

EXAMINATION OF THE MORTGAGEE'S POWER OF SALE

By

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Abstract

The whole essence of Law of mortgage is to formulate rules that ensure the return of the borrowed sum with profit to the lender, while assisting the borrower to solve his pressing financial needs. If anything is borrowed, it should be paid back³ however, over the time it is discovered that human beings are by nature deceitful. ‘the wicked borrows but does not pay back...’⁴ coupled with the prevalence of unforeseen circumstances, which becloud the business environments, thus giving rise to every lender of money to make adequate provision for security before lending his money out. The mortgagee’s efforts are geared towards realizing a valuable security in the event of failure to repay the loan by the mortgagor.⁵ These efforts ensure that to a large extent, the mortgagee (bank) has a recourse upon the mortgagor’s default in his contractual obligation on the date fixed for payment of the mortgage debt to exercise any of the available remedies, which are cumulative, and not necessarily in the alternative.⁶ The choice of a remedy usually depends on whether the mortgagee wants his capital or the interest. Where he wants his capital and seeks to put an end to the security, he commonly opts for either action for enforcement of covenant to repay, sale of the security or foreclosure. Whereas where he is concerned with the interest, he takes to possession of the property or appoints a receiver.⁷ Also, an order for specific performance and foreclosure are more suited to an equitable mortgagee while the others are applicable to a legal mortgagee.⁸

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³ KJV Bible: Exodus 22:14

⁴ KJV Bible: Psalms 37:21

⁵ Smith, I.O. 2006. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited. 62.

⁶ *UBN Plc v Olori Motors Co. Ltd* (1998) 5 NWLR (Part 551) 652; Oniekoro F.J. 2007 *Mortgages in Nigeria Law and Practice*. Enugu: Chenglo Ltd., 2007

⁷ Henchman, A. P. 1972. ‘Remedies of the Secured Creditor’ being lecture delivered at Annual Summer School, Law School of the University of Western Australia. Retrieved Jan.7, 2005 from <http://www.austlii.edu.au/au/journals/UWALawRw/1971/2.pdf>.

⁸ Osamolu S.A, Oduwole O.T, and Oba C.O. 2008. *Real Property Law and Conveyancing Practice in Nigeria* Abuja: Lawlords Publications. 278.

Also doubts have long existed whether an equitable mortgagee possesses a power of sale, in the absence of a court order. Furthermore, it has been unclear whether an equitable mortgagee can sell only the equitable legal estate, which has been mortgaged, or the entire legal and equitable estate. The case of *Swift 1st v Colin* might be perceived as having resolved these issues⁹. This study examines the analysis of mortgagee's power of sale, when it is exercisable, destroying of the equity of redemption; mortgagor's blocking the power of sale; rules of sale by mortgagee, forfeiture in case of equitable mortgage under the Conveyancing Act 1881, Property and Conveyancing Law 1959 and under the Mortgage and Property Law of Lagos (MPL) 2010 and found out that laws regulating mortgage transactions in Nigeria need reformations and recommend among others scrapping of the Asset Management Corporation of Nigeria (AMCON) though modeled on asset securitization/Special Vehicles (SPV) models which have been used in other jurisdictions like the United Kingdom (UK) and the United States of America (USA) but has failed to yield the desired results.

KEYWORDS: Mortgage transaction, Power of sale, Legal mortgagee, equitable mortgagee

⁹ Steve Evans, A scrutiny of Power of Sale arising under equitable mortgage. A case for reining these in (May 1, 2015). University of Leicester School of Law Research Paper No. 15-14. SSRN:< https://ssrn.com/abstract_2601322> accessed 31 May, 2025

Law of Mortgages is as old as the institution of banking itself. Historically speaking, the rules governing mortgages were formulated by the early money lenders who traded with cash (gold) and imposed their harsh conditions on the helpless and desperate borrowers. Law of mortgages developed from the insistence by the Lender that the Borrower must deposit something for instance title deeds with the lender to serve as security for the borrowed sum of money. Where the borrower fails, refuses or neglects to repay the loan, the lender-mortgagee shall be at liberty to sell the item given as collateral by the borrower – mortgagor.¹⁰ It is a generally accepted principle that capital is the main stay of any economic activity. Regrettably, the business sector rarely comes by this powerful factor of production, thus, the need for lending. The commonest means of sourcing for funds is through borrowing. No prudent financial institution can lend money without insisting on security for repayment of loans advanced. The reality of insistence on security by the creditor or lender seems to stem from borrower's proclivity to default in the repayment of loan sums and interest when due, the inextricable consequences of insolvency and commercial expediencies to reduce credit risk and liquidity exposure¹¹. This security could be in the form of a guarantee or mortgage or both.¹² A foresight lender would always prefer a security of a proprietary character, otherwise known as real property³. This therefore qualifies the lender as a secured creditor, which is the concern of this work. A mortgage is a conveyance of a legal or equitable interest in property with a redeemability clause. That is to say, that upon the repayment of the loan or the performance of some other obligation, the conveyance shall become void or the interest shall be re-conveyed. In other words, it is a transaction whereby, as security for a loan of money, the borrower transfers to the lender, an interest in some property of the borrower, real or personal, on the condition that the

¹⁰ Emmanuel Egburuonu Law of Mortgages for seasoned Bankers and Lawyers (Basic Rights Publications Ltd 2015)

¹¹ R. A. Onuaha, Thesis on Land Use Act 1978 and Issues of Reform plus Rules and Regulations on Sectional Rights of Occupancy in Nigeria by the Presidential Technical Committee on Land Reform (ANON Publishers, Owerri 2013), 179-180.

¹² F.J. Oniekoro, Mortgages in Nigeria, Law and Practice (Chenglo Limited, Enugu 2007), 1. ³ E. Chianu, Law of Securities for Bank Advances (3rdedn. Ambik Press, Benin 2006), 2.

lender's interest in the property will terminate on repayment of the loan. The lender does insist on getting a security as it relates to the money lent to the borrower because of the difficulty experienced in recovering the money advanced. This is to guard against the borrower absconding with the loan. This buttresses the point enunciated by Lord Lindly that, Mortgage under the general law is by no means without complications, "no one... by the light of nature ever understood an English mortgage of real estate."¹³

This paper has six sections and this section constitutes section one.

Section two discusses the Nature and Definition of Mortgage, its legal framework

Section three discusses the types and creation of mortgage;

Section four discusses the enforcement mechanisms, and the analysis of power of sale;

Section five talks about the reforms, a survey of the financial and economic context of mortgages with particular reference to securitisation of mortgages and the Crosby and Miles Reports; a lesson from the United Kingdom and the United States of America. A more detailed discussion of the problems in the current law and regulatory framework of mortgages with particular reference to defaults and repossession in the law while

Section six presents the findings as obtained in the previous sections, concludes, and makes possible recommendations for changes.

2.0 **Section Two**

2.1 **Nature and Definition of Mortgage**

The nature of a mortgage transaction involves a **Mortgagor** who is the transferor of the interest in land, the **Mortgagee** who is the transferee of the interest in land, and the **Mortgage sum (debt)** which is the sum of money over which the interest is transferred.

In *Adetona & Anor. v Zenith International Bank Plc.*,¹⁴ Chukwuma-Eneh, JSC stated that in a proper mortgage, the title to the property must have been transferred to the mortgagee subject to the proviso of the mortgaged property being reconveyed by the mortgagee to the mortgagor upon performing the condition stipulated in the mortgage deed and invariably upon payment of the debt at the time so stipulated in the deed of mortgage.

¹³ Per Lord Macnaghten, *Samuel v. Jarrah Timber and Wood Paving Corp.* (1904) A.C 323 at p. 326.

¹⁴ (2011) 12 SC (Part IV) 44; (2011) 18 NWLR (Part 1279) 627 S.C. ¹⁶ (2009) 13 NWLR (Part 1159) 577 C.A.

Hence a Mortgage is defined as a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms while a Mortgage Deed is a written agreement containing written conditions amongst which is the provision of the time when the agreement will be terminated by a refund of the money borrowed from the mortgagee, or the occurrence of the right to sell the mortgaged property upon failure of the mortgagor to repay the sum lent to him by the mortgagee. See the case of Intercity Bank Plc v Feed and Food Farming Ltd & 2 Ors¹⁵.

Oniekoro¹⁶ defines mortgage as the transfer of interest in land as security for the discharge of a debt or the performance of an obligation subject to redemption. He further states that though the transaction is essentially between two parties (mortgagor and mortgagee) a third party may be involved as a guarantor or as a head lessor giving or confirming his consent to the assignment or sub-lease of the leasehold interest used as security for the loan or it may involve the mortgaged property where the owner is different from the borrower.

