

Mortgagor's Rights in a Mortgaged Property considered.
By
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Abstract

The ever-expanding scope of global commerce with the attendant rise in the demand for fiscal liquidity for business exigencies has given credence to the growing relevance of mortgage financing specifically and secured credit transactions generally. One of the most fascinating aspects of the intricate concept of mortgage at common law is the myriad of opportunities afforded a mortgagor to redeem a property used as security as against the stringent and often technical conditions a mortgagee must comply with to enforce mortgage security. It is often assumed that most of the principles regulating mortgages at common law are designed to favour a mortgagor in addition to the ample protection afforded a mortgagor as well in equity. This paper seeks to examine the position of the law and equity vis-à-vis the rights of a mortgagor over a mortgaged property as well as the legal limits of a mortgagee seeking to enforce his security.

1. Introduction

According to *Black's Law Dictionary*¹ a mortgage is defined as an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt. In *Cousins'* classical work on mortgages², a succinct historical explanation of the evolution of the English mortgage was highlighted thus:

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¹ Bryan A. Garner: *Black's Law Dictionary* (6th ed.) (St. Paul, Minn: West Publishing, 1990), p. 1009.

² E. Cousins and I. Clarke, *The Law of Mortgages*, (2nd ed.), (London: Sweet and Maxwell, 2001), p. 11.

The practice of giving rights over land as security for debt is of great antiquity. Until the end of the twelfth century the transaction was by way of lease by the mortgagor to the mortgagee, and was either a *vivum vadium* (live pledge) or a *mortuum vadium* (dead pledge), mort i.e. (dead), gage (pledge).

Commenting on the essential nature of a mortgage in modern parlance, learned authors *Megary and Wade* wrote:³

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 i.e. that upon repayment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be reconveyed. The borrower is known as the 'mortgagor', the lender as the 'mortgagee.'

Several efforts have been made by the courts in Nigeria to define mortgage. In the case of *Intercity Bank Plc. v Fred and Food Farms Nig. Limited*⁴ a mortgage is defined as a conveyance of property as security for a debt which is lost or becomes dead to the debtor if the money or the interest due thereon is not paid on certain date. The court said further:

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.⁵

³ Megary and Wade, *The Law of Real Property*, (6th ed.), (London: Sweet and Maxwell, 2003), p. 1169.

⁴ (2001)17 NWLR [pt. 742] 349.

⁵ See also: I.O. Smith, *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications (Nigeria) Limited, 2001), p. 35, where mortgage is defined as "a legal or equitable conveyance of title as a security for the payment of debt or the discharge of some other obligations for which it is given, subject to a condition that the title shall be re-conveyed if the mortgage debt is liquidated."

2. The Nature of a Mortgage

The most essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in a property with a provision for redemption. That is, upon repayment of the loan, the conveyance shall become void and the interest shall be reconveyed.⁶

It is basically a security transaction and at equity, as long as the security remains intact, there is no justification for expropriating the property of the mortgagor merely because of his inability or failure to make prompt payment. All that the mortgagee is entitled to is the assurance of repayment of money or performance of other obligations. A mortgage is merely an additional security provided by a mortgagor to reassure the mortgagee that money or other obligations secured will be repaid or performed and not that it should or will be repaid out of the mortgaged property. Reiterating this principle, learned authors *Cheshire and Burn* opined:

In natural justice and equity, the principal right of the mortgagee is to money and his right to the land is only as a security for the money. Hence the rule established by courts of equity was that a mortgagor must be allowed to redeem his fee simple, despite his failure to make repayment on the appointed date. Time was not therefore to be of the essence of the transaction. The position is that upon the date fixed for repayment, the mortgagor has at Common law a contractual right to redeem. If the date passes without repayment, he obtains a right to redeem in equity.⁷

Commenting also on the nature of a mortgage at law, learned authors, Cousins and Clarke⁸, stated:

Although the essence of a mortgage transaction is the charging of property as security for performance of an

⁶ See: *Bank of the North (Nigeria) Limited v Akintoye* (1999) 12 NWLR (pt. 631) 392; for further discussion on mortgage, see I.O. Smith, *Practical Approach to Law of Real Property in Nigeria*, (1st ed.) (Lagos: Ecowatch Publication, 1999), p. 236.

