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Examining the process of mortgage transaction in Nigerian Law

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Abstract
Mortgage transactions constitute a vital component of property financing and credit security in Nigeria, serving as a bridge between land ownership and access to capital. With the expansion of the banking and real estate sectors, mortgages have become increasingly significant in facilitating economic development. However, the process of creating, perfecting, and enforcing mortgage transactions in Nigeria is often fraught with legal, administrative, and procedural challenges, largely arising from statutory requirements, land tenure complexities, and institutional inefficiencies. This article examined the process of mortgage transactions under Nigerian law with the aim of identifying problems affecting the process of mortgage transactions in Nigeria, making recommendations on the problems discovered. It was found that while Nigerian mortgage law provides a comprehensive legal framework for the creation and enforcement of mortgages, practical challenges such as delays in obtaining Governor's consent, high transaction costs, inefficient land registration systems, and occasional abuse of mortgagee powers continue to undermine the effectiveness of mortgage transactions. It was therefore recommended that the government should commence the process of legal and institutional reforms that aimed at simplifying consent procedures, strengthening land administration systems, enhancing borrower protection, and improving the enforcement of mortgage remedies.

Keywords: Process, mortgage, transactions, nigeria, property, law, remedies

Introduction

Mortgage transactions occupy a central position in Nigeria's system of secured credit and property financing [1]. Rooted in English common law principles received into Nigerian law, the concept of a mortgage has been adapted through statutory provisions and judicial decisions to suit local land tenure realities.

Nigerian courts have consistently recognized mortgages as proprietary security interests that allow land or interests in land to be used as collateral for the repayment of debts. The importance of mortgage transactions has increased significantly with the growth of Nigeria's banking and real estate sectors. Financial institutions rely heavily on mortgages as a means of minimizing lending risks, while borrowers depend on them to access long-term capital for residential, commercial, and industrial development. Therefore, mortgage financing plays a vital role in economic development by enabling the conversion of land assets into active capital. Through mortgage arrangements, individuals and businesses are able to access credit facilities that support housing development, infrastructure expansion, and commercial activities. This contributes to job creation, urban development, and economic growth. In the same vein, the Nigerian courts have acknowledged the commercial importance of mortgages in several decisions. In Afribank v. Alade [2] the Supreme Court recognized the mortgage as a legitimate and essential security device in banking transactions, emphasizing the lender's right to realize its security upon default. This judicial recognition underscores the role of mortgages in sustaining confidence in the credit system. In the case of Adenekan v. Owolewa [3] the Supreme Court reaffirmed the commercial reality that mortgage transactions are indispensable to modern banking operations. The court emphasized that parties who freely enter into mortgage agreements must be bound by their terms, subject to compliance with the law. However, in spite of the economic significance of mortgage transactions in Nigeria, their practical operation is beset by serious challenges. These challenges affect both the creation and enforcement of mortgages and have hindered the development of an efficient and accessible mortgage finance system. For instance, statutory requirements in creating mortgage contracts and bureaucratic bottlenecks under the Nigerian land tenure system are part of the challenges faced in mortgage transactions in Nigeria. The aim of this article is to appraise the process of mortgage transactions in Nigeria, identify some challenges and problems affecting the process and make recommendations in relation to the problems discovered.

Conceptual Overview

Synonymously, the word mortgage is used as loan, lien, property loan, homeowner's loan [4]. Technically, mortgage has been given many definitions. It is fundamentally a legal device that allows an interest in land to be used as security for the repayment of a debt. It creates a proprietary right in favour of the mortgagee, while the mortgagor retains the equitable right to redeem the property upon repayment. In essence, a mortgage balances the interests of the lender, who seeks security for a loan, and the borrower, who retains ownership rights over the property. Denotatively, the term is used to refer to a legal agreement in which a person borrows money from a lender (usually a bank) to purchase property—most commonly a house—and pledges that same property as collateral to secure the loan. If the borrower fails to repay the loan, the lender has the right to seize the property through a process known as foreclosure [5]. Mortgage was also defined as an agreement which may be expressed by deed between persons in which a borrower of a sum of money puts up his property as collateral for the money given with the understanding that the property will be conveyed back to him upon the repayment of the money and any interest on it [6]. Mortgage transaction occurs where the owner of an interest in land, puts forward the land as security to another party in exchange for an advance of a sum of money as loan. The security or collateral remains with the party advancing the sum of money until the money and all interest on it is repaid.