2.2 Legal framework for creation of Mortgages in Nigeria

Various legislation deal with the creation of mortgages in Nigeria. This invariably makes the legal framework of mortgages in the country a little complex. For this reason, it is essential to point out at onset that due to the absence of uniform laws that regulate mortgages, the creation of mortgage in Nigeria largely depends on which state the property is located. While some states of the federation have enacted their mortgage laws, others still reference the legal framework applicable during the colonial period. Therefore, this section seeks to analyze these laws, focusing on key provisions relating to mortgage creation in Nigeria.

2.2.1 The Common Law

By virtue of Section 32 (1) Interpretation Act¹⁷ the Common Law, the Statute of General Application and Doctrines of Equity, which was in force in England on the 1st day of January 1900, are also applicable in Nigeria. Hence, common law has been made applicable to Nigeria and has remained in existence in some parts of Nigeria. In common law, a legal mortgage is created in one of the

¹⁵ (2001) 17 NWLR (Pt. 742) 347 at Page 364 ; Emmanuel Egburuonu. *Law of Mortgages for seasoned Bankers and Lawyers* (Basic Rights Publications Ltd, 2015); O.J.A Olulana, *The Law and Practice of Banking, Collateral Securities and Mortgages*, (Lagos: Diversities Enterprises Publishers, 2000) 246

¹⁶ Oniekoro. F.J. 2007 *Mortgages in Nigeria Law and Practice*. Enugu: Chenglo Ltd., 1.

¹⁷ Interpretation Act, Cap.123, LFN, 2004.

following ways: - fee simple, sublease or sub-demise, or Assignment depends on whether it is a leasehold or freehold estate.

2.2.2 The Doctrine of Equity

An equitable mortgage only transfers a beneficial interest in the asset to the lender (mortgagee) with full legal ownership remaining with the mortgagor. It should be pointed out that the modes of creating equitable mortgages in Nigeria are uniform. Hence, a distinction between CA State and PCL State is not necessary here. The following are ways an equitable mortgage can be created:

- i. Deposit of Title Deed with an intention to create a mortgage
- ii. Deposit of Title Deed with an agreement to execute a legal mortgage
- iii. Equitable Charge of the Mortgagor's Property
- iv. Equitable mortgage of an equitable interest

2.2.3 Statutes of General Application

Just like the Common Law and Doctrine of Equity, Statutes of General Applications are part of the received English Laws that are in force in England on 1st January 1900 which have been imported into the Nigerian legal system. Nigeria having got independence in 1960, the received English laws by virtue of Section 32 (2) of the interpretation Act¹⁸ only apply to the extent of local jurisdictions and local circumstances.¹⁹ For mortgage transactions, in particular, two major Statutes of General Application that remain relevant are the Property and Conveyancing Law²⁰ and the Conveyance Act (CA).²¹

2.2.4 Local Legislations

Apart from Common Law, Doctrine of Equity, Conveyance Act applicable in some states of old Northern and Eastern regions, and the Property and Conveyancing Law, applicable in some states of the old Western and Midwestern regions, some indigenous or local legislation regulate the creation of mortgages in Nigeria. This segment examines some of these legislations.

2.2.4.1 Legal Mortgage under the Land Use Act

The Land Use Act (LUA),²² which the major Act regulating mortgage transactions in Nigeria, has not expressly prescribed modes of creation of mortgages in the country. Instead, the Act maintained the existing methods of creation of mortgages. Notably, Section 48 of LUA preserves the pre-Act conveyancing laws subject to such additions, alterations or omissions as will bring them into conformity with this Act or its general intendment.

¹⁸ Interpretation Act, Cap.123, LFN, op. cit.

¹⁹ *Idehen vs.idehen*, (1991), 6 NWLR (Pt.198), 22.

²⁰ PCL, 1959.

²¹ CA, 1882.

²² LUA, Cap. L5, LFN, op.cit.

2.2.4.2 Legal Mortgage under Mortgage and Property Law of Lagos State

The law regulating all mortgage transactions in Lagos State is the Mortgage and Property Law (M&PL)²³ of Lagos State. In effect, this law abolished the Property and Conveyancing Law. Section 15 of the M&PL²⁴ and provides that:

A mortgage of a right of occupancy in land shall be created at Law 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, or by a charge by deed expressed to be by way of statutory mortgage in the forms provided under this law: Provided that a first mortgage shall have the same right to possession of documents as if his security included a right of occupancy.

2.2.4.3. Legal Mortgage under Mortgage and Foreclosure Law of Kaduna State

Section 30 (1) of the Kaduna State Law on Mortgage and Foreclosure²⁵ has provided for the creation of a legal mortgage by demise subject to a provision for cesser on redemption; by sub-demise subject to a provision for cesser on redemption; by a charge expressed to be by way of a legal mortgage; and by way of mortgage created by execution of form MR 02 annexed to this Law Schedule I. The above modes of mortgage creation have departed from that of Lagos State.

By the provision of Section 30 (1) whoever has a registerable interest in Land can create mortgage through the above-mentioned modes.

2.2.4.4. Registration of Titles Law

Section 18 of the Registration of Titles Law (RTL)²⁶ provides that the registered owner of land may in the prescribed manner charge the land or lease with the payment of money to the like extent as if the land was not registered land. The charge is completed by an entry in the register of the particulars of the mortgagee and the registration of the charge in *Form 5 of the Land Registry*. Thus, the only way a legal mortgage can be created under this law is by a charge using Form 5.

2.2.4.3.5. Company and Allied Matters Act

Section 191 of the Company and Allied Matters Act²⁷ (CAMA) allows a company to mortgage or charge its property and uncalled capital, and issue debentures, debenture stock and other securities

²³ M&PL, 2010.

²⁴ Ibid.

²⁵ Kaduna State Law on Mortgage and Foreclosure, op. cit.

²⁶ RTL, 2010.

²⁷ CAMA, 2020.

whether outright or as security for any debt, liability, or obligation of the company. However, for debentures to qualify as adequate and enforceable security for mortgage or loan advanced, Section 192 and 193 of the Act²⁸ requires that the company shall, within 60 days, deliver to the registered holder thereof, the debenture or a certificate of the debenture stock under the common seal of the company (if the company has a common seal) or alternatively, execute the debenture as a deed by the company.

hat prohibition at the time when the charge was granted to him/her.

²⁸ Ibid.

Types and Creation of Mortgage**3.1 Types of mortgage**

In Nigeria, there are basically two types of mortgage. They are:²⁹

3.1.1. Legal Mortgage

3.1.2. Equitable Mortgage

A legal mortgage involves the transfer of legal interest in land (whether leasehold or freehold) while equitable mortgage involves the transfer of equitable interest in land with the interest serving as security for loan made subject to redemption upon repayment of the debt and interest.³⁰

3.1.1 Legal Mortgage

A legal mortgage is the most secure and comprehensive form of security interest as it transfers legal title to the Mortgagee and prevents the mortgagor from dealing with the mortgaged assets while it is subject to the mortgage. The involvement of legal interest in creation of legal mortgage necessitates the mandatory requirement for the document of creation to be under seal.

The method of creation of a legal mortgage in Nigeria is dependent on the state where the property is situate. The validity of such mortgage is based on its compliance with the existing law of the state and in addition to the law of the state where the property is situate where both are not the same. The applicable laws are subject to the provisions of the Land Use Act 1978.

Thus, there are three applicable laws in the creation of a legal mortgage³¹.

These are:

²⁹ Smith I.O. 2006. *Nigerian Law of Secured Credit*. (Lagos: Ecowatch Publications Limited. 38.

³⁰ Oniekoro, F.J. 2007 *Mortgages in Nigeria Law and Practice*. Enugu: Chenglo Ltd. 34.

³¹ Odgers', D.G. 'Construction of Deeds and Statutes' in Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009); see Bryan A. G. (ed), *Black's Law Dictionary* (9th edition, U.S.A: Thomson West, 2001) 475. This may come in form of a legal charge which does not actually transfer mortgagor's interest or title in the property to the mortgagee. No transfer or creation of legal interest in land by a grantor in favour of a grantee may be valid except it is made by deed. See Imhanobe, S. O., *Legal Drafting & Conveyancing*: 2nd ed. Sylvester Imhanobe Legal Research Ltd. 2007) 172. See also s. 77(1) Property & Conveyancing Law 1959, applicable to States in the former Western Region of Nigeria. Also *Akingbade v. Elemosho* (1964) ANLR 146 at 149; *Igbum v. Yinusa* (2001) 9 WRN 15 at p. 19.