⁷ *Ibid.*

⁸ Cousins and Clarke, above note 2 at p. 2.

obligation, the transaction had for centuries been carried out by conveying an estate in land to the lender....The purpose of security is to afford the obligee some additional means of enforcing the performance of the obligation by, or extracting the money equivalent from the obligor. Thus a lender is often unwilling to rely solely on the borrower's personal credit, and requires a greater certainty of repayment than the mere possibility of enforcing the claim in an action of debt.

Once a mortgage is created, the mortgagor can no longer deal with the object of the mortgage freely because it is encumbered. The property can only be released from the encumbrance by discharging the obligation secured by it to the mortgagee. This is known as the mortgagor's right to redeem. This right is an integral part of the mortgagor's equity of redemption. Generally at common law, where a mortgagor defaults in the repayment or performance of any obligation secured under a mortgage, the property becomes vested in the mortgagee at the expiration of the date fixed in the Deed of mortgage. However, in equity, the mortgagor will be allowed to redeem the property after his default.⁹ This right will still arise even if the parties have made time to be of essence in the mortgage contract. This right to redeem in equity will subsist until the mortgagee has exercised such powers as he may have to destroy the borrower's equity of redemption by statute, foreclosure, sale or release.¹⁰

Let us now consider the various rights assured to the mortgagor both in law and in equity as a precursor to the topic under consideration.

3. Mortgagor's right to redeem:

Despite the conveyance of right of property to the mortgagee, the mortgagor remains the real owner of the mortgaged property and has an estate in the form of equity of redemption which entitles him not only to redeem his property after the contractual date has passed but also to deal with the beneficial ownership by selling, charging or leasing the property subject only to the mortgagee's encumbrance. His

⁹ *Hunter v Seton* (1802) 7 Ves. 265.

¹⁰ *Weld v Petre* (1929) 1 Ch. 33 at 43.

equitable title subsists until extinguished by lapse of time, release, sale or foreclosure.¹¹

One essential feature of a mortgage which distinguishes it from other forms of secured credit transaction is the fact that it is basically aimed at providing collateral assurance of repayment as against assignment, gift or lease of the land. Hence the right of a mortgagor to redeem a mortgage must not, in any way, be impaired or clogged. This principle was established in the famous case of *Samuel v Jarrah Timber and Wood Paving Corporation Ltd*¹² vide the now popular maxim that “once a mortgage, always a mortgage, there must be no clog on the equity of redemption”.

Expatiating on this, the Supreme Court in *Ejikeme v Okonkwo*,¹³ stated inter alia:

It is a settled rule of equity that any agreement which directly bars the mortgagor's right of redemption is ineffectual. Similarly, stipulations which, even indirectly tend to have the effect of making a mortgage irredeemable, are equally void and unenforceable as clogging the equity of redemption.

Also in *Rafuka v Kurfi*¹⁴ the apex court reiterated the foregoing principle when it stated that:

...the right of a mortgagor to redeem his mortgaged property cannot be taken away even by an express agreement of the parties. 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 Deed.

Reiterating the right of a mortgagor to redeem, the Court of Appeal stated , inter alia, in *Ndaba (Nig.) v Union Bank (Nig.) Plc*¹⁵ thus:

¹¹ Smith, *Nigerian Law of Secured Credit*, above note 5 at p. 65.

¹² (1904) A.C. 323 per Lord Macnaghten at 326.

¹³ (1994) 8NWLR (pt.362)266.

¹⁴ (1996) 6 NWLR (pt. 453)235.

¹⁵ (2007) 9 NWLR (pt. 1040) 439.

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 particular person. The right of equity of redemption continues until mortgagor's title is extinguished or the interest destroyed by sale either under the process of Court or by the mortgagee.

Upon the creation of a valid mortgage (legal or equitable), a mortgagor possesses three distinct potential rights to redeem the mortgage property. One of these rights is in law, while the other two are rights in equity. They will now be examined in turn.

