resources.

Real estate development therefore concerns the efforts of persons and government to use available land to create money. It has been defined as a "business process encompassing activities that range from renovation and re-lease of existing buildings to the purchase of raw land and the sale of developed land to others."[5]Biobaku states that it concerns the process of buying land, financing real estate deals and building projects as well as orchestrating the process of property development from start to finish…[6] So it is surmised that everyone who is engaged in purchase and sale of land whether as a speculator or a builder; or engaged in the transfer of interests in land to another person as security for loan can be described as being involved in real property or estate development.

1.2 The Concept of Secured Credit Financing

[5] https://en.m.wikipedia.org>wiki>real

[6]SamodBiobaku, 'Attributes of Successful Real Estate Development,' available at https://www.privateproperty.co.ng accessed June 4, 2019.

Secured credit transactions concern borrowing and lending of credit backed by collateral owned by the borrower who willingly grants proprietary interests in the property to the creditor to give him greater assurance of the repayment of his advanced interests. The term 'secured credit financing presupposes that some credit financing may be unsecured thereby exposing the lender to greater risks. These forms of credit lending are outside the scope of this paper. To Sangosanya credit financing refers to "the process of obtaining funds or capital generally for the purpose of supporting a development and/or investment by gaining control over assets."[7] Secured credit financing usually concern banks and other financial institutions who lend money to business men, private and public companies for various reasons which usually include growing their businesses. The creditor bank's interest which is the loan advanced to the borrower becomes secured by an interest in the debtor's property. The essence of any secured credit finance mechanism is to create more capital by generating readily accessible and affordable funds for entrepreneurs as well as establish adequate legal controls to give mortgage operators better confidence in lending as well as ensuring more effective enforcement strategies.

Secured credit financing concerns money; specifically the lending, borrowing and security for money lent and borrowed. Lending involves the voluntary and temporary grant of property, whether movable or immovable property for a purpose and on agreed terms of return of property to owner. In relation to finance, lending is any agreement (oral or otherwise) which allows a person to advance money or credit to another person and imputes certain obligations on both the lender and the borrower on the money or credit learnt.[8] Borrowing which is the opposite of lending also concerns request for the advancement of credit. Borrowing, the precursor to lending imports the willingness to be bound by the covenant to repay thus removing transaction from the purview of a grant or a gratuitous benefit. Security is "collateral given by a debtor to secure a loan;"[9] rights exercisable against some property of the debtor to discharge an obligation.[10] Aiyar[11] described a security to mean anything that makes the money more assured in payment or more readily recoverable. It is the payment of a debt or claim, either by a right to resort to

[7] A. G Sangosanya, 'Development and Financing of Mass Urban and Rural Housing in Nigeria'(1988)*The gravitas Review of Business & property Law, 63*
[8] Bryan A Garner (ed.) *Black's Law Dictionary* (10thedn. Thomas Reuters 2014)
[9] Henry Campbell Black; *Black's Law Dictionary*(6thed; West Group, Centennial edition 1891-1991)1355
[10] Sykes & Walker, *The Law of Securities* (5thed Law Book Co, 1993)6
[11] K J Aiyar, *Judicial Dictionary* (14th ed. Butterworths India, LexisNexis, 2007)978

some form of property, tangible or intangible for payment or by guarantee of some person to satisfy the debt or claim for which another person is primarily liable.[12]

2. Legal Framework For Real Estate Development And Secured Credit Financing In Nigeria

The extant laws which provide and regulate real estate development in Nigeria include the Land Use Act 1978 which has been variously described as "the most impactful of all legislations touching upon the land tenurial system of this country before and after nationhood;"[13] as a piece of legislation whose "tenor is nationalization of all lands in the country;"[14] a legal revolutionalizing interests of Nigerians by expropriating the radical title;[15] as a hybrid and a special kind of lease; "abrogating absolute ownership or freehold interest by the community, family and individual."[16]

Other relevant laws are the Capital Gains Tax Act;[17]which makes every gain on property a chargeable gain; Land Instrument Registration Act 2004; the Conveyancing Act 1881; the Property and Conveyancing Law 1959, Stamp Duties Act 2004[18] amongst other State laws which are all relevant to real property development in Nigeria. Underlying these statutes is the right of persons (individuals and corporate entities) to acquire and own immovable property in Nigeria enshrined in the Constitution[19] with derogation only on justifiable grounds as set out in section 44(2) and 45respectively.

