

## How Potent is the Mortgagee's Power of Sale?

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### *Abstract*

*A mortgagee has certain remedies for securing the repayment of his loan. They consist of an action on the covenant for repayment of loan, foreclosure, taking up possession, appointment of a receiver and a sale of the mortgaged property. A mortgage deed usually contains a covenant for the repayment of the loan for which the mortgagor is personally liable and upon which the mortgagee can sue on or after the contractual date for redemption. The mortgagee's power of sale is the most potent of all his remedies as he realizes his security without much effort. This paper centers its discussion on realty and examines the statutory provision relating to the exercise of the power of sale and the attitude of the courts to ensure compliance.*

### 1. Introduction

A lender may advance money to a borrower on the borrower's personal recognition and rely on his genuine promise to repay. If the borrower fails to pay, his promise can only be enforced by an action for the debt in a court of law. But even then, the debt may not be realised if the borrower has no assets or, if there are, the value may not be sufficient to defray the debt in full.

However, because of the difficulty experienced by lenders in recovering money advanced to borrowers, they always insist on the borrowers giving security for money lent. If the lender were sure that the debtor would honour his indebtedness when due, there would be no need for security since there is always a promise of payment in all credit transactions. Experience has taught the lender that the same humble borrower who came cap in hand begging for loan with a promise to repay on the due date may turn out to be very hostile and uncompromising when the moment of repayment arrives. As a result, the lender, more

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often than not, would be unwilling to accept the empty promise of the borrower but would rather insist that certain property be made available to secure the debt so that when the borrower defaults in repayment, he can then have something to fall back upon.

The law gives the lender certain rights and powers to recover his principal and interest if, either the mortgage repayment falls into arrears or the mortgagor is unable to redeem at the stipulated time of redemption. One of such powers or rights is that of sale which may be expressed in the deed creating the mortgage or implied into it by statute.<sup>1</sup> Even this power of sale, which is regarded as the most potent remedy of a mortgagee, is in fact an illusion in terms of practical realisation. This paper attempts to show that the mortgagee's power of sale which is available to him where he secures a legal mortgage may after all not be enforceable at law and where it is, he may be prevented from exercising his right as a result of certain lapses in the process of trying to enforce his power of sale which is a right derived from a legal mortgage.

## **2. Meaning of a Mortgage**

A mortgage is a disposition of property as security for a debt. It may be effected by demise or sub-demise of land, by a transfer of a chattel, by an assignment of a chose in action, by charge on any interest in real or personal property or by an agreement to create a charge for securing money or money's worth, the security being redeemable on payment or discharge of the debt or other obligation.<sup>2</sup> It is the conveyance of a legal or equitable interest in property as a security for the payment of debt or discharge of some other obligation for which it is given.<sup>3</sup>

Generally, whenever a disposition intended as a security for money, whether this intention appears from the deed itself or from any other instrument or from oral evidence, it is considered as a mortgage and redeemable. It can be submitted that mortgage is a creation of an interest in a property defeasible upon performing the condition of

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<sup>1</sup> S. 19 CA1881 and S.123 PCL 1959.

<sup>2</sup> *Halsbury's Laws of England* 4<sup>th</sup> Ed., Vol. 32, P187.

<sup>3</sup> *Pharmatek Ind. Projects Ltd v. Trade Bank (Nig) Plc* (2009) All FWLR (pt.495) 1678.

paying a given sum of money with interest at a certain time for the purpose of securing debt or some other obligation. The legal consequence being that the owner of the mortgage property becomes divested of the right to dispose of the property until he has secured a release of it from the mortgagee.<sup>4</sup> Thus the essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property, with a provision for redemption, that is, upon repayment of the loan or performance of some other obligation the conveyance shall become void or the interest shall be reconveyed. The right to redeem a mortgaged property is so inseparable an incident of mortgage that it cannot be taken away either expressly or by implication, nor can such redemption be limited to time or a particular person.<sup>5</sup>

### 3. Types of Mortgage

#### i. *Equitable Mortgage*

An equitable mortgage is a contract, which creates a charge on the property but does not convey any legal estate or interest to the creditor. Such a charge amounts to an equitable interest.<sup>6</sup> Its operation is that of an executory assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance and is enforceable under the court's equitable jurisdiction. As a general rule, all property, whether real or personal, which may be the subject of a legal mortgage can equally be charged in equity.