4. Contractual or legal right to redeem:

This is the right specifically reserved to the mortgagor in the mortgage contract to recover his property, as the owner in law, upon discharging the obligations which the mortgage was created in order to secure. At law the contract is construed so strictly that a mortgagor exercising his right to redeem must comply punctiliously with the proviso for redemption. Thus a mortgage to secure a money loan ordinarily fixes a definite date for repayment and at law repayment must be made precisely on that date.¹⁶

At common law and in equity, a mortgagor has no right to redeem before the legal due date stipulated in the instrument creating the mortgage.¹⁷ In the same vein, the mortgagee has no right in law and in equity, to call in his money before the stipulated date unless there is a special agreement to that effect.¹⁸ After the stipulated date, the mortgagor ceases in law to have any right to redeem his property.

Generally the date for repayment and redemption may be suspended for any period, however long, provided that the mortgage contract is not a device to render the right as well as the equity of redemption illusory or otherwise a cloak for an unconscionable bargain. In practice the period (that is the prescribed date of

¹⁶ Cousins and Clarke, above, note 2 at p. 359.

¹⁷ *Brown v Cole* (1845) 14 Sim. 427.

¹⁸ *Williams v Morgan* (1906) 1 Ch. 804.

redemption) is usually short because it is an advantage to the mortgagee to place the mortgagor in default as soon as possible.

In *Twentieth Century Banking Corporation Limited v Wilkinson*,¹⁹ the danger of fixing a date too far in future for the redemption of a mortgage was highlighted as a mortgagee was refused the right to enforce his security until the contractual [legal] due date, fixed to be thirteen years, has arisen. Over the years therefore, it has become an acceptable conveyancing practice at common law to fix a shorter date than the contractual date for redemption.

5. Equitable Right to Redeem:

It is the right of a mortgagor to recover his security by discharging his obligations under the mortgage despite the fact that the time fixed by the mortgage contract for the repayment or the performance of the obligation(s) has passed. Put differently it is the right of a mortgagor to recover his mortgaged property after the expiry of the legal right to redeem through its non-exercise on the contract date.

According to Lord Bramwell in *Salt v Marquess of Northampton*:²⁰

The right to redeem in equity is therefore a right given in contradiction to the declared terms of the contract between the parties.

In modern times, it is generally implied that a mortgagor has a right to redeem even after default on the date named for redemption.²¹ Hence Maitland in his classic, *Equity*²², wrote:

The common law mortgage by conveyance is one long *suppressio veri* and *suggestio falsi*.

¹⁹ (1977) Ch. 99

²⁰ (1892) A.C.1 at 18

²¹ See *Kreglinger v New Patagonia Meat and Cold Storage Co. Limited* (1914) A.C. 25 per Lord Parker at p. 50.

²² J. Brunyate, (ed.) *Maitland on Equity*, (2nd ed.), (Cambridge: Cambridge University Press, 1936), p. 182.

It is perhaps safe to assert that this right of a mortgagor is a superimposition of equity on the mortgage agreement and it gives the mortgagor a continuing right to redeem which may be exercised at any time before the right is destroyed by foreclosure.

6. Equity of Redemption:

This right of a mortgagor must be distinctly distinguished from that which arise after the legal due date has passed. In *Kreglinger v New Patagonia Meat Co.*,²³ Lord Parker pointed out that equity of redemption arises simultaneously in favour of the mortgagor as soon as a mortgage is created. The law Lord stated that a mortgagor's equity of redemption arises "as soon as pen is put on paper, before it dries up ..." Equity from the outset treats the mortgagor as continuing to be the owner of the property which he has conveyed away, subject only to the mortgagee's interest which is not a right to the mortgaged property but to the mortgage debt²⁴. Hence a mortgagee's beneficial interest in the security is only as a means for enforcing his right to the debt and nothing more.

In the light of the foregoing, it is submitted, that the equity of redemption is not only an equitable right but a proprietary interest. In England before 1926²⁵, equity of redemption was construed as an estate. In *Casborne v Scarfe*,²⁶ it was held, *inter alia*, that:

An equity of redemption has always been considered as an estate in the land, for it may be devised, granted or entailed with remainders and such entail and remainders may be barred by a fine and recovery, and therefore and therefore cannot be

²³ Above, note 21 at p. 48.

²⁴ See: *Okonkwo v C.C.B. (Nig.) Plc.* (2003) 8 NWLR (pt. 822) 347; *UBA Plc. v Okeke* (2004) 7 NWLR (pt. 872) 393.