In the case of Olowu v. Miller Bros Limited, [7] the court defined the term mortgage as security created by contract for the payment of a debt already due or to become due. In the case of Adenekan v. Owolewa, [8] the term was defined as an ordinary contract between the mortgagor and the mortgagee. In Intercity Bank Plc v. Feed & Food Farms Nig. Ltd, [9] it was defined as a conveyance of property as security for a debt, which is lost or became dead to the debt if the money or the interest due on it is not paid on a certain date [10]. It should be observed that Nigerian courts not only in the above cases emphasised that a mortgage is not an absolute transfer of ownership but a security arrangement.

Statutorily, the term is described by the Stamp Duties Act (SDA) [11] as a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time; and includes conditional surrender by way of mortgage; any conveyance of any lands, estate or property in trust to be sold; any agreement, contract or bond accompanied with deposit of title deeds; and any deed operating mortgage. Equitable mortgage under the Act means an agreement or memorandum under band relating to deposit of any title deed or instrument being evidence of title to property or creating a charge on lands, tenements or hereditaments, whether expressed to be created by pledge or otherwise [12]. A mortgage may therefore be defined as a conveyance of land or an interest in land by way of security for a debt or obligation, subject to the condition that the conveyance will be void upon repayment of the debt. The Land Used Act [13] recognises the mortgage as a valid form of security, provided statutory requirements, including the Governor's consent, are met.

It should be noted that a mortgage deed is a written agreement which contains written conditions and among the conditions is the provision of the time when the agreement is 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 the mortgagor by the mortgagee.

It is clear from the above that for a better understanding of the concept of mortgage transaction, the features of the transaction should be discussed. The most important feature of a mortgage is that it is a conveyance of a legal or equitable interest in property with a provision for redemption that is, that upon the repayment of the loan, the conveyance becomes void or the interest is re-conveyed. Proprietary nature is another key feature of mortgage transaction [14]. By creating a mortgage, the mortgagor grants the mortgagee a legal or equitable interest in the property, which can be enforced in case of default. This proprietary interest is distinct from a personal obligation and enables the mortgagee to exercise remedies such as the power of sale or foreclosure. The Supreme Court, in Intercity Bank P.L.C V. Feed & Food Farm Nig. Ltd [15]. highlighted that the mortgagee's interest is secured over the property, while the mortgagor retains the equitable right of redemption.

To sum up the features of mortgage, there is a need to understand that mortgage is conveyance of an interest in land to a lender of money. The land is held only as security or collateral to ensure repayment of the money loaned. The property is re-conveyed back to its owner when the money loaned is repaid. However in the event of a failure to repay the money advanced, the lender of the money has the right to sell the land to realise the money advanced. He can also exercise other remedies to ensure payment [16].

Mortgages may be broadly categorised into legal mortgages and equitable mortgages. A legal mortgage is a transfer of a legal estate or interest in land or other property for the purpose of securing the repayment of a debt. An equitable mortgage is one that passes only an equitable estate or interest. For instance, the deposit of title deed with a bank as security for a loan creates an equitable mortgage as against a legal mortgage which is created by deed transferring the legal estate to the mortgagee. An important feature of mortgages, both legal and equitable i that once a mortgage, always a mortgage and nothing but a mortgage. The essential character of an equitable mortgage is that it is an agreement to enter into a legal mortgage. In Kadiri v. Olusola, [17] the court held that it is a well established rule of equity that a deposit of a document of title without (either) writing (or word of mouth) will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit.

It is good to state that for a mortgage to be legally recognized and enforceable in Nigeria, certain essential elements must be present. These are the parties, the mortgage debt, the mortgage property and the intention to create security. Absence of any of these elements can render the transaction invalid or unenforceable.

Accordingly, a valid mortgage requires two primary parties. These are the mortgagor and the mortgagee. The mortgagor is the person or entity who owns or has an interest in the property and seeks to use it as security for a loan. The mortgagee is the lender or financial institution to whom the property is mortgaged as security. Both parties must have legal capacity to contract. Where a corporate body is involved, it must act within its statutory powers, and where individuals are involved, they must have the legal capacity to enter into contractual agreements. Mortgage debt is the second element in the contract of mortgage [18]. It is a fundamental element of a mortgage.