The essence of an equitable mortgage is an agreement to enter into a legal mortgage. Anything that can be construed as such an agreement will constitute an equitable mortgage. Hence, a mere deposit of title deed<sup>7</sup> or a mortgage executed under hand only will be an equitable mortgage. It is possible for a memorandum of deposit of title deeds as security for a mortgage advance to be under seal and this would be an equitable mortgage.

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<sup>4</sup> *Bank of the North Limited v Bello* (2000) 7 NWLR (Pt.664) 2442

<sup>5</sup> *Ndaba (Nig) Ltd. v UBN Plc* (2007) 9NWLR (Pt. 1040) 439

<sup>6</sup> In the English Law of Property Act 1925, an equitable interest means all interests and charges in or over or its proceeds of sale other than legal estates.

<sup>7</sup> See *Yaro v Arewa Construction Ltd* (2008) 154 LRCN 163; *Ogundiani v Araba & Anor* (1978) NSCC (vol. 11) 55

However, an equitable mortgage carries the rights of a legal mortgage and since equity looks on that, as done which ought to be done, specific performance of the agreement, a right of legal mortgagee could be obtained by an equitable mortgagee.

ii. *Legal Mortgage*

This involves execution under seal and the transfer of the legal title from the mortgagor to the mortgagee, subject to the mortgagor's right of redemption which is a right to a reconveyance on payment of the mortgage monies in accordance with the covenants in the mortgage. The main attributes of a legal mortgage are; a covenant to pay principal and interest on a given date and a covenant to pay interest in the event of default or payment of the principal on the day named or variations of the statutory provisions with regard to mortgage as the arrangement between the parties requires.<sup>8</sup>

#### 4. Power of Sale

The power of sale may be express or statutory. The power of sale is express where on account of special circumstances or of the importance of the transaction, the intending mortgagee prefers not to rely on the statutory power but to insert the power of sale in the mortgage. The ordinary express power gives to the mortgagee and every person for the time being entitled to give a discharge for the mortgage debt power at any time after the date fixed for payment to sell either by public auction or private contract and subject to special conditions as to title and if there were prior charges, to sell the mortgaged property or any part of it either subject to or free from those charges, and in the latter case to pay them off out of the purchase money and to execute assurances to the purchasers.<sup>9</sup> The right of sale of the mortgagee is the only certain shield of recovery of the mortgagee's investment.<sup>10</sup>

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<sup>8</sup> *Ogiorio Igbinovia* (1998) 13 NWLR (Pt. 582) 426

<sup>9</sup> *Halsbury's Laws of England*, *op. cit.*, at p.323

<sup>10</sup> *Omidiji v FMB* (2001) 13 NWLR (Pt.731) 646; *BON Ltd v. Akintoye* (1999) 12 NWLR (Pt. 631) 392.

In any mortgage made after 1881, a power of sale is conferred by statute. The mortgage must be by deed and the power may be varied or extended by the mortgage deed and applies to the mortgage only so far as a contrary intention is not expressed in it.<sup>11</sup>

A mortgagee must not sell the mortgage property until his power to do so has arisen and become exercisable. The difference between the power of sale arising and becoming exercisable is that if the power has not arisen, the mortgagee has no statutory power of sale but if it has arisen, the mortgagee can make a good title to a purchaser free from the equity of redemption even if the power has not become exercisable.

In *Ojikutu v Agbonmagbe Bank Ltd. & Ors.*,<sup>12</sup> the plaintiff mortgagor brought an action against the first defendant, the mortgagee, asking for a declaration that a sale of mortgaged property was void and should be set aside and an injunction to restrain the first defendant from selling the property. The plaintiff had mortgaged a property to secure a loan from the defendant bank. Failing to repay the loan at the stipulated date, he wrote to the Bank promising to repay the debt fully at a later date and requested the Bank to stop charging interest. The first defendant nevertheless sold the property to the second and third defendants.

The plaintiff argued that he had not been served with a notice of foreclosure and that the rate of interest charged by the bank on the loan was excessive and illegal. The first defendant alleged that the plaintiff had given it a written undertaking, after being served with a notice of foreclosure and sale, that he would discharge his debt by a given date and had also authorized the first defendant to sell the property if the debt was not discharged by that date. The court held that a purchaser of mortgaged property is not under a duty to make enquiries from the mortgagor whether the mortgagee's power of sale had become exercisable or was validly exercised.

#### i. When It Arises

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<sup>11</sup> S. 101(3) LPA.

<sup>12</sup> (1966) 2 ALR Comm, 433.