3.1.1.1. **Conveyancing Act, 1881, 1882 (CA)** which is applicable in the Northern and Eastern states of Nigeria, and some parts of Lagos that are outside the **Mortgage and Property Law of Lagos State, 2010.**).

3.1.1.2. **Property and Conveyancing Law, 1959 (PCL)** which is applicable in the states comprising of the old western Nigeria. These are Ogun, Oyo, Osun, Edo, Ondo, and Delta states.

3.1.1.3. **Mortgage and Property Law of Lagos State, 2010 Mortgage and Property Law of Lagos State, 2010** applicable in some parts of Lagos State.

The legal mortgage must be done in the proper form. This proper form is the use of deeds or the use of statutory forms that are usually provided in the statutes mentioned above (C.A., PCL, and (MPL). A deed is a document which passes interest in property or which binds a person to perform or abstain from doing an action. It furnishes evidence or information about something.³² At common law, it is any written instrument that is signed, sealed, and delivered and that conveys some interest in property.³³

3.1.2 **Equitable mortgage**

An equitable mortgage involves the transfer of the borrower's beneficial interest in an asset to the lender by way of security for the performance of particular obligations, on the express or implied condition that such beneficial interest will be retransferred when the secured obligations are discharged.³⁴ As only the beneficial interest in an asset is transferred, an equitable (rather than a legal) security interest is created.

3.2. **Creation of Mortgage**

3.2.1 **Creation of Legal Mortgage under the Conveyancing Acts (C.A.)**³⁵

In the **Conveyancing Acts**, there is no statutory provision on the mode of creation of legal mortgage in the Conveyancing Act. So, the applicable law is the common law provisions as regards the creation of a legal mortgage. This is subject to the provisions of the Land Use Act, 1978. Under the Land Use Act landowners do not have freehold interest but leasehold interest as all land in the state is vested in the Governor of that state to hold in trust for the

³² Odgers', D.G. 2009 'Construction of Deeds and Statutes' in Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited,).

³³ Bryan A. G.2001 9th ed., *Black's Law Dictionary* (9th edition, U.S.A: Thomson West. 475.

³⁴ Harrold v. Plenty (1901)2 Ch. 314

³⁵ 1881

people.³⁶ **At common law, legal mortgage of leasehold interest may be created by any of the following ways:**

- 3.2.1.1. **Assignment** of the unexpired interest of the mortgagor to the mortgagee subject to a provision for cesser on redemption.
- 3.2.1.2 **Sub demise** for a term of years absolute subject to a provision for cesser on redemption.

The difference between the two modes of creation of a legal mortgage lies in the fact that an assignment transfers to the mortgagee the unexpired interest of the mortgagor while the sub-demise transfers only a term of years.³⁷

Conveyancing Act³⁸ and Common Law have been made applicable to Nigeria³⁹ and have remained in existence presently in some parts of Nigeria.⁴⁰

- 3.2.1.3. **Deed of Statutory Mortgage:** - This is another method by which a legal mortgage may be created in the Conveyancing Act states. Section 26(1) of the Conveyancing Act provides in part that, a mortgage of freehold or leasehold land may be made by deed expressed to be by way of statutory mortgage... This method is very easy to create and may be discharged by a simple receipt. This however, turns out to be one of its disadvantages as the receipt is not registerable and the mortgage may continue to reflect in the register of mortgages.⁴¹⁴² The Conveyancing Act³¹ has

³⁶ Section 1 Land Use Act, 1978.

³⁷ Imhanobe, S.O. 2010 Legal Drafting & Conveyancing (with Precedents) 3rd ed. Abuja: Temple Legal Consult. 537; Co-op Bank Ltd. v. Lawal (2007)1NWLR (pt.1015)287

³⁸ There is the one of 1881, which was further improved by the one of 1882. Section 1 of the Conveyancing Act, 1882...this Act may be cited together as the Conveyancing Acts, 1881, 1882.

³⁹ The Act is one of the statutes of general application. The common law, the Act and doctrines of equity, which apply to Nigeria, must have been in force in England on the 1st day of January 1900, among other qualifications. See s. 32(1) Interpretation Act. There are similar provisions in some State - enacted statutes all over the country. See for instance s. 28 High Court Law, Chapter 49, Laws of Northern Nigeria 1963.

⁴⁰ Some of the States where the Conveyancing Act and Common Law mode of creation of legal mortgages apply may include Kano, Kaduna, Anambra, Enugu and many other states that do not have local legislations relating to property transactions in Nigeria. These include conveyance of the fee simple estate to the mortgagee with a covenant for re-conveyance to the mortgagor upon full payment of the loan. The other one was lease or demise of the property to the mortgagee, which lease would come to an end upon repayment of the loan by the mortgagor. See Megarry, R & Wade, W. (n.21) p. 1172. Those modes of creation existed in England in the 17th Century. Freehold or estate in fee simple is no longer possible in Nigeria and any creation of mortgage in Nigeria should be one of leasehold estate subject to the provisions of the Land Use Act. Such leasehold estate may arise from actual or deemed grant of right of occupancy whether statutory or customary by the Governor or the local government. See ss. 5, 6, 34 & 36 of the Land Use Act

⁴¹ Daddem Y.Y Op.cit, pgs.129-130

⁴²Statutory or customary by the Governor or the local government. See sections. 5, 6, 34, and 36 of the Land Use Act. See also Eimunjeze, F. (n.44) 156. ¹⁰ Both assignment of the lease and sub-demise (sub-lease) to the

provided an abridged form of mortgage by deed. The purpose of the statutory form is to shorten the mortgage document but not to alter the substantive rights of the parties.⁴³

The creation of legal mortgage under the Conveyancing Act automatically creates implied covenants on the mortgagor to repay the mortgage money with interest on the stated date to the mortgagee who is also under the covenant to re-convey the mortgage property.⁴⁴

3.3 Creation of Legal Mortgage under the Property and Conveyancing Law (PCL)

The creation of legal mortgage in the Property and Conveyancing Law states is regulated by the provisions of the Property and Conveyancing Law. While Section 108(1) of the Property and Conveyancing Law provides for the creation of mortgage with respect to freehold property, Section 109(1) regulates the creation of mortgage with respect to leasehold estates in property. Thus, although the Land Use Act has introduced some limitations to land tenure system by, which it has now restricted estates or interests held in land to leasehold (right of occupancy). However, it is submitted, that the creation of legal mortgage in the Property and

mortgagee are common law principles, which are not captured in the Conveyancing Act 1881 & 1882. See Megarry, R & Wade, W. 1925 (n. 21) P. 1178. Creation of a mortgage of leasehold by sub-demise in England became codified as from 1925 in Section. 86(1) of Law of Property Act 1925.

⁴² Section 26(1) Conveyancing Act 1881 (CA). This should be as in form 1 of the Third Schedule to the Act with such variations as may be necessary. See Dadem, Y. Y. (n.42). Professor Smith identified assignment of the right of occupancy (lease) and sub-lease as the only modes of creation of legal mortgage of leasehold in Conveyancing Act States. See Smith, I. O. (n. 7) P. 366. Imhanobe holds similar view. See Imhanobe S. (n. 22) 374. Both learned authors omitted. s. 26 of Act, which provides for statutory mortgages.

⁴² The mortgagee would then be liable for covenants touching on the land such as covenant on user, covenant to repair etc. See Megarry, R 1946. *Megarry's Manual of Law of Real Property* (Oakley, A. J. ed. 8th edn. Sweet & Maxwell 2002) 381 See Megarry, R., *ibid.* p. 495 The mortgagor can only create subsequent equitable mortgages by relying on his equity of redemption. See Megarry & Wade (n.21) 1178. See Megarry J. et al, (n.21) P. 1178. Such covenants may include User, sub-letting etc. Such restriction on creation of subsequent legal mortgages may make mortgage by assignment to be unattractive to mortgagors. The issue of privity of estate with the head lessor and liability for covenants in the lease may make such mode of creation of legal mortgage unattractive to the mortgagee.

⁴³ R. Rudden & H. Moseley.1967 *An Outline of the Law of Mortgages* (Nikes). London: Walker & Co. (Printers) Ltd. P.31

⁴⁴ Section 26(2) of the Conveyancing Act that:

there shall be deemed to be included, and there shall by virtue of this Act be implied in the mortgage deed first, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely): that the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money with interest thereon in the meantime at the stated rate...secondly, a proviso to the effect following (namely): that if the mortgagor on the stated date, pay to the mortgagee the stated mortgage money with interest thereon.the mortgagee ... shall re-convey the mortgage property to the mortgagor or as he shall direct.