²⁵ Sections 85 and 86 of the Law of Property Act 1925 have not only codified the common law position prior to the Act, it has also amplified the ambit of the rights accruing to the mortgagor by virtue of his equity of redemption. A mortgagor now possesses not merely his equitable title but also a legal reversion. For further reading on the current position in England, See: *Halsbury's Laws of England*, vol.32 (London: Butterworth, re-issue, 1999), para.503.

²⁶ (1738) 1 Atk. 603 Per Lord Hardwicke

considered as a mere right only, but such an estate whereof there may be a seisin.

In giving credence to the potency of a mortgagor's equity of redemption, the Courts have placed it on the same footing as the equity of *cestui que trust*.²⁷ A mortgagor's equity of redemption is therefore not only his right to redeem but also his right to the beneficial ownership of the mortgaged property during the continuance of the mortgage.

Having this equitable title, he may deal with the beneficial ownership just as if he had never made a mortgage, he may sell it, settle it create charges upon it, demise it, he may do anything he pleases with it, subject only to the mortgagee's incumbrance. Moreover he will continue to have an equitable title to the property until his title is terminated.²⁸

In the case of *Re Sir Thomas Spencer Wells*²⁹ the English Court of Appeal held, *inter alia*:

In equity the mortgagor is regarded as the owner of the mortgaged land subject only to the mortgagee's charge, and the mortgagor's equity of redemption is treated as an equitable estate in the land of the same nature as other equitable estates....It would just be unconscionable for a mortgagee to set up a claim to hold the land comprised in his mortgage free from the equity of redemption as it would be for a trustee to set up a claim the trust property in his hand for his own use. Consequently, the reasoning which has induced the Court to hold that a trustee cannot on failure of the trusts set up his legal title so as to defeat the Crown's claim to *bona vacantia* applies with equal force to a mortgage of a leaseholds where the mortgagor, being an individual has died intestate without next of kin, or being a company, has been dissolved.

²⁷ See: *Casborne v Scarfe*, above, note 26. See also: *Re Sir Thomas Spencer Wells* (1933) Ch. 29

²⁸ See: *Weld v Petre* (1929) 1 Ch. 33 at 42.

²⁹ (1933) Ch. 29.

Other interests of the Mortgagor in a mortgaged property include the following:

a. Where Mortgagee takes possession:

Although the mortgagee is entitled to take possession of the mortgaged property, especially in a legal mortgage, he is liable to the mortgagor for profits made or that prudently ought to have been made. For instance, it is not enough for the mortgagee to argue that when he took possession, no tenant rented or took a lease of the mortgaged property. Equity insists that the mortgagor ought to have used his best endeavour to ensure that the property was leased at the prime market rate for similar property in the neighbourhood.

Hence in practice, the mortgagee is discouraged from taking possession strictly in law except as a way of protecting the security.

b. Where the mortgagor remains in possession:

He enjoys rents and profit exclusively from the property without having to account to the mortgagee and notwithstanding that the security is insufficient.³⁰ While in possession, the mortgagor can create leases binding between himself and the tenant upon the principle of estoppels³¹; although not binding upon the mortgagee should the latter assert his paramount title to possession. This power to create leases effective between the mortgagor and his lessee is fundamental and cannot be adversely affected by an agreement which restricts the statutory power to create leases by making its exercise subject to the prior consent of the mortgagee.³²

It is however opined,³³ and rightly so in our view, that the position of the mortgagor in possession is precarious and unless such right is reserved under an agreement, the mortgagee has the option to

³⁰ See: *Ex-parte Wilson* 35 ER p.315.

³¹ See: *Marriot v Edwards* (1834) 6 C & P., p. 208.

³² See: *Trent v Hunt* (1853) 9 Exch. p. 14.