Where the power is contained in the deed, it arises after due notice demanding payment of the mortgage money or the happening of some specified event. Every mortgagee, whose mortgage was under the statute and whose mortgage shows no contrary intention, has power of sale provided that (i) the mortgage was made by deed and (ii) the mortgage money is due, that is the legal date for redemption has passed. And if the money is payable by installments, the power arises as soon as any installment is in arrears.

In *S.O.N. Okafor and sons Ltd. v Nigeria Housing Development Society Ltd*,<sup>13</sup> the mortgagee granted loan of £11,330 to the mortgagor. The principal sum was to be released in installments. Interest was due within a given period after the receipt of an installment. All but £330 was released and the mortgagor owed £505.19s 9d as interest due on the released installments. When the mortgagee attempted to sell, the mortgagor applied for an injunction to restrain the sale. He failed. The Supreme Court had to construe section 19 of the Conveyancing Act 1881, which is an equivalent of section 123 (1) (1) of the Property and Conveyancing Law which reads in part:

A mortgagee, where the mortgage is made by deed ... have ... a power, when the mortgage money has become due, to sell ... the mortgaged property.

It was held that there is power to sell when any installment of the mortgage money has become due in the manner provided for in the mortgage deed.

In *Payne v Cardiff Rural District Council*,<sup>14</sup> Lord Hanworth, M.R. stated 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 cases where the debt is repayable by installments.

It is necessary to state here that Sections 19(1) Conveyancing Act 1881 and 123 (1) of the Property and Conveyancing Law 1959 provide that a mortgagee has power to sell the property as long as the

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<sup>13</sup> (1972) ECSLR (Pt.1) 349.

<sup>14</sup> (1932) 1 KB 241, 251-2.

mortgage is by deed. It therefore follows that even where the mortgage is equitable, so long as the instrument has a seal on it, the mortgagee has power to sell without recourse to court. It is argued here that an equitable mortgagee has nothing other than an equitable interest and but for the statutory provisions referred to above, he would not have the power to transfer title to a purchaser.

However, where the mortgage is equitable, a court order is required before the mortgagee can sell. In *Adjei v. Dabanka*,<sup>15</sup> where the mortgage was by deposit of title deeds coupled with an informal document, Michelin, J. held that:

It was essential ... for the mortgagee ... to have come to the court to obtain an order of foreclosure before a sale of the mortgaged property could have been legally effected. Not having done so ... the sale ... was an invalid sale, and amounts in law to a nullity.

However where an equitable mortgage evidenced in writing confers a power to sell on the mortgage, the dictum of Michelin J. in *Adjei v. Dabanka*<sup>16</sup> would not apply.

### ii. When Exercisable

Even where the power has arisen, whether under the Conveyancing Act, 1881 or the Property and Conveyancing Law, 1959, it is not exercisable unless one of the following conditions is in fact satisfied:

- (a) Notice in writing requiring payment of the mortgage money has been served on the mortgagor and default has been made in repayment of all or part of it for three months after such service;<sup>17</sup> or
- (b) Some interest under the mortgage is two months or more in arrears; or

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<sup>15</sup> (1930) 1 WACA 63.

<sup>16</sup> *Supra*.

<sup>17</sup> *BON Ltd. v Aliyu* (1997) 7 NWLR (Pt. 612) 622.

(c) There has been a breach of some provision contained in the mortgage deed on the part of the mortgagor to be observed or performed, other than and besides a covenant for payment of mortgage money or interest thereon.<sup>18</sup>

### 5. Conduct of Sale

The mortgagee is to exercise the power of sale for his own interest. Salmon, L. J. in *Cuckmere Brick Co. Ltd. v. Mutual Finance*<sup>19</sup> said:

It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has a right to realise his security by turning it into money when he likes. Nor in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the action is badly attended and the bidding exceptionally low. Provided none of those adverse factors is due to any fault of the mortgagee, he can do as he likes...

A mortgagee exercising his power of sale must act in good faith and with reasonable care.<sup>20</sup> The only obligation incumbent on a mortgagee selling under a power of sale in his mortgage is that he should act in good faith. He must ensure that he actually sells the property; he must sell it to an independent purchaser and not buy it himself whether directly or indirectly through his agent.