Conveyancing Law jurisdictions in Nigeria is still regulated by Section 109(1) of the Property and Conveyancing Law.⁴⁵

Generally speaking, there are three ways by which a legal mortgage can be created under the Property and Conveyancing Law, which are-

3.3.1. Demise: - This is a form of creation of legal mortgage for a term of years absolute, subject to a provision for cesser on redemption. Any conveyance of an estate in fee simple (freehold) by way of mortgage shall operate as a demise of the land in favour of the mortgagee for a term of years absolute.⁴⁶ This is because, as stated earlier, the Land Use Act, which has limited the interests held in lands to leasehold, has impeached the mortgagor's capacity to create mortgage by freehold system in Nigeria.

3.3.2 .Sub-demise or Sub-lease:- This involves the creation of mortgage for a term of years absolute, less at least by one day than the term of interest vested in the mortgagor and subject to a provision for cesser on redemption.⁴⁷ The sub-demise or sub-lease must be at least one day shorter than the duration of the leasehold interest being mortgaged by the mortgagor; otherwise the mortgage (sub-demise or sub-lease) will operate as an assignment.⁴⁸ Where the mortgagor has a term of years only, the only possible way of creating legal mortgage is by sub-lease.⁴⁹

3.3.3. Charge by Deed: - A charge by deed expressed to be by way of legal mortgage is another means by which a legal mortgage can be created in the Property and Conveyancing Law jurisdiction. This is pursuant to Section 108(1) and 109(1) of the Property and Conveyancing Law⁴³.

3.4 Creation of Mortgages under the Mortgage and Property Law of Lagos State, 2010

3.4.1 Legal Mortgage

⁴⁵ 1959 : It provides that a mortgage of a term of years absolute shall only be capable of being effected at law, either by a 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; and where a license to sub-demise by way of mortgage is required, such license shall not be unreasonably refused.

⁴⁶ Daddem Y.Y. 2009 Op.cit. p.130

⁴⁷ Imhanobe S.O. 2010 Op.cit. p.375

⁴⁸ Daddem Y.Y 2009 Op.cit. p.130

⁴⁹ Smith I.O 2006. *Nigeria Law of Secured Credit*. Lagos: Ecowatch Publications Limited. 2001. P.40

Section 15 (1) of the Mortgage and Property Law of Lagos State, 2010, states in respect of legal mortgage:

A mortgage of a right of occupancy in land shall be created at Law either by:

- 3.4.1.1. a demise for a term of years absolute, subject to a provision for cesser or redemption; or
- 3.4.1.2. a charge by deed expressed to be by way of legal mortgage; or
- 3.4.1.3. a charge by deed expressed to be by way of statutory mortgage in the forms provided under this Law.

As from the commencement of the Mortgage Law, a mortgage cannot be created by assignment. By Section 15 (2), any purported assignment by way of mortgage made after the commencement of the Law shall (to the extent of the estate of the mortgagor) operate as a demise of the land to the mortgagee for a term of year's absolute, but subject to redemption. The same is provided in Section 16 (2) in the case of leasehold.

In a mortgage by charge “by deed expressed to be by way of Legal or Statutory Mortgage”, the mortgagee takes no actual estate in the land at all, but under Section 17 (1) of the Mortgage Law, he is protected in the same way as if he had a legal estate. This provision in the Mortgage Law is similar to Sections 85 (1) and 86 (1) of the Law of Property Act of England, which have received judicial pronouncements in many cases.⁵⁰

In the case of leaseholds, Section 16 (1) of the Mortgage Law states that a legal mortgage can only be created by:

- 3.4.1.4. a 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 redemption; or
- 3.4.1.5. a charge by deed expressed to be by way of legal mortgage; or
- 3.4.1.6. a deed expressed to be made by way of statutory mortgage in the forms provided under this Law; and where a licence to sub demise by way of mortgage is required, such licence shall not be unreasonably refused.

⁵⁰ See, e.g. *Grangegide Properties Ltd. v. Collingwood Securities Ltd.* [1964] 1 W.L.R. 139; *Grand Junction Co. Ltd. v. Bates* [1954] 2 Q.B. 160.

3.4.2. **Equitable Mortgage**

Section 18 (1) of the Mortgage Law retains the creation of equitable mortgage by (i) agreement to create a legal mortgage, or (ii) mortgage of equitable interest.

3.4.2.1. Where an agreement to create a legal mortgage is drawn up but it is discovered that the written document is defective in form e.g. by not affixing a seal (but it is otherwise valid), it thus fails to take effect as a legal mortgage but instead becomes an equitable mortgage. The basis for this is the court's power to order specific performance of a contract to create a legal interest in land,⁵¹ and the rule that the defective document nevertheless showed a contract by the parties to create a present security. Equity regards as done that which ought to have been done⁵² by effectuating the parties' agreement in equity.

3.4.2.2. The second instance when an equitable mortgage might arise by agreement to create a legal mortgage is where the parties never actually presently tried nor intended to create a legal mortgage but simply agreed to create the same in the future. There is thus a contract or an agreement to create a legal mortgage.

3.4.2.3. Equitable mortgage is created where what is mortgaged is an equitable right or interest. An example is the mortgage by a beneficiary under a trust, which is just a mortgage of the beneficiary's equitable interest.

3.4.2.4. Equitable mortgage by mere deposit of title deeds Section 18 (1) of the Mortgage Law of Lagos State appears to outlaw the practice of creating equitable mortgage of land by mere deposit of title documents. The relevant part of the sub-section states:

As from the commencement of this Law, an equitable mortgage of a right of occupancy shall not be created by a mere deposit of title (documents) or charge on a property except it is accompanied by an agreement...⁵³

This provision calls to mind Section 2 (1) of the Law of Property (Miscellaneous Provisions) Act 1989 of England, which provides:

⁵¹ *Basma v. Weeks* [1950] AC 441, [1950] 2 All ER 146; *Bank of New Wales v. O'connor* (1888) 14 A.C. p.2723

⁵² *Walsh v. Lonsdale* (1882) 21 Ch.D 9; *Ogundiani v. Araba* (1978) 6 – 7 SC, 55 at 73.

⁵³ Section 18 (1) of the Mortgage Law of Lagos State ; *Chapman v Chapman* (1851), 13 Beav 308

A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms, which the parties have expressly agreed in one document or, where contracts are exchanged, in each.⁵⁴

Some preliminary discussion of the English position on creation of equitable mortgage by mere deposit after the 1989 Act⁵⁵ will throw some light on the import and purport of Section 18 (1) of the Mortgage Law of Lagos State. Until the enactment of the 1989 Act⁵⁶ in England, it was a common and legally recognized practice for an owner of landed property who wished to use the property as security for a loan of money to him, simply to hand over his documents of title to the property to the lender, on the understanding that upon his refund or repayment of the loan sum to the lender, the latter would return the documents to the borrower. The handing over of title documents created an informal security, an equitable land mortgage or, more specifically, an equitable mortgage by deposit of title documents.

4.0

Section Four

Analysis of Power of Sale and Enforcement Mechanisms

4.1 Analysis of Power of Sale

The remedy of sale has been described as the most potent of all the mortgagee's remedies.⁵⁷ It has also been described as the most effortless manner employed in the realization of security. It is central to legal mortgages created by deed and is predicated on⁵⁸:

4.1.1 the mortgage being by deed.⁵⁹

4.1.2 the mortgage money having become due and payable⁶⁰; and

⁵⁴ Section 2 (1) of the Law of Property (Miscellaneous Provisions) Act 1989 of England

⁵⁵ See: Essien, E., "United Bank of Kuwait v. Sahib: The Rise and Fall of Security by Deposit of Title Documents". (1998) *Journal of International Banking Law, Issue 2, London*: Sweet & Maxwell, p. 80.

⁵⁶ Particularly Section 2 thereof. ³¹ Rossdale, P., "Abolition of Security by Deposit of Title Deeds" (1996) vol. 140 S. J. p.1223.

⁵⁷ Chianu E. 2005. *Law of Securities for Bank Advances (Mortgage of Land)*. Edo: Ambik Press. 115.: Bordland's Trustees v. Steel Bros (1901) 1 Ch. P.279 at 288; Edohoeket v. Inyang (2010) 7 NWLR (pt.1192) 1-224 C.A Holding 7

⁵⁸ Section 19 (1) Conveyancing Act 1881, Section 123 (1) Property and Conveyancing Law 1959.

⁵⁹ Sanusi v Daniel (1956) SCNLR 288; Okonkwo v Co-operative & Commerce Bank (Nig) Plc (2003) 8 NWLR (Pt.822) 347.

⁶⁰ Agboola v United Bank for Africa & 2 Ors (2011) 11 NWLR (Pt.1258) 357 at pages 411-412

4.1.3 the absence of a contrary intention in the mortgage deed.