3. Secured Credit Financing In Nigeria- Examining Mortgages And Charges

There are several forms of secured credit financing in Nigeria. They include mortgages, charges, pledges which typically involve real estate and appear to give more confidence to creditors as they are tied to land which is generally perceived to be valuable and appreciating in value as well as being readily disposable. Other secured credit systems which concern personal property are chattel mortgages and Bills of Sale which are outside the purview of this paper which is centred on mortgages and charges.

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[12] *Bristol Airport Plc v Powdrill*, [1990] 2 All ER 493
[13]*Nkwocha v Governor of Anambra State* (1984) 6 SC 362 at 363, per Irikefe JSC (as he then was)
[14]*ibid; per Eso, JSC*
[15]Umezulike, A, ' Does Land Use Act Expropriate' Another View (1986) 5 JPPL 61
[16]Mabogunje, A L, 'Land Reform in Nigeria: Progress, Problems & Prospects' available at https://aiteresources.worldbank.org accessed 5/6/2019
[17] Cap C 1 Laws of the Federation of Nigeria (LFN) 2004;
[18] Cap S 8 Laws of the Federation of Nigeria (LFN) 2004
[19] Section 43 Constitution of the Federal Republic of Nigeria 1999 (as amended)

In *Suberuv A.I.S.L. Limited*[20], the Court of Appeal defined a mortgage to be "a conveyance of land or an assignment of chattels as security for payment of a debt or discharge of some other obligation for which it is given. The security is redeemable on payment or discharge of such debt or obligation despite any provision to the contrary. Also in the earlier case of *Olowu V Miller Bros Ltd*[21] a mortgage transactionwas defined as " a security created by contract for the repayment of a debt already due or to become due." Nguta, JSC in *Adetono v First Bank (Nig) Plc*[22] defined a mortgage as a conveyance of title to property that is given as security for the payment of debt or the performance of an obligation that will become void upon payment or performance according to stipulated terms. It is a legal or equitable conveyance of the title as security for the payment of debt or the discharge of some obligations which it is given subject to a condition that the title shall be re-conveyed if the mortgage debt is liquidated;"[23] and "a conveyance or other disposition of land designed to secure the payment of money or the discharge of some other obligations."[24]

A mortgage has also been given statutory meanings. The Stamp Duties Act of Nigeria[25] has descriptively defined a mortgage to mean:

> A security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time; and includes conditional surrender by way of mortgage any conveyance of any lands operating as a mortgage estate or property to be sold; any agreement, contract or bond accompanied with deposit of title deeds; and any deed of equitable mortgage under the Act which means an agreement or memorandum under hand relating to deposit of any title deed or instrument being evidence of title to property or creating a charge on lands, tenements or hereditaments whether expressed to be created by pledge or otherwise.

According to the Mortgage and Property Law of Lagos State,[26] a mortgage is described to be "the transfer of any interest in specific moveable or immoveable property for the

[20] [2007]10 NWLR (Pt 1043)590
[21] [1922] 3 NLR 110
[22][2012] 6 WRN 49 at77.
[23] I O Smith, *Practical Approach To Law of Real Property in Nigeria* (Nigeria: Ecowatch Publications Limited, 1999)236
[24] E H Burn, *Cheshire's Modern Law of Real Property* (12th edition; London: Butterworths, 1976)636
[25] Stamp Duties Act, Cap 58, Laws of the Federation of Nigeria (LFN) 2004
[26] Mortgage and Property Law of Lagos State 2010

purpose of securing the repayment of a loan against an existing or future debt or the performance of an engagement which may give rise to pecuniary liability."

A charge has also been given judicial and statutory definitions. The Company and Allied Matters Act[27] which defines a charge to include a mortgage [28]states that a charge is a security whereby real property is appropriated for the discharge of debt or other obligations but does not pass either an absolute or special property in the subject of the security to the creditor nor any right to possession. The lender/ *charge* becomes empowered to appropriate the property of the *chargor* in the event of the borrower's /*chargor's* default by virtue of the Deed of Charge over the property of the *chargor*. The *chargee*'s right of realization of his credit or money loaned to the *chargor* is by judicial process in case his non- repayment of the debt.