In *Viatonu v Odutayo*,<sup>21</sup> a moneylender granted the loan. When the mortgagor defaulted, he was given another two months to redeem, but within two weeks, the mortgagor tendered the money to redeem. Before this, the mortgagee had instructed her husband and

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<sup>18</sup> S. 20 CA, 1881 & S. 125 PCL 1959. *Barker v Illingworth* (1908) 2 Ch.20.

<sup>19</sup> (1971) 2 ACC ER 633 at 643.

<sup>20</sup> *Abdulrahman v. Oduneye* (2009) 17 NWLR (Pt. 1170) 220; *W.A.B. Ltd. v. Savannah Ventures Ltd* (2002) 10 NWLR (Pt. 775) 401.

<sup>21</sup> (1950) 19 NLR 119.

partner in an auctioneering firm to sell the property. The purchaser was a partner in the auctioneering firm. The sale was set aside. The court held that the sale was collusive, not made *bona fides* and therefore void. The court stressed that:

A mortgagee cannot sell to himself or his agent or to anyone concerned in or connected with the sale on his behalf; he must act *bona fides*...the whole transaction between partner and partner cannot be maintained.

However, the mortgagee whether selling under express or statutory power, may generally conduct the sale in such a manner as he may think most conducive to his own benefit unless the deed contains any restrictions as to the mode of exercising the power, provided he acts *bona fide* and observes reasonable precautions to obtain not "best price" but "proper price."

This obligation of the mortgagee was restated by Ibekwe, J.S.C. in *Eka-Ette v Nigeria Housing Development Society*.<sup>22</sup> as follows:

The only obligation incumbent on mortgagee selling under and in pursuance of a power of sale in the mortgage deed is that he should act in good faith. We, however, are conscious of the fact that in determining whether the mortgagee's conduct in any given case comes up to the required standard or not, regard must be had to the circumstances of the particular case. Every case has to be determined on its own facts and in the light of its own circumstances.

Commenting on the mortgagee's duty to act in good faith in selling the mortgaged property, Lord Herschell said in *Kennedy v De Trafford*.<sup>23</sup>

It is very difficult to define exhaustively all that would be included in the words "good faith" but I think it would be unreasonable to require the mortgagee to do more than

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<sup>22</sup> (1973) NSCC. 373 at 381.

<sup>23</sup> (1897) AC 722 at 185.

exercise his power of sale in that fashion. Of course, if he willfully deals with the property in such manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

Ayoola, E. O., J S C, commenting on the issue of good faith stated in *West African Breweries v Savannah Ventures Ltd. & Ors*<sup>24</sup> as follows:

For my part, I do not think that an allegation of lack of good faith always necessarily implies dishonesty, even though an allegation of dishonesty will imply absence of good faith. The description of lack of good faith in *Kennedy v. De Trafford*<sup>25</sup> did not imply dishonesty. Where lack of good faith is alleged without particulars, the opponent should ask that the allegation be struck out for want of particulars.

However, it has been held that where the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings.<sup>26</sup>

It is worthy to mention here that the fact that a mortgagee sold to a relation or intimate companion does not nullify the sale. It is for the mortgagee to show that everything in relation thereto was done properly and fairly. In *Viatomu v Odutayo*,<sup>27</sup> Ademola J. said:

Since the mortgagee and the purchaser are members of the auctioneering firm which sold by private treaty, the onus...is on the mortgagee to show that everything was done fairly and bona fide.

In the above-mentioned case, the onus was not discharged especially as the sale was at undervalue, property worth £1,500 was sold at £600.

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<sup>24</sup> (2002) 10 NSCQR (Pt2) 895 at 900.

<sup>25</sup> *Supra*.

<sup>26</sup> *Hewson v Cleeve* (1904) 2 Ir. R.536.

<sup>27</sup> *Supra*.

The principle of separate corporate legal personality is indeed established in Nigerian Law.<sup>28</sup> It therefore follows that a mortgagee may sell the mortgaged property to an incorporated company of which he is a member and, where the company is the mortgagee, he too may buy from the company. Where there is bad faith in the sale or conduct thereof to or by a corporate person, the corporate veil may be lifted and the sale vitiated.<sup>29</sup>

Where the sale is tainted with fraud, no court will sustain it as the transaction would not be real transaction but a sham, completely founded on criminal conduct.<sup>30</sup>

Where there is a close relationship between the mortgagee and the purchaser, the sale will be scrutinized and will only be upheld if the mortgagee proves that he took reasonable precautions to obtain the best price reasonably obtainable at the time of sale. The facts of *Twe Kwong Lam v Wong Chit Sen*<sup>31</sup> is illustrative on this point. The company that purchased the mortgaged property had the mortgagee, his wife and sons as Directors. At the auction, the only bid came from the mortgagee's wife on behalf of the company. The funds for the purchase were advanced by the mortgagee to the company as an interest-free loan. No independent expert advice was obtained to ascertain the value of the property at the time of sale. The sale was set aside.