These three conditions are conjunctive and not disjunctive.

The right of the mortgagee to sell the property can only be employed if the power of sale **arises** and **becomes exercisable**⁶¹. In *Nig. Advertising Services Ltd. v. UBA Plc*⁶² it was stated that a mortgagee's power of sale becomes exercisable if it has arisen and once it has so arisen the title of a subsequent purchaser will not be affected by its improper or irregular exercise and the sale will be regarded as valid. The power of sale arises where the mortgage debt is not paid at any time fixed for payment. The mortgagee has no power to sell the mortgaged property until the legal date of redemption has passed or the mortgagor has breached a covenant in the mortgage. For instance, the covenant to pay interest or principal promptly may warrant a sale.

The fact that there is power to sell when any instalment of the mortgage money has become due in the manner provided for in the mortgage deed was highlighted in *Payne v. Cardiff Rural District Council*⁶³. It is to the effect that the phrase "when the mortgage money has become due" cannot mean only when the whole debt is due; it includes when part only is due in situations where the debt is repayable by instalments.⁶⁴

The existence of any of these three following conditions makes the power of sale to become exercisable⁶⁵:

4.1.4 Notice requiring payment of the mortgage money has been served on the mortgagor or on several mortgagors and there is default of payment for three months after such service; or

4.1.5 Some interest under the mortgage is in arrears and unpaid for two months after becoming due;

4.1.6. There has been a breach of some provisions contained in the mortgage deed or under the provisions of the Conveyancing Act or the Property and Conveyancing Law.⁶⁶

⁶¹ In *Babatunde v B.O.N. Ltd.* (2011) 18 NWLR (Pt. 1279) 738 S.C it was held that before a mortgagee can pass a good title to a purchaser free from the equity of redemption, the right to exercise the power of sale under a mortgage must have arisen, the mortgage debt must have fallen due. Hence, once the precondition of notice of sale is given to the mortgagor by the mortgagee or his agent, preceded by a notice of demand of repayment of money lent to the mortgagor and the mortgagee proceeds to sell in good faith, the subsequent purchaser in good faith gets a good title and a court will not intervene in the sale only because the sale did not meet with the satisfaction of the mortgagor.

⁶² (1999) 8 NWLR (Part 616) 546.

⁶³ (1932) 1 KB 241. Also reflected in *S.O.N. Okafor & Sons Ltd v Nigeria Housing Devt Society Ltd.* (1972) ECSLR (Part 1) 349.

⁶⁴ Reiterated in Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009) 145 that where the mortgage debt is payable by instalments, the power of sale arises as soon as any instalment is in arrears.

⁶⁵ Section 20 Conveyancing Act 1881, section 125 Property and Conveyancing Law 1959.

These requirements were interpreted in *B.O.N. v. Aliyu*⁶⁷ to the effect that compliance with them is mandatory and not advisory. Therefore, any sale of any mortgage property without the requisite notice is invalid *ab initio* and cannot convey any title to a subsequent purchaser. It should be noted that by the provisions of sections 19 (2) of the CA and 123 (2) PCL, any of these requirements may be excluded either altogether or be varied by agreement of the parties.⁶⁸ However, certain provisions that exist not to protect the parties but the public may not be waived. In *Okonkwo v. Cooperative and Commerce Bank (Nig.) Plc*⁶⁹ it was held that the provisions of section 19 of the Auctioneers Law CAP 12 Laws of Eastern Nigeria still applicable in some states cannot be waived since it does not exist to protect the parties, but the public.

Based on the foregoing, the mortgagee must wait for the power of sale to arise and also to become exercisable before he sells. The effect of this is that a purchaser who purchases a property before the power of sale arises will not get a good title. But a purchaser who buys without the power becoming exercisable will have a good title notwithstanding this irregularity; the remedy of the mortgagor will only lie in damages against the mortgagee.

In *Federal Administrator General v. Cardoso*⁷⁰ it was stated obiter that a mortgagee may sue for foreclosure or he may exercise his right of sale of the property, in the two latter cases by action at law. However, this seems contrary to Section 19(1) Conveyancing Act 1881 and 123(1) of the Property and Conveyancing Law 1959 that provide to the effect that a mortgagee has the power to sell the property so long as the mortgage is by deed. Therefore, even where the mortgage is equitable, in so far as the instrument has a seal on it, the mortgagee has power to sell without recourse to court. Whereas, for equitable mortgage not made by deed, **a court order** is required before the mortgagee can sell.⁷¹ In *Adjei v. Dabanka*⁷² the mortgage was by deposit of title deeds coupled with an informal document. It was held to the effect that it was essential for the mortgagee to have come to the court to obtain an order of foreclosure before a sale of the

⁶⁶ Although some provisions of the laws are exempted and the parties may decide to exclude them - Section 19(2) Conveyancing Act 1881, Section 123 (2) Property and Conveyancing Law 1959.

⁶⁷ (1999) 7 NWLR (Part 612) 622 at 634.

⁶⁸ *WEMA Bank Plc v Abiodun* (2006) 9 NWLR (Part 984) 1. In *Bank of the North v. Babatunde* it was held to the effect that where in a mortgage deed the parties agree to exclude certain provisions of the law to enable the mortgagee exercise his power of sale, this is not prohibited by law or against public policy.

⁶⁹ (2003) FWLR (Part 154) 457; *Davis v Bowsher* (1774) 5 Term Rep. 488.20

⁷⁰ (1973) NSCC 577, 580

⁷¹ Chianu E. 2000. *Law of Securities for Bank Advances (Mortgage of Land)*, (Edo: Ambik Press. 119. ¹²⁶ (1930) 1 WACA 63, 67; Governor of Kwara State v. NICON Plc. (2017) ALL FWLR (pt.890)600-783

⁷² (1930) 1 WACA 63, 67.

mortgaged property could have been legally effected. To this effect, the sale was held invalid as it failed to comply with this. The rationale to this has been attributed to the fact that an equitable mortgagee has nothing more than an equitable interest and he would not have the power to transfer title save for the statutory provisions aforementioned to that effect. This is based on the principle of *Nemo Dat Quod Non Habet*. The foregoing is subject to the express stipulation in the mortgage contract. Hence, where an equitable mortgage evidenced in writing confers a power to sell on the mortgagee, the dicta in *Adjei v. Dabanka* would not apply.⁷³

It is pertinent to note that in exercising his power of sale, the mortgagee is not a trustee of the mortgagor of the power of sale. Rather, the power is given to the mortgagee for his own benefit to enable him realize his security.⁷⁴ The mortgagee's motive for selling is immaterial even if it means to spite the mortgagor or it is unfavorable to the mortgagor. The decision of the mortgagee is not limited by the fact that the exercise or non-exercise of the power of sale would cause loss or damage to the mortgagor or that the timing of sale is advantageous. The court has no right to inquire into the motives of a mortgagee for exercising his power of sale since the power is vested on the mortgagee for his own interest. However, he cannot sell to himself; not directly or through his agent. He needs to act honestly and in good faith.⁷⁵

Where the sale is completed, the mortgagee should use the amount to satisfy the mortgagor's indebtedness to him. If there is another mortgage he should use the balance to settle the other mortgage else he must return the balance of the sale to the mortgagor.⁷⁶ The mortgagee can sue the mortgagor in court to recover the balance where the proceeds of the sale does not satisfy the principal and the interest. This is because of the mortgagor's primary undertaking to pay the principal and interest. The mortgagor can also sue the mortgagee for the surplus where he refuses to give it. The mortgage proceeds of sale of a mortgaged property must be applied in the following order: Pay up all mortgages having priority, Pay commission to the auctioneer and all

⁷³ Chianu E. *Law of Securities for Bank Advances (Mortgage of Land)*, (Edo: Ambik Press, 2000) 120.

⁷⁴ Dadem, Y.Y.D. 2009 *Property Law Practice in Nigeria*. Jos-Nigeria: Jos University Press Limited. 147. In *Salami v Wema Bank (Nig.) Plc* (2010) 6 NWLR (Part 1190) 341 C.A. it was stated that the interest of the mortgagee is paramount and as long as the sale is conducted *bona fide* a mortgagor has no legal basis to complain in respect of, or about a low price.

⁷⁵ *Eka-Eteh v NHDS Ltd.* (1973) 6SC 183, *W.A.B Ltd v Savannah Ventures Ltd* (2002) 10 NWLR (Part 775) S.C. 401. A sale may be set aside where the mortgagee fails to act in good faith. This is one of the remedies available to the mortgagor (see Chapter 4, FN 164) Also held in *Abdulrahman v Oduneye* (2009) 17 NWLR (Part 1170) 220 C.A. that the only obligation incumbent on a mortgagee selling under and in pursuance of a power of sale in the mortgage deed is that he should act in good faith.