Furthermore, charges have been explained by Denman J in *Tancred v Delagoa Bay*[29] to mean a document which does not absolutely transfer property as security for loan with a condition for re-conveyance but is a document which only gives a right to payment out of a particular fund or particular property without transferring that fund or property. A charge thus gives the creditor the right to demand and pursue definite remedies against the property of the *chargor* /borrower that has been appropriated by it for the purpose of discharging his debt. It is trite therefore that a creditor in a charge transaction neither obtains possession nor ownership of the borrower's property as there is no conveyance of title nor delivery of possession but a mere right to sue to be paid out of the property charged by the Deed which has the effect of creating an encumbrance on the property in the favour of the creditor.

A charge is thus the pledging of something as security without delivery of title or possession;[30] and is defined further as a proprietary interest granted by way of security without a transfer of title or possession.[31] The rationale behind the creation of charges include the priority it gives to the *chargee* as a secured creditor over unsecured creditors in the event of the insolvency of the company; and the right of pursuit of his claim even into the proceeds of the disposition of the charged property where a company in violation

[27] S. 197(10). Cap 20, Laws of the Federation of Nigeria 2004.
[28] This may account for the failure of persons to make a clear distinction mortgages and charges.
[29] [1889]23 QBD, 239
[30]*Black's Law Dictionary* (9th ed. Thomson Reuters, 2009) p. 759.
[31]Per Lord Hoffman in *Re Bank of Credit and Commerce International* (N0 8) [1998] AC 214 at 226.

of the rights of a *chargee* disposes of the property subject to the charge. The essence of a charge is that it protects the interest of the *charge* from being destroyed by the *chargor* while granting business convenience and efficacy to the *chargor* to improve his business without undue constraints.

Details of the mode of creation of these secured credit systems, rights of the parties and enforcement strategies will not be canvassed here. Suffice it to state that mortgages and charges are used as security for loans to develop other businesses or yield return on financial investments which would in turn, positively impact the Nigerian economy. It is apposite to adumbrate on the factors that have variously and continuously worked in the opposite direction for the borrower, the lender and the Nigerian economy.

4. Challenges of Real Estate Development And Secured Credit Financing In Nigeria

The major challenge to real estate development in Nigeria is the challenge of law especially the challenge of amendment of the Nigerian Constitution which incorporates the Land Use Act 1978 thereby housing its many provisions that have proven to be antithetical to the development of real estate in Nigeria. One of these provisions is the over flogged issue of the consent requirements in the Land Use Act which although acknowledged, was ameliorated by the Supreme Court in *Savannah Bank v Ajilo.*[32] In this case, the Supreme Court adopted a position which wrested from borrowers their erstwhile leverage to approbate and reprobate simultaneously by refusing to honour an obligation to repay a loan they had enjoyed on the basis that the transaction was void for non-compliance with section 22 of the Land Use Act on governor's consent to alienate. The legal position that a governor's consent is required for alienation of interest is still germane but non compliance before executing the agreement would no longer render it void but inchoate. While it is acknowledged that the Supreme Courts' position gives the parties more time and latitude to do business, it does not solve the problem of hamstringing free enterprise between parties. It does not remove the intractable delays, expenses and bureaucracies involved in obtaining consent of the Governor.

Another provision of the Land Use Act that has proven to be discouraging of real estate development is encapsulated in S.5 which concerns the right of the Governor to revoke the right of occupancy granted for public purposes. Granted that the intendment of the

[32] (1989) 1 NWLR (pt. 97) 305. See also *Okuneye v First Bank of Nig. Ltd* (19966 NWLR (Pt 475)749

law is to make land available for development of public social amenities without which society would remain at its pristine and primordial stages; this power to revoke however leaves private investors open to possible revocation so long as it is stated to be for public purposes. Once the land already purchased for development by an individual or corporate body is validly revoked and compensation according to law paid to the holder of the right of occupancy at the relevant time, whether sufficient or not, the fact that the land was not eventually re-deployed to public purpose projects does not automatically entitle the holder to the property. To succeed at all against the government in cases of improper revocation of rights of occupancy has proven to be a herculean task that will take many years and gulp much capital that an investor could have more readily deployed to more fruitful ventures. This fact remains discouraging of real estate development.