The mortgagee should consult experts as to the best method of sale whether the property should be sold by auction or private treaty. Where the sale is to be by auction, the mortgagee should take expert advice on the reserve price. In the Irish case of *Holohan v Friends Provident and Century life Office*<sup>32</sup>, the mortgagee was advised by its surveyors that a better price would be obtained if vacant possession is obtained from the tenants. The mortgagee brushed the expert advice

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<sup>28</sup> Section 37 CAMA, Cap 59, Laws of the Federation of Nigeria, 1990; *Salomon v Salomon & Co. Ltd.* (1897) A.C. 22 at 51.

<sup>29</sup> E. E. Essien, *Law of Credit and Security in Nigeria*, op.cit. p.248.

<sup>30</sup> *Bank of the North v Muri* (1998) 2 NWLR (Pt. 536) 153; *NHDS Ltd v Mumuni* (1977) 2 SC 57.

<sup>31</sup> (1983) 2 ALL ER 54.

<sup>32</sup> (1966) I.R.I.

aside and proceeded to sell. The Irish Supreme Court set the sale aside.

The mortgagee is not obliged to postpone the sale or adopt a method of piecemeal sale for the purpose of enhancing the best price. The timing of the exercise of a right of sale by a mortgagee is within his unfettered discretion. In *Temco Engineering and Co Ltd v Savannah Bank of Nig. Ltd.*,<sup>33</sup> some of the mortgaged plots were small while others were large. The market value of the small plots was between ₦125, 000 and ₦135, 000, and the large plots between ₦175, 000 and ₦200, 000. The mortgagee sold the small plots for ₦90, 000 and the large one for ₦130, 000. The mortgagor's plea of undervalue was rejected in the light of evidence that there was a slump in the property market arising from economic depression and political uncertainty at the time of sale.

In cases as in above, the onus rests on the mortgagor to prove that the property was sold at a gross undervalue, thereby raising a presumption of fraud. On proof of this, the onus shifts to the mortgagee to give evidence of slump in the property market or some other factors that occasioned the sale at the price at which he did.

In *Eka-Eteh v Nigeria Housing Development Society*,<sup>34</sup> the property was mortgaged for a loan of £2,500 in September 1962. On the mortgagor's default, the property was sold for £2,850 in November 1964. In the mortgagor's suit to set the sale aside on the ground of undervalue, the trial judge rejected the valuation of surveyor which the mortgagor put in evidence as unsatisfactory. On appeal, Ibekwe, J.S.C. said, at that point "the plaintiff's claims for damages stood like a broken reed – lacking the very support which it so badly needed."

In *Yakasai v Tropical Commercial Bank PLC*<sup>35</sup> the mortgaged property was advertised for sale at ₦250, 000 but was sold at a public auction at ₦45, 000. Fraud was neither pleaded nor evidence of it adduced. The court of Appeal could not pronounce on the issue of

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<sup>33</sup> (1995) 5 NWLR (pt 397) 607

<sup>34</sup> (1973) NSCC 373.

<sup>35</sup> (1997) 10 NWLR (pt 526) 694. See also *Ikeanyi v African Continental Bank Ltd.* (1991) 7 NWLR (pt 205) 626.

undervalue or fraud in the absence of evidence to ground the mortgagor's argument that the property was sold at an undervalue. However, in *Pinnock v G. B. Ollivant and Co. Ltd.*,<sup>36</sup> the plaintiff as surety, additionally mortgaged his landed property to the defendant. The debtor defaulted and the defendant gave notice to sell the mortgaged property to realise the debt, which then stood at about £76. On receipt of the notice the debtor made further repayments to the defendant, which reduced the outstanding debt to below £40. The defendant then sold the property for £40, admittedly £100 below its estimated market value. The court held that the price at which the property was sold made the sale "an utterly discreditable transaction."

Where mortgagee, in the exercise of his power of sale, commits blunder and there is considerable loss occasioned by it, he will be liable to the subsequent mortgagee or the mortgagor since he is a trustee of the proceeds of sale.

Salmon, L.J. in *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*<sup>37</sup> said:

I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it...given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.