⁷⁶ *Eka-Eteh v NHDS Ltd.* (1973) 6SC 183.

other costs of sale, Pay up outstanding interests, Pay up outstanding mortgage sum; and Pay balance to person entitled to equity of redemption.⁷⁷

4.2. Mortgagee's Power of sale under the Mortgage and Property Law of Lagos State ('MPL') 2010⁷⁸

The realization of the importance of the mortgage institution to economic development and the enormity of disputes arising from mortgage transactions made it imperative for the Lagos State Government to take a critical look at the mortgage institution. The purpose of the enactment of the Mortgage and Property Law of Lagos State ('MPL') 2010 was to regulate mortgages in the interest of the investors and creditors; and to address the critical challenges posed by the freedom of contract. The Mortgage Board also established under the MPL, is vested with the power to 'give adequate protection to the members of the public seeking mortgage loans and to ensure that the mortgage industry is operated fairly, honestly, efficiently and free from deception or non-competitive practices. Consequently, the enactment of the MPL 2010 has made the provisions of the Conveyancing Act 1881 inapplicable to mortgage transactions in Lagos State.

4.2.1 Sale of Mortgaged Property

A mortgage instrument may provide for the mortgagee's power of sale and stipulate conditions for the exercise of that power so that except the mortgagee complies strictly, the sale shall be ineffectual. The power of a legal mortgage to sell the mortgaged property upon the mortgagor's default is statutory and need not be express. Section 35 (1)(i) of MPL confers on the mortgagee, the power to sell or concur with any other person to sell the mortgaged property or part of thereof when the mortgage debt has become due. The sale may be by public auction or by private contract.

It is important to note that, these powers are deemed to be in any mortgaged deed and need not be express.

The mortgagee's power of sale arises with respect to a legal mortgagee as contained in the deed of mortgage or by the provisions of the Law. An equitable mortgagee generally has no such

⁷⁷ Section 21 (3) Conveyancing Act 1881 reflected in Section 127 Property and Conveyancing Law 1959.

⁷⁸ Tokunbo Orimobi, Looking at a Mortgagee's power of sale and court ordered sale in Lagos State. <archive.businessday.ng> accessed 31 May 2025.

powers since no legal estate is passed from the mortgagor to the mortgagee but the equitable mortgagee may enforce his security by seeking and obtaining an order of court to sell. This order of court in the case of a judicial sale directs the sale of the mortgaged property usually by public auction and the mortgagor's title is vested in the purchaser through a certificate of purchase with the requisite consent.

The power of sale vested on the legal mortgagee under the MPL relates to a mortgage of a right of occupancy in land created at law by demise for a term of years absolute, subject to cesser on redemption or a mortgage of a term of years absolute created at law by a sub-demeise, subject to cesser on redemption; or where a charge by deed expressed to be by way of legal statutory mortgage is created in the forms provided by law. The implication is that, the legal mortgagee in all the above cases may sell the mortgaged property upon mortgagor's default and subject to the provisions of statute, extinguish the mortgagor's equity of redemption and vest title in the purchaser of the mortgaged property.

In the case of an equitable mortgage by deposit of title or charge accompanied with an agreement to create a legal mortgage, Section 18(2) MPL enables the mortgagee in whose favour a mortgagor executes a legal mortgage pursuant to an order of court, to subsequently exercise all the powers of the legal mortgagee under the MPL. Including the power of sale.

For clarification purposes, Section 18(1) and (2) of MPL state thus:

As from commencement of this Law, an equitable mortgage of a right of occupancy shall not be created by a mere deposit of title or charge on a property except it is accompanied by an agreement to create a legal mortgage. in favour of the mortgagee or in case of mortgage of an equitable interest, in a property by an assignment of an equitable interest. in favour of the mortgagee with a provision for cesser on redemption.

Provided that in a case of mortgage by deposit of title or charge accompanied by an agreement to create a legal mortgage, a mortgagee may, within 30 days by an Originating Summons bring an action in court requiring the mortgagor to exercise a legal mortgage in his favour and thereafter exercise the powers of legal mortgagee under this Law⁷⁹

⁷⁹ Section 18(1) and (2) of MPL

4.2.2 Exercise of the Mortgagee's Power of Sale

Section 37 (1)⁸⁰ states that a mortgagee shall not exercise the power of sale conferred by this Law unless:

- (i) A notice requiring payment of the mortgage money has been served on the mortgagor or one or more mortgagors, and default has been made in payment of the mortgage money, interest on it, for two months after such service, or
- (ii) There has been a breach of some provisions contained in the mortgage deed or in this Law, on the part of the mortgagor or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

The foregoing conditions are mandatory and failure by the mortgagee to comply or the non-occurrence of the event before sale is an infraction of the mortgagor's Right of Redemption and entitles the mortgagor to sue for damages.⁸¹

4.2.3 Obligations of the Mortgagee in Exercising Power of Sale⁸²

In exercising the power of sale, the Law requires the mortgagee to act in good faith, not fraudulently, not have unfair dealing with the mortgaged property or collude with the purchaser resulting in gross undervalue of the property. The sale cannot be impeached by the court even where the sale is disadvantageous to the mortgagor. A locus classicus is the case of *Andrew Okonkwo v Cooperative & Commercial Bank*⁸³ in this case, the Supreme Court stated that fraud was not specifically pleaded, and no evidence led on it. Also the plaintiff and his brother were

⁸⁰ MPL 2010

⁸¹ Section 38(2) of MPL 2010 states that 'where a conveyance or an assignment is made in exercise of the power conferred by this Law or any other Law replaced by this Law, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorize the sale; that due notice was not given; or where the mortgage was made before or after the commencement of this Law, that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on conveyance concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has given, or the power is otherwise properly and regularly exercised but any person prejudiced or affected by an authorized or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power'. This section is a disappointment to the reasonable expectations of prospective mortgagors under the MPL 2010 and contradicts the main objectives behind the enactment of the Law. The implication of the aforesaid Section 18(2) of MPL is that the omission of the mortgagee to satisfy the condition precedent under Section 37(1) of MPL, is treated by the La as an irregularity which would not impeach the sale or invalidate the assignment of title to an innocent purchaser thereof, (purchaser without notice) in the absence of fraud on the part of the purchaser or collusion between the mortgagee and the purchaser. Also, the mortgagor's remedy lies in damages against the mortgagee mainly and could be of less value to the mortgagor compared to his equity of redemption which must have been destroyed.

⁸² A.C.B Ltd v Ihekwoaba (2003) 16 NWLR (Pt.846) 249 at page 269-270

⁸³ (2003) CLR 2(b) (SC); (2003) NGSC 21

present at the venue of the sale and indeed participated in the bidding. The Plaintiff who allegedly had N96, 000.00 with him, bided and offered only N70, 000.00 for his property. When the property was sold for N110, 000.00 he said it was undervalued, or that there was fraud and or collusion etc. the plaintiff clearly in my view has no case. If a mortgagee exercises his power of sale bona fide for the purpose of realizing the debt and without collusion with the purchaser, the court will not interfere even though the sale is disadvantageous unless the price is so low as in itself to be evidence of fraud.

4.2.4 The Court Ordered Sale

The MPL 2010 makes provision for judicial or court ordered sale in appropriate circumstances. The most popular of such circumstances is where a mortgagee of an equitable interest created pursuant to Section 18(1) of MPL 2010, applies to court by way of an Originating Summons for a court order to sell a mortgaged property. It therefore implies that, a mortgagee of an equitable mortgage created either by way of deposit of title deeds or charge accompanied by an agreement to create a legal mortgage or by an assignment of an equitable interest in a property without more, can only sell the mortgaged property through the court. Also Section 22 of the MPL 2010 makes provision for a court ordered sale where a person entitled to redeem a mortgaged property seeks judgment or order for sale instead of redemption.

4.2.5 Application of Proceeds of Sale

Section 39⁸⁴ deals with the mode of application of the proceeds of sale realized upon open market or court ordered sale.

In the case of market sale, the mortgagee is bound to discharge prior encumbrances to which the sale is made subject, if any, and in the case of a court ordered sale, payment into court of a sum to meet any prior encumbrance is required. The remaining proceeds of sale shall be held by the mortgagee in trust to be applied first, in the discharge of the payment of all costs, charges and expenses properly incurred by him incidental to the sale or attempted sale, or otherwise, secondly in the discharge of the principal sum with accrued interests and costs and other money due under the mortgage, and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceed of the sale.