³³ See: Smith, *Practical Approach to Law of Real Property in Nigeria*, above, note 6 at p. 65.

treat him as his tenant or as a trespasser.³⁴ It is therefore strongly advised that a Solicitor acting for the mortgagor must ensure that the right of the mortgagor to remain in possession is agreed upon and incorporated into the Deed of mortgage between the parties.

c. Mortgagor as equitable owner

In this capacity, a mortgagor is entitled to equitable remedies such as bringing application before the Court restraining a lessee or a third party from causing damage to the mortgage security.³⁵ The rationale for this is to ensure that the reversionary title of the mortgagor is not endangered.

d. Surplus from the proceeds of sale

Section 21(3) of the Conveyancing Act³⁶ as well as section 127 of the Property and Conveyancing Law³⁷ stipulates the order of disbursement of the proceeds of sale of a mortgaged property³⁸. It must be applied as follows:

- i. Payment into court for the satisfaction of prior encumbrances;
- ii. Payment of all costs, charges and expenses properly incurred by the mortgagee as incidental to the sale, attempted sale or otherwise;
- iii. Payment of the principal mortgage sum as well as accrued interest and costs;
- iv. Payment of other money, if any, due under the mortgage; and

³⁴ See: *Patridge v Bere E.R.* vol. 10 p. 1311.

³⁵ See: *Van Gelder, Apsimon & Co v Sowerby Bridge & Co. Society* (1890) 44 Ch. p.374.

³⁶ 1881

³⁷ 1959 of the defunct Western Nigeria (now made up of Delta, Edo, Ekiti, Ogun, Ondo, Osun and Oyo States) of Nigeria.

³⁸ See: *Okonkwo v Cooperative & Commerce Bank (Nig.) Plc.* (2003) 8 NWLR (pt. 822) 347. See also: *Ibiyeye v Fojule* (2006) 3 NWLR (pt.968) 640.

- v. The residue of such money shall be paid to the person entitled to the mortgaged property (the mortgagor) or to the person authorized to give receipts for the proceeds of sale.

From the foregoing statutory prescription, the surplus remaining after satisfying all expenses arising from a mortgage transaction must be promptly remitted to the mortgagor. This is the underlying explanation for the assertion in law that, although a mortgagee is not a trustee of the mortgagor for the sale of a mortgaged property³⁹, he is a trustee for the proceeds of sale.

e. Right to reopen a foreclosure order absolute

A foreclosure order may be re-opened at the instance of a mortgagor if:

- i. The mortgagee after obtaining a foreclosure order sues the mortgagor on his personal covenant to pay the loan; or
- ii. The mortgagor after the foreclosure order absolute without delay applies to court and he is able to satisfy the Court that his inability to redeem the mortgage had been due to circumstances beyond his control;
- iii. That the property is worth more than the amount of the loan; and
- iv. That it is just and equitable that he be allowed to redeem the property.

If the Court is satisfied, the foreclosure may be re-opened and the mortgagor will be allowed to redeem the mortgage.

f. Tracing mortgaged property to a third party

The fact that the mortgage security has been sold by a mortgagee will not prejudice the right of the mortgagor. The equitable doctrine of tracing will act in aid of the mortgagor to follow the mortgage security

³⁹ In the absence of vitiating factors such as fraud or collusion, the mortgagee is not under any obligation to sell a mortgaged property at the mortgagor's reserved valuation price. It will suffice if the property is sold by the mortgagee through a licensed auctioneer by due process in the market overt to the highest bidder.

into the hands of a third party purchaser, especially where it is established that the property was sold *mala fide*.⁴⁰

7. Conclusion:

The foregoing attests to the profound rights and remedies available in law as well as in equity to a mortgagor in a mortgage transaction. It is doubtful if there is any field of law where equity has so prominently intervened to mitigate the rigidity of the law as it has done in the field of mortgage. Apart from the legal protection of a mortgagor, the equitable lee-way for him is so pungently pervasive. This is understandable in view of the near-abstract outlook foisted on a mortgage transaction by its sheer technical nature which were often exploited against a mortgagor who is unable to redeem his mortgage on the legal due date.

These precipitated shrewd mortgagees profiting from the misfortunes of mortgagors. It is strongly submitted that the current favourable disposition of the law and equity towards mortgagors should be sustained to make mortgage transactions attractive to the general public who are already wearied and bugged down by the extreme complexities of mortgage transaction.

⁴⁰ See: S.O. Imhanobe, *Legal Drafting & Conveyancing*, (2nd ed.) (Abuja: Rock-Links Ltd, 2007), p. 392.