It is submitted that a mortgagee obtaining a fair valuation of the mortgaged property which is the true market value before embarking on the sale would measure up to the required standard.

Furthermore, emphasis must be placed on the fact that the sale must be a true sale. A 'sale' by the mortgagee to himself, either directly or through an agent is no true sale and may be set aside or ignored.

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<sup>36</sup> (1934) 2 WACA 164.

<sup>37</sup> (1971) 2 All ER. at p. 646.

## 6. The Pitfalls in the Power of Sale

The mortgagee may discover to his astonishment that the instrument or transaction embodying the power of sale is void and therefore unenforceable. This state of affairs may arise as a result of one or a combination of the following factors:

- i) The property, the subject of the mortgage is a family property and requisite consent was not obtained.
- ii) Lack of consent as required under sections 21 or 22 of the Land Use Act
- iii) Lack of registration of the mortgage document at the deed registry.
- iv) Lack of registration of the mortgage document at the Corporate Affairs Commission if created by a company.

### i. Consent Requirement under Customary Law

It is generally agreed that family property is owned by members of a particular family and no individual member has an alienable right over the property without the consent of the principal or important member of the family.<sup>38</sup>

Customary law land holding pattern still subsists even after the introduction of the Land Use Act.<sup>39</sup> Thus where land belonged to the family or community before the Act, the family or the community as the case may be, has right of occupancy of the land. A mortgage of such family land requires the consent of the head and all the principal members of the family,<sup>40</sup> before that of the Governor. Obtaining the latter consent without the former does not suffice to create a mortgage and vice versa. Thus the double consent requirement must be met for a valid mortgage transaction.

Where only the consent of the head of the family or that of the head and some important members of the family is obtained without the consent of some principal members, the mortgage is voidable at the instance of the principal members whose consents were not obtained.

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<sup>38</sup> *Kadiri Adagun v Fagbola* (1932) 11 NLR 110, *Oyebanji v Okonola* (1968) NMLR 221.

<sup>39</sup> Cap. L5 Laws of the Federation of Nigeria, 2004

<sup>40</sup> *Aganran v Olushi* (1907) 1 NLR 117; *Ekpendu v Erika* (1959) 4FSC 79.

Where only a member who is not the head of the family consented to the mortgage, the transaction is not only voidable but also void.<sup>41</sup> It is also necessary that the property be properly described as family or communal property rather than as individual property of the person consenting, since in the latter case the transaction will be void even if the individual is the head of the family.<sup>42</sup>

If an individual member uses family property to secure personal debt without consent of the other members, those other members, on being aware of the transaction, are entitled to bring an action to set aside the security transaction and repossess the property. In *Barclays Bank D. C. O. v Olofintuyi & Ors*,<sup>43</sup> the plaintiff bank sought for a declaration setting aside a deed of conveyance executed in favour of the first defendant by the second defendant as a representative of the family. The second defendant had created a mortgage over the property in favour of the plaintiff to secure the payment of the then existing and future liabilities of the second defendant to the plaintiff bank. The property was subsequently sold and conveyed to the first defendant. The court had to determine whether the disposition was in fraud of the plaintiff. This, the court held was in affirmative because the conduct of the second defendant in selling the property in dispute, as admitted by him, was in clear fraud of the rights of the plaintiffs in it.

Also in *Kadiri Adagun v Fagbola*,<sup>44</sup> a member of the family purported to mortgage the property allotted to him; the mortgage deed was cancelled at the instance of the family on the ground that he had no alienable interest in the property.

It therefore follows that even where family or communal land has been allotted to a member, the family consent is still necessary before the member can mortgage the allotted portion of land because an allotment of family property under customary law means no more than a mere permission from the family to make use of the family land and the title remains with the family. Therefore, an allottee of family

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<sup>41</sup> *Ekpendu v Erika, Supra*

<sup>42</sup> *Adejumo & Ors. v Ayantegbe* (1989) 3 NWLR ( Pt.110) 417 held no 4.

<sup>43</sup> (1961) WRNLR 252.

<sup>44</sup> *Supra*

property cannot make any valid disposition of the family land (or encumber it, example by mortgage) without consulting the elders of the family and their consents must in all cases be given before a grant can be made to a stranger.<sup>45</sup>

A mortgagee must be circumspect enough to avoid taking family property as security for loan granted to an individual member of the family. If it becomes necessary to take such a property as security, he must endeavour to obtain the consent of all the principal members of the family to obviate a situation whereby the mortgage will be declared null and void at the point he intends to exercise his power of sale. The other members of the family may not be aware of the transaction until the mortgagee takes steps to enforce his right.