⁸⁴ MPL 2010

4.3. Clogging the Equity of Redemption: The Rule

Historically, a mortgage given as security for a loan took the form of a conveyance to the lender of the borrower's legal title. Upon repayment of the loan, the mortgagee reconveyed legal title to the mortgagor. If the mortgagor failed to pay on the due date (the contractual date of redemption), the mortgagee's title became absolute at law. At this time, however, the equitable right to redeem arose. The rule against clogging or fettering the equity of redemption relates to this equitable right. Lord Parker described the rule against clogging the equity of redemption in the following terms:

The rule may be stated thus: the equity, which arises on the failure to exercise the contractual right, cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction.⁸⁵

The right to redeem is so inseparable in incident of mortgage that it cannot be taken away by an expressed agreement of the parties that the mortgage is not redeemable or that the right is to be confined to a particular time or to a particular description of persons. The right continues, unless and until the mortgagor's title is extinguished or his interest is **destroyed** by sale either under the process of the Court or of a power in the mortgage incident to the security. In the case of *Ejikeme v Okonkwo*⁸⁶ The Supreme Court per Ogundare JSC at 278 held that in view of the borrowers' equity of redemption therefore, the plaintiff will not be right to claim that the defendant could not redeem the mortgage by paying for the principal sum and interest until the year 2001, that is 35 years from 1966. For this reason, therefore, the learned trial judge was right to dismiss his claims and the Court of Appeal was also right to affirm that decision.

Also mortgage therefore could not contain a clause that conferred on the mortgagee an option to buy the mortgaged property.⁸⁷ Similarly, a clause, which allowed the mortgagor only a limited time period within which to redeem the mortgage was void as a fetter on the mortgagor's right.⁸⁸ Clauses, which conferred a collateral advantage on the mortgagee, such as a mortgagor's promise to buy specified goods only from the mortgagee, were also regarded suspiciously

4.3.1 What a Mortgagor must do to redeem his property

⁸⁵ *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 48.

⁸⁶ (1994) 8 NWLR (Pt. 362) 266

⁸⁷ *Samuel v Jarrah Timber and Wood Paving Corporation Ltd* [1904] AC 323.

⁸⁸ *Salt v Marquess of Northhampton* [1892] AC 1.

If the Mortgagor intends to redeem his property, he must take the initiative to bring an action for redemption. It is not for the Mortgagee to make the first move unless he wants his money back quickly. The Mortgage may decide to sit back and wait until the mortgagor's claim becomes statute barred, or he may exercise his right of sale of the property.⁸⁹

4.3.2. Exceptions

There are circumstances where the mortgagee by agreement or conduct had clogged the equity of redemption:

4.3.2.1 The first category concerns the effect of an assignment of the mortgage to another creditor of the mortgagor in the circumstances of an “all moneys” clause where the assignee of the mortgage claims that the mortgage secures other debts of the mortgagor owing to that assignee.⁹⁰

4.3.2.2 The second category concerns the effect of arrangements between mortgagor and mortgagee, pursuant to which the mortgagee acquires the title to the property⁹¹,

4.3.2.3 The third category of case concerns the effect of charging an excessive interest rate where the right of redemption has been severely constrained, or made almost impossible, by the substantial increase in the amount required to redeem when compared to the actual principal sum borrowed and the period of the loan.

4.4 Mortgagor's blocking the power of sale

Like in other commonwealth countries, the power of sale in Nigeria is exercised either by a court order or a power of sale clause under a Mortgage Deed. An equitable Mortgagee's power of sale by a Court order involves sale under the supervision of Court. On the other hand, where a mortgage was created by deed with a power of sale or a deed of trust clause, a legal Mortgagee may exercise his power of sale without an order of court once the power has arisen and is exercisable.

However, the right of the Mortgagee to exercise the power of sale may be in jeopardy where the Mortgagee is not aware of the real legal nature of the mortgaged property. This is because a

⁸⁹ *Federal Administrator General v Cardoso* (1973) 8 N.S.C.C.577 at Page 580.

⁹⁰ *Katsikalis v Deutsch Bank (Asia) AG* [1988] 2 Qd R 641 and *Re Modular Design Group Pty Ltd* (receiver and manager appointed) (in liq) (1994) 35 NSWLR 96.

⁹¹ *Re Modular Design Group Pty Ltd* (receiver and manager appointed) (in liq), (1994) 35 NSWLR 96.; In *Kerr v Ducey* [1994] 1 NZLR 577, a transferee of a mortgage purported to add a judgment debt to the secured sum. In finding against the transferee, the court held that the language of the mortgage would not permit this and the “clog” argument was not raised.

Mortgagee cannot transfer a better title to a third party other than that of the Mortgagor. For instance, a Certificate of Statutory Right of Occupancy issued in the name of the Mortgagor does not conclusively mean that the Mortgagor has title or interest in the mortgaged property. The Certificate only raises a rebuttable presumption of right of occupancy over the mortgaged property, which may be set aside if a third party shows evidence of a better title. It is therefore in the Mortgagee's best interest to thoroughly investigate and ascertain the Mortgagor's title at the preliminary stage of a mortgage transaction.

Again, the cumbersome process of perfection of title in Nigeria may defeat the right of legal Mortgagee right to exercise his power of sale. Since the responsibility to obtain consent to transfer interest in the mortgaged property lies on the Mortgagor, some dubious Mortgagors may intentionally neglect to obtain the requisite consent, thereby making the mortgage void, *prima facie*. To avoid this pitfall, the Mortgagee must ensure that the Mortgagor obtains the consent of the Governor or at least takes concrete steps towards obtaining same before crediting the Mortgagor's account with the loan sum.

Though, the Mortgagee's right to exercise the power of sale cannot be impeached even though the sale is disadvantageous to the Mortgagor, the Mortgagee may expose himself to damages if the price of sale is so low or the procedure for sale of the mortgage property does not conform with the relevant law or the Court Order. This also applies in cases of unfair dealing with the mortgaged property or collusion with the third party purchaser resulting in gross undervalue. The law expects both equitable and legal Mortgagee to act *bona fide* when exercising their power of sale.

Lastly, the slow process of adjudication of cases is also a cog in the wheel of exercising the power of sale. Upon foreclosure, most Mortgagors commence legal proceedings to unduly prevent the legal Mortgagee from exercising his power of sale. Also, it is not uncommon for the Mortgagor's Solicitor to file all sorts of preliminary objections and interlocutory applications to prevent an equitable Mortgagee who approaches the court to enforce his power of sale from exercising same. These delays can be managed if all the conditions and legal requirements for exercising the power of sale upon default of the Mortgagor to repay the loan were clearly spelt out prior to advancing the loan.

4.5 Rules of sale by Mortgagee

This concerns the manner in which the sale is conducted and constitutes the most difficult issue regarding sale. It should be remembered that the mortgagor is vitally affected by the sale price. If it is greater than the mortgage debt and expenses, then the balance goes to the mortgagor. If it is less, then there is liability for the balance. The duty of the mortgagee in respect of the sale itself was formerly based on good faith alone, but subsequent dicta in this regard implied an additional duty to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment the Mortgagee chose to sell it.

According to **Salmon L.J** in **Cuckmere brick ltd v Mutual finance ltd.**

“The duty of the mortgagee is first, to act in good faith and secondly to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell”

The burden of proof is on the mortgagor to prove breach of this duty by the mortgagee.

A mortgagee who exercises his power of sale is not a trustee for the mortgagor and owes no fiduciary obligations to the mortgagor in the manner in which the sale is conducted but is a trustee of the purchase money received and shall, after paying off any prior mortgages, pay all expenses incidental to the sale, interest and cost due under the mortgage and the surplus to the person entitled to the mortgaged property. The law as to sale under under-value is laid down by the court in **Eka-Etet v. Nigeria Housing Development Society Ltd.**⁹²

4.5.1 Protection of the Purchaser

A purchaser acquires an unimpeachable title basically on the condition that the power of sale has arisen, for the Statute protects him and frees him from the problems of constructive notice that the power of sale has not become exercisable. The law provides that where a conveyance is made in the professed exercise of the powers of sale conferred by this Act, the title of the purchaser shall not be impeached on the ground that no case has arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person injured by an unauthorized or improper exercise of the power shall have his remedy in damages against the person exercising the power⁹³

⁹² (1973) 6 SC 183 at 198

⁹³ Conveyancing Act 1881, s.21 (2); PCL Cap 100 Laws of Western Nigeria 1959, s.126 (2).