The presence of outdated English statutes such as the Conveyancing Act 1881 still operative in parts of Nigeria excluding the West with provisions especially regulating creation of mortgages and protection of interests of parties which are not viable nor are they 21st century compliant, make growth in the real estate sector a mirage. This position explains the apparent gap in real estate operations in different parts of the country. Due to this state of affairs Lagos State has since jettisoned colonial laws which cannot tackle current realities in the housing sector for more appropriate laws.

Inconsistent government policies especially between governments of different political parties which would readily abandon programmes and policies already acted on by investors just to score a cheap political point cause losses which over time have discouraged investments. The unstable economic and political climate readily displayed in the knack of new governments to impose new tax regimes to garner more revenue for their states regardless of the taxes already paid in a fiscal year deter investors.

Several cultural hang – ups which discourage persons from investing in mortgage houses boomerang on mortgage companies which end up with several unoccupied homes and unrewarded investments. A typical example is the misguided sentiment that it is only a man who has bought land and built a home that is recognized as successful under many cultures rather than the person who is living in government quarters no matter how highly exalted. This attitude makes purchasing of houses from government through a mortgage transaction to be hardly recognized as a worthwhile venture. The fact that such persons may end up building no homes at all is usually in those circumstances preferable to purchasing one of the investment homes. Also customary beliefs which promote the notion that family land should not be sold but put to subsistence agriculture and left intact for generations yet unborn hamper real estate development as these notions would not allow persons put their lands to more productive ventures like leases, mortgages. Land becomes tied down or locked in to satisfy primordial cultural sentiments rather than being put into more fruitful ventures.

Obnoxious demands of touts and local government agents who in pursuit of revenue adopt several strategies, invariably make it impossible for land developers to make meaningful investments. There are multifarious demands by different youth groups within the community where the potential land for investment is located and various forms of unregulated payments demanded by the local and state government parastatals which discourage real estate development. The unregulated presence of agents and middle men in land acquisitions who end up hiking the prices of the property put up for sale make most lands remain unsold in the hands of the owners as purchasers now find it difficult to meet the demands of these land agents and speculators.

The general poverty in the land especially from the recent depression of the Nigerian economy has made it difficult for many persons to go into real estate development as they now grapple with mundane needs of food, shelter and clothing. Also, real estate companies who were able to finance properties with facilities from finance institutions are facing huge losses as viable buyers cannot be readily found. And where naturally the poor demand should have led to a crash in prices of these houses, we experience a situation where the demand of high interest on loans advanced to builders by the banks make sale at cheaper rates unwise economic options thereby leaving empty and occupied premises rapidly disintegrating for lack of human occupation and use.

Closely akin to the above is the high cost of building materials and labour which are all discouraging of real estate development in the country. Multiple taxation such as development tax or levy, building levy, fence permits, building plan levy and so many others make any effort at land development very expensive. Ogedengbe and Adesope[33] writing on real estate development in Nigeria highlighted high interest rates on loans, numerous requirements for applicants of these loans to fulfill as well as the very high inflationary rates in the country as some of the problems of financing real estate development in Nigeria.

[33] P S Ogedengbe& A AAdesopo, ' Problems of Financing Real Estate Development in Nigeria,' 14(6) 2003 *Journal of Human Ecology*, 1

The Nigerian monetary economy poses institutional impediments to secured credit financing in Nigeria. Banks in Nigeria unlike banks in other climes generally do not engage seriously in real banking and investments into real estate due to factors already highlighted. These banks rather engage mainly in what may be described as financial trading where they re-invest monies of depositors in other forms of securities other than real estate on short terms. The Banking industry and other financial institutions should be the real drivers of development through the grant of facilities to investors. Most of these banks instead of going into long term investments with private investors prefer to lobby government officials for government funds which they house for mainly government businesses and projects. These funds can only be deployed to short term investments which limit the robustness of banking processes. There is therefore too much government in banking business as the bulk of public funds are not deployed to the real economic sector to grow the sector. We have a situation where Nigerian banks lay siege on government funds to stay afloat in business rather go into financial investments and marketing.