#### ii. Consent Requirement under The Land Use Act

Under Sections 21 and 22 of the Land Use Act, the approval of the Local Government or consent of the Governor of the state (whichever is applicable) is required for a valid mortgage of interest in land. The Act provides:

S.21. It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever:

- a) Without the consent of the Military Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable sheriffs and civil process law, or
- b) In other cases without the approval of the appropriate Local Government.

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

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<sup>45</sup>

*Adejumo & Ors v Ayantegbe*, supra

In *Savannah Bank (Nigeria) Ltd. v Ajilo*,<sup>46</sup> the respondent mortgaged his land, which he acquired prior to the Land Use Act 1978 to secure a loan, which was granted to a company where he had majority shares. When he defaulted, the mortgagee sought to sell the property. He commenced proceedings to restrain the mortgagee from selling on the ground that the mortgage was void, the Governor's consent not having been obtained to it. The case was argued on the narrow but technical contention that since the mortgagor acquired his land prior to the Land Use Act, there was no need for consent to validate the mortgage. The Supreme Court however held that section 22 governs all statutory rights of occupancy, whether expressly granted by the Governor under Section 5 (1) (a) or deemed granted under section 34 (1) – (4).

It is submitted that *Savannah Bank v Ajilo*'s<sup>47</sup> case appears to illustrate the fact that Governor's consent is required for alienation of all types of statutory right of occupancy.

Furthermore in *Rockonoh Property Co. Ltd. v NITEL*,<sup>48</sup> the Supreme Court held that the absence of necessary ministerial approval or consent in an instrument requiring such is a serious defect which vitiates the title sought to be conferred by the relevant instrument such instrument is null and void even if registered with Land Registry.

In *International Textiles Industries Nigeria Ltd. v Aderemi*,<sup>49</sup> the Supreme Court held that in accordance with the *Savannah Bank v Ajilo*'s<sup>50</sup> case, that by virtue of Section 22 of the Land Use Act, the holder of a right of occupancy alienating or transferring his right of occupancy must obtain the consent of the Governor to make the transaction valid. If he fails, then the transaction is null and void under Section 26 of the Act.

However, I submit here that the provision of the Land Use Act does not just provide that consent should be obtained to a mortgage, rather it makes it the duty of the holder of a statutory right of

<sup>46</sup> (1989) 1 NWLR (Pt.77) 305.

<sup>47</sup> *Supra*.

<sup>48</sup> (2001) 7 SC (Pt.111) 154.

<sup>49</sup> (1999) 6 SC (Pt.1) 1; *UBN Plc v. Ishola* (2001) 15 NWLR (Pt.735) 47.

<sup>50</sup> *Supra*.

occupancy to obtain consent before alienation. The section provides that “it shall not be lawful for the holder of a statutory right of occupancy to alienate without consent.”

The reasoning of the Supreme Court Justice is predicated upon the provisions of section 26 of the Land Use Act, which renders the instrument or transaction conferring interest in land not in accordance with the provisions of the Act null and void.

### iii. Registration of Instrument of Mortgage

Most States of the Federation have provisions in their respective Land Instrument Registration Laws requiring the registration of instruments affecting land rights and interests.

In *Okunsanya v Ogunfowora*,<sup>51</sup> the legal mortgage was registered in the Lagos Land Registry without the prior consent of the Governor. In his testimony, the Registrar of Instrument testified that by virtue of Section 25 of the Land Instrument Registration Law, the registration was regular. Undoubtedly, he was in error. Section 10 of the Law provides that a document that requires consent cannot be registered unless consent has been obtained.

Also, in *Elkali v Fawaz*,<sup>52</sup> it was held that a document for which consent has not been obtained is not an instrument for purpose of registration.

In *Alimi Lawal v G. B. Olivant (Nig) Ltd.*,<sup>53</sup> the plaintiff appellant instituted the action asking for a declaration that the purported registration of the deed of conveyance dated 2<sup>nd</sup> February, 1961 and registered as No.6 at page 6 in volume 430 of the Register of Deeds kept in Lands Registry at Ibadan was illegal, null and void and of no effect. This assertion was premised on the facts pleaded that the plaintiff is an illiterate person and the deed was not executed by him in the presence of a Magistrate or Justice of the Peace. The Supreme court upheld the decision of the trial court to the effect that since there is no evidence either oral or patent on the face of the deed that it was executed in the presence of a Magistrate or Justice of the Peace, that

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<sup>51</sup> (1997) 9 NWLR (Pt.520) 347.