However, provisions of a Statute protect only purchasers for whom the mortgagee has executed a conveyance, so that if an aggrieved mortgagor commences an action to impeach the purchaser's title after sale, but before the conveyance, the purchaser cannot take advantage of statutory provision. A mortgagee who takes a mortgage in an unregistered land in a Registration Area, and who failed to register as first owner under the **Registration of Titles Act**⁹⁴, cannot in exercise of his statutory power of sale convey a valid title to the purchaser. This applies to lands in cities⁹⁵

4.5.2. **Forfeiture in case of equitable mortgage**

4.5.2.1 **Action for Foreclosure**

An action for Foreclosure is a judicial procedure by which the mortgagee acquires the mortgaged property for himself free from the mortgagor's equity of redemption. It is a more effective remedy available to the mortgagee in urgent need of his capital, which he cannot realize from the rents and profits accruing from the mortgaged property, or which in fact, is non-existent. As a result of the foregoing constraints, the courts, which jealously protect the equity of redemption, allows a mortgagee to **destroy** the equitable right to redeem with its own assistance. A Foreclosure Order will not be made until the contractual date has passed with the principal and or interest remaining unpaid after a demand and a reasonable time allowed to lapse without compliance.

However, I would suggest that an action for Foreclosure should not be granted by the Courts where the interest of the mortgagee is the only outstanding money that has remained unpaid. If the principal money has already been paid, the mortgagor should be allowed to redeem his property provided he devises no other means to pay the mortgagee his interest. But the only problem here is that at times, the accrued interest ends up being higher than even the principal sum itself, in which case, the mortgagee many indeed have to end up succeeding in a Foreclosure action against the mortgagor.

A notice of Foreclosure once given and received remains valid and in force until the exercise of the mortgagee's power of sale; and the mortgagee is not bound to make any concession or to suspend the exercise of his power of sale. An action for Foreclosure being an action to recover

⁹⁴ 40 Cap 166, Laws Lagos State of Nigeria, 1994

⁹⁵ Oguchi v. Federal Mortgage Bank of Nigeria Ltd (1990) 6 NWLR PT 156 @ p.330

landed property must be brought within twelve years from the date upon which the right of recovery accrued i.e the date fixed for payment of the principal. Otherwise, it becomes statute barred.⁹⁶

5.0

Section Five

Reforms in the law

The government has accepted that it is obligated to rescue the banking system from its near collapse brought about by irresponsible borrowing and other financial malpractices by bankers. It has belatedly recognised that bankers took advantage of light touch regulation, which they were so eager to espouse, and then abuse. The effects of this near collapse of the financial system have been the collapse of the mortgage market, and the very sharp downturn in the economy. As a result Asset Management Corporation of Nigeria (AMCON) was established in 2010 to efficiently resolve non-performing loan (NPL) assets of banks in Nigeria but it has also failed and it's time to say goodbye to AMCON.

5.1 Non Existence of Laws Regulating Securitization

Laws regulating concepts such as securitization are non-existent. The Nigerian stock exchange only supports the equities market. Even though Section 191, 192, and 193 of the Companies and Allied Matters Act (CAMA) 2020 provided that debentures are transferable, debenture holders in Nigeria are yet to freely transfer their interests as security on the floor of the stock exchange due to the absence of laws regulating securitization of this type of security. The market is not yet matured to reach the trading platform of these securities despite their importance.

5.2 Undue delay in Mortgage Proceedings

Mortgage parties usually suffer untold hardships during proceedings arising from undue delay. For example, it sometimes takes mortgagees 10 or even 15 years of litigations to get an order of foreclosure from courts. It took the court eight years in the case of *Federal Mortgage Bank of Nigeria v .Olloh*⁹⁷ to determine which court had jurisdiction to entertain the matter. Furthermore, a conflict of judicial interpretation is another reason that creates such delays

⁹⁶ See Section 15 of the Limitation Law Cap 118 Laws of Lagos State of Nigeria, 1994.

⁹⁷ (2002)LLJR-SC

during the proceedings. For example, while it is clear that Section 21 and 22 of the Land Use Act outlawed any alienation without obtaining Governor's consent, the courts, particularly in *Jacobson Eng CO and Anor v. UBA ltd*⁹⁸ and *Okuneye v. FBN*⁹⁹ have not been unanimous as to whether an equitable mortgage needs a Governor's consent. In the former case, the court of appeals division of Lagos held that consent must be obtained in any transactions created upon delivery of titles, whether it is legal or equitable mortgages. Unfortunately, the same division of the court in 1996 under another panel held that deposit of a title documents in an equitable mortgage does not require any consent. This has left the lower courts wandering in a dilemma as to which of the authorities is to be followed. In turn, this has created a security risk for banks. It puts them in a precarious position where advances are made before obtaining consent on securities offered by the customers.

5.3 Conflicts and Inconsistencies of the Laws

Section 25 of the Insurance Act is inconsistent with section 5 of the NHF Act. Section 25 (3) (a) of the Insurance Act provides that the Insurance Company should invest a maximum of 35% from its life fund in real property development; however, section 5 of the NHF Act provided that Insurance Companies should invest a minimum of 40% of its life funds in real property development. The bone of contention is that, while the NHF Act required Insurance Companies to invest at least 40% of its life fund in property development, the Insurance Act outlawed the Insurance companies from investing more than 35% of their life fund in real property. This has created a considerable problem as it dug a hole where the said companies can hide from contributing their quota to mortgage finance. It is based on this that Insurance Companies have failed to make their equity contribution.

Furthermore, under the Infant Relief Law of some states in Nigeria, all contracts entered in to by an infant for the repayment of money are absolutely void. In effect, a mortgage transaction entered in to by an infant is that the infant cannot be made liable under the contract. Thus, section 7 of the Land Use Act restricted the right of a person under the age of twenty- one (21) to be granted land by the governor. This implies that 21 years is the age of majority recognized by the Land Use Act. This is inconsistent with the provisions of section 77 of the 1999

⁹⁸ (1993) 3 NWLR (Pt 283) 586

⁹⁹ (1996) 6 NWLR (Pt 457) 759

Constitution of the Federal Republic of Nigeria (As Altered), which recognizes 18 years as the age of majority.

6.0

Section 6

Findings, Conclusion and Recommendations

6.0.1 During this research, our findings reveal that the Mortgagee who abuses his power of sale by exercising his discretion to sell the mortgaged property unfairly when he decides to sell it at an undervalue will not simpliciter make the court to set aside the sale even if is very disadvantageous unless the price is so low as in itself to be evidence of fraud¹⁰⁰

6.0.2 The mortgagee is not also obliged to postpone sale so as to obtain the best price reasonably obtainable for, the timing of the exercise of a right of sale by the mortgagee is entirely within his discretion

6.0.3 The provisions of MPL 2010 on mortgagee's power of sale have substantially replicated the provisions of Conveyancing Act 1881 without due regard for the main objectives of the Law. Despite the Enactment of MPL 2010, the mortgagors-investors are still worse off and open to the manipulation of mortgage providers, thereby defeating the functions of the Mortgage Board under the Act.

6.0.4 Also a look at the provisions relating to judicial sale reveals that the provisions are scanty and the Law has failed to take into cognizance the non-existence of adequate High Court Rules relating to judicial sale.

6.1 Conclusion

In conclusion, the phrase 'once a mortgage always a mortgage' to us is a legal principle that does not ensure a borrower's right to redeem a property after it has been mortgaged because all the laws is in favour of the mortgagee once the mortgagor defaults in payment and the only thing the

¹⁰⁰ Ihekwoaba v African Continental Bank Ltd (1998) 10 NWLR (Pt.571) 590 at page 609

law obviously allows the mortgagor is entitled to is damages except in a very slim chances where the mortgagor can set aside the sale.

6.2 **Recommendations**

- 6.2.1 overhauling of the laws regulating mortgages in Nigeria to avoid conflicts and inconsistencies of the laws.
- 6.2.2 Laws regulating securitization of mortgages should be promulgated
- 6.2.3 In addition to other factors that may warrant the mortgagor to bring an application to the Court to restrain the mortgagee's power of sale, the fact that a mortgagee sells the mortgage property at an undervalue should be an additional factor, even though the Courts protect the Mortgagee as we can see from a few cases cited in this paper.
- 6.2.4 The Courts should really caution the mortgagee against selling at an undervalue, and this should be part of the Rules for the formation of a Mortgagor and Mortgagee Relationship. It enables the Mortgagor feel safer, because the mortgagee has got nothing to lose once the mortgage property is already in his possession.
- 6.2.5 The Central Bank of Nigeria and or other financial regulators should be serious with its supervisory role over all Banks in Nigeria, and ensure that it does not cover up any bank malpractice discovered by any Bank or its Management and ensure that most of these financial institutions comply with the provisions of law guiding mortgages without being fraudulent in the process.
- 6.2.6 Adequate High Court Rules relating to judicial sale. Here, a more detailed provision is necessary to make court orders more effective in passing good title to the purchaser.