A mortgage cannot exist independently of a secured debt. This debt may arise from a loan, advance, or other contractual obligations, and must be clearly specified in the mortgage deed. The Supreme Court in Adenekan v. Owolewa [19] emphasized that a mortgage is meaningless without an underlying debt or obligation.

Mortgage property is the third element in mortgage transactions. It should be noted that the property to be mortgaged must be identifiable, and the mortgagor must have the legal authority or right to mortgage it. Under Nigerian law, this property is typically land or an interest in land held under statutory or customary rights of occupancy. The property must also be capable of being transferred or assigned to create the security interest. Finally, there must be a clear intention to create a mortgage as a security arrangement, rather than as an outright sale or gift.

Intention is usually expressed in the mortgage deed, which must stipulate that the conveyance of the property is conditional upon the repayment of the secured debt. Courts in Nigeria have consistently held that the intention of the parties is paramount in determining whether a transaction constitutes a valid mortgage, as seen in Afribank Ltd v. Alade [20].

Historically, mortgage law in Nigeria has its origins in English common law, which was introduced during the colonial era [21]. The English legal system provided the foundational principles of mortgages, including the notions of legal and equitable mortgages, the equity of redemption, and the rights and obligations of mortgagors and mortgagees. These principles were received into Nigerian law and have since influenced both judicial reasoning and statutory development.

The adoption of English mortgage concepts provided Nigerian courts with established doctrines for interpreting mortgage transactions, particularly in areas concerning foreclosure, power of sale, and redemption rights. For instance, the equitable principle that a mortgagor has a right to redeem the property even after default known as the equity of redemption remains central in Nigerian mortgage jurisprudence.

Following independence, Nigeria sought to adapt these inherited principles to its unique social, economic, and land tenure context.

The enactment of statutory instruments such as the Land Use Act 1978 and amendments to the Conveyancing Act represented efforts to regulate and formalize land transactions, including mortgages. Nigerian courts have played a significant role in shaping mortgage law through case law. Key judicial pronouncements, such as Afribank v. Alade [22] and Savannah Bank Ltd v. Ajilo [23], have clarified the rights of mortgagees and mortgagors, reinforced the necessity of compliance with statutory requirements, and emphasized the equitable protection of borrowers.

Over time, mortgage law in Nigeria has evolved to balance the interests of lenders ensuring security and predictability and borrowers, by protecting equity of redemption and preventing oppressive practices. This evolution reflects the intersection of common law doctrines, statutory regulation, and judicial interpretation tailored to Nigeria's land tenure system [24].

Mortgage and Other Transactions

Mortgage transactions often intersect with other forms of property arrangements, such as leases, sales, charges, and assignments. Although these transactions may involve similar property, their purposes, effects, and legal consequences are fundamentally different. Understanding these distinctions is crucial for both legal practitioners and financial institutions, as they determine enforceability, rights, and remedies.

Mortgage and Lease

A mortgage is primarily a security instrument, designed to secure the repayment of a debt. In contrast, a lease is a contractual arrangement granting the tenant the right to use and occupy property for a specified period in return for rent. While a mortgage may allow the mortgagor to remain in possession of the property, the primary purpose is to provide security to the mortgagee, not to confer enjoyment or use. The legal consequence is that, in a mortgage, the mortgagee has enforceable rights to the property upon default, including power of sale or foreclosure, whereas a lessee under a lease only has possessory rights and no interest in ownership. Nigerian courts, as in Ogunwale v. Olawepo [25], have emphasised that leasing and mortgaging serve different objectives and are mutually exclusive in purpose.

Mortgage and Sale

A sale involves the transfer of ownership of property from the seller to the buyer for consideration. In contrast, a mortgage does not transfer ownership but merely creates a security interest over the property to secure a debt. The mortgagor retains the equity of redemption, which allows them to reclaim the property upon full repayment of the debt. Courts, including in Kadiri v. Olushola [26] consistently maintains that a mortgage cannot be equated to a sale; ownership remains with the mortgagor, and remedies available to the mortgagee are confined to enforcement of the security interest rather than ownership rights.