<sup>52</sup> (1940) 6 WACA 212, 214.

<sup>53</sup> (1972) 3 SC 129.

the instrument ought not to have been accepted by the Registrar for registration. Consequently, the registration was declared illegal, null and void.

In *Ejilemele v Opara & Anor*,<sup>54</sup> It was held by the Court of Appeal that by virtue of the Land Instruments Registration Law, 1963 of Eastern Nigeria (applicable in Rivers State) registration shall not cure any defect in any instrument or confer upon it any effect or validity which it would not have otherwise had.

It is necessary to state here that where the mortgage is created by a company, such instrument creating the mortgage should be registered. Section 197(1) of the Companies and Allied Matters Act<sup>55</sup> provides that every charge including a mortgage created by the company, shall be void against the liquidator and any creditor of the company if the instrument creating the charge is not delivered to the Corporate Affairs Commission for registration.

However the full consequence of the above-discussed statutory provisions will dawn on the mortgagee whenever he tries to exercise the perceived power of sale. More often than not, it is the mortgagor that rushes to court to obtain an injunction to restrain the mortgagee from carrying on with the planned sale. The mortgagee can only establish his right to sell by reliance on and production of the instrument creating the legal mortgage. If this instrument has been rendered void or inadmissible as a result of lapses, it becomes impossible to prove the existence of a mortgage and the resultant power of sale embodied therein. A mortgagee should comply with statutory provisions as regards the perfection of instruments so as to enable him reap the benefits bestowed by laws regulating mortgage transaction.

## 7. Conclusion

From the above discussions, it is evident that a mortgagee exercising his power of sale is prone to a lot of obstacles. This may arise as a result of faulty documentation. However care should be taken to ensure that mortgage instrument is properly drafted to reflect the

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<sup>54</sup> (1998) 9 NWLR (Pt.567) 587 at 591.

<sup>55</sup> Cap P20, Laws of the Federation 2004.

applicable laws. Various modes of creating a legal mortgage under different legal regimes applicable in different parts of Nigeria are enumerated. It therefore follows that it may be an ineffective security documentation to create a charge by deed expressed to be by way of a legal mortgage over a landed property situate in any of the Eastern States.

A mortgagee should not think that a mortgagor would fold his arms to watch his property being sold as it has been shown that whenever the mortgagee wants to enforce his security by sale, the mortgagor would be the first to run to the court for injunction to restrain the mortgagee from selling.

There are a plethora of cases on this subject including; *Savannah Bank Limited v Ajilo*<sup>56</sup> and *Awojugbagbe Light Industries Ltd v P. N. and N. I. D. B. Ltd*<sup>57</sup>. Such suits turn out to be vexatious and serve no useful purpose other than to stall for time and frustrate the mortgagee in the exercise of his power of sale.

It can be discerned from the discussion that the grant of consent either by the family or Governor and/or Local Government is of the essence in the valid creation of a mortgage. In *Akpadiaha v Owo*,<sup>58</sup> it was held that an allottee of family land even if he developed the land, cannot alienate it without consent of the family. An allotment is no more than a mere permission or license from the family to make use of family land. The law<sup>59</sup> makes it obligatory for Local Government approval or Governor's consent to be obtained for transfer or alienation of any right of occupancy.

However the requirement of consent to a creation of mortgage is justified by the fact that there is need to monitor and regulate such transaction as it may result in title passing to the mortgagee. Hence, the mortgagee should ensure that the requisite consent is obtained to validate the transaction so that a valid title would be transferred to the purchaser on his exercise of power of sale and will effectively give him the power to sell when the need arises.

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<sup>56</sup> (1989) 1 NWLR (Pt.77) 305.

<sup>57</sup> (1993) 1 NWLR (Pt. 270) 485.

<sup>58</sup> (2002) 1 AKSLR 106.

<sup>59</sup> The Land Use Act 1978.

Finally, the mortgagee should ensure that the mortgage instrument is properly drafted to reflect the applicable law and is registered to validate the transaction so that he can exercise his power of sale when the need arises.

The statutory provisions guiding the power of sale should be strictly complied with before such power can be exercised and where in doubt can apply to the court for the enforcement of his remedies where he had secured a legal mortgage.