Although these banks declare huge profits every quarter or fiscal year, such profits are hardly deployed to the real estate sector. This scramble for government resources means that the fortunes of most banks become tied to availability or otherwise of government funds and any shortfall in government's revenue expectations opens the door to banking distress. Whilst many banks remain afloat due to government patronage, real estate development will continue to nosedive as insufficient financial base of banks will continue to have a negative impact on their ability to invest in mortgages and other investment strategies.

The way the Nigerian State is operated is another impediment to real estate development. The accumulation of funds in the hands of the government and the process of "dualism" in which Nigerians play more allegiance to their ethnic groups rather than the Nigerian State discourage persons from developing property in areas where they only live and do business simply because they are of a different ethnic group and cannot guarantee the protection of their property and investments in "alien" or foreign lands.

5. Conclusion and Recommendations

Investments in real estate in Nigeria and in fact elsewhere cannot be separated from secured lending processes usually championed by the various financial institutions. Mortgage transactions and charges remain at the centre of the development of the real sector in a developing nation like Nigeria despite the challenges already noted. It is trite that the reliance on some outdated English statutes which are hangovers from Nigeria's colonial experience have not engendered much growth in the real estate sector coupled with the shackling provisions of the Land Use Act 1978 as the umbrella legislation regulating transactions over land in Nigeria. This Act which has tied up the effective deployment of land assets for creation of further wealth especially in the real sector through provisions already highlighted require immediate amendment to remain a useful tool for development.

It is therefore trite that any improvements in the real estate sector in Nigeria will most likely occur from the amendment and enactment of relevant laws. The way forward is the immediate amendment of the Land Use Act 1978 to reflect modern and current realities in the investment sector of the Nigerian economy. And particularly, this work recommends the immediate amendment of sections 5, 22 & 51(1) of the Land Use Act 1978 which by their express provisions grant the governor of a state the power to revoke statutory rights of occupancy, demands that such holders of statutory rights of occupancies obtain the governor's consent before alienating any interest validly; insists that the mortgagor is the holder of a statutory right of occupancy thereby effectively excluding the mortgagee from qualifying as a holder and therefore not entitled to be paid compensation for improvements in the case of government's compulsory acquisition of mortgaged property.

Mortgage transactions in Nigeria can further be enhanced by the repeal of all outdated colonial statutes still operative in Nigeria such as the Conveyancing Act 1881. More proactive legislation like the Mortgage and Property Law of Lagos State which is sensitive to the peculiar needs of Lagos be copied by other States in the country to more adequately encourage investments especially in the real estate sector through provisions which guarantee ease of borrowing and lending transactions. Flowing from the need to enact better laws to guarantee secured credit loans is the immediate need to regulate by law the demands (both statutory and otherwise) which discourage mortgage transactions in Nigeria such as the high cost of perfection of titles, the cost of obtaining consent for transactions on land, the immediate abolition of unregulated payments to unregistered groups who lay claim to various interests in land.
The cultural hang-ups which have deterred bold investments in the real sector can be redressed through effective education and enlightenment of the citizenry. The fear of investing in real estate in States in the country other than a person's State of origin

because of lack of faith in the government's ability to uphold the provisions of the Constitution and the lessons learnt from the abandoned property saga of the civil war years can be reduced through effective judicial activism and more inclusive government policies which encourage investments and uphold individual's fundamental rights to own property in any part of the country.

It is recommended that the Capital Gains Tax Act which provides that "tax shall be by the rate of ten percent on every chargeable gain" be amended to read five percent on gains from real property to encourage real estate development. Since the business of secured credit financing in Nigeria has been established as a catalyst for development in real estate, prohibitive tax laws which hamper investments should be repealed to encourage financial houses to deploy their resources to the real property sector. Also the lending and borrowing rates of banks and other financial houses should be reviewed to encourage the lenders, the borrowers and invariably the nation's economy.