Mortgage and Charge

Both charge and mortgage are forms of security interests. However. a charge is a security interest over property without transferring ownership to the creditor, whereas a mortgage involves the transfer of legal or equitable interest to secure a debt as elucidated in the case of Adaran Ogundiani v. O.A.L Araba & Anor [27]. Further, a charge merely creates a lien or encumbrance over the property without transferring ownership. In a charge, the lender's rights are generally contractual and personal, whereas in a mortgage, the lender has a proprietary right enforceable against third parties. Charges, particularly floating charges, are commonly used in corporate finance over movable assets or receivables. Mortgages, on the other hand, are typically employed over real property or immovable assets. Both Mortgage and charge provide security to the creditor. However, a mortgage generally confers stronger proprietary rights and is enforceable through remedies like foreclosure or sale. On the other hand, a charge allows the creditor only to realize the value of the charged asset in case of default but does not convey ownership.

Mortgage and Assignment

An assignment involves the transfer of rights under a contract or chose in action from the assignor to the assignee. Unlike a mortgage, which secures a debt through interest in property, an assignment transfers the benefit of contractual rights, such as rents, debts, or insurance proceeds. While a mortgage typically allows the mortgagor to redeem the property upon repayment, an assignment usually results in the absolute transfer of the assigned rights.

Mortgage and Lian

Lien is a claim or qualified right of a creditor over the property of a debtor which serves as security for the debt or charge or the performance of some other obligation. It was held in Afro Tech Services Ltd. v. Mia & Sons Ltd [28] that lien is the right to retain possession of a property of another until a debt is paid [29]. A lien does not grant a right to sell or to otherwise deal with property and the right is extinguished if the creditor parts with possession to the debtor or his agent [30]. The major difference between a mortgage and a lien is that a lien is a means of coercing the debtor to pay the money advanced to him, rather than as security against payment not being made. Also, a lien may be created over other properties and not necessarily on real property as in mortgages [31].

Mortgage and Pledge

Pledge is a deposit of some personal property to a creditor as a security for some debt or engagement or the performance of some act. The pledgor only has-the right to possession over the property until the debt is satisfied while in mortgages, the mortgagee acquires ownership and the borrower usually retains possession. It is a possessory security as distinct from a proprietary security in mortgages, thus vesting in the pledgee a right to possession of land and enjoyment of the profits, while the radical title remains in the pledgor. In the case of Adetona v. Zenith International Bank Plc, [32] the court succinctly summarises the distinction as follows-

The main difference between a mortgage and a pledge is that in the former, the general title in the property is transferred to the mortgagee subject to be reversed by performance of the condition; whereas, by the latter, the pledgor retains the general title and parts with the possession. By mortgage the title is transferred, by a pledge, possession is transferred [33].

Rights and Duties of Mortgagor and Mortgagee

Usually, both the mortgagor and the mortgagee have series of rights and duties of which they are bound. This enables a working mechanism between both parties. Mortgage transactions give rise to reciprocal rights and duties that reflect both contractual obligations and statutory protections as stated out in the case of Owoniboys Tech Services Ltd. V. U.B.N Plc. [34].

Rights of Mortgagee

Where a mortgage is created, both the mortgagor and mortgagee have certain rights. These rights and remedies include taking over possession of the premises, appointment of a receiver, foreclosure, action in court to recover the sum of money and sale of the property.

In the case of African Continental Bank Limited v. I.D.S. Ltd & Ors, [35] a mortgagee has rights to recover his money. This can be in various ways. He may decide to opt any of them to exercise so as to recover the loan. He may decide to enforce the security against the property. He can sue upon the personal covenant of a mortgagor for payment. He may also decide to go for both. However, where the mortgagee sues, option specifically chosen to recover the money must be clearly stated in his claim.

It should be noted that where the mortgage is made by deed, the mortgagee has power to sell or to concur with any other person in selling the mortgaged property, or any part thereof. This can be either subject to prior charges, or not. It can also be either together or in lots; by public auction or by private contract; subject to such conditions respecting title, or evidence of tile, or other matter. He also has power to vary any contract for sale and to buy in at an auction. He can also rescind any contract for sale and to re-sell without being answerable for any loss occasioned thereby.

Additionally, a mortgagee has power at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature. More so, he has power when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof. He equally has the power to while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract. [36]

The Property and Conveyancing Law (PCL) [37] provides that a legal mortgagee has a right to take possession of the mortgaged property. This right is immediate, not contingent upon the default of payment of the amount. He can also let out the property. Where he does that, he owes a duty not just to account for rent received, but for what he could, by prudent use might have received, and also to prevent voluntary waste [38].

Another right of a legal mortgagee is the power to appoint a receiver in the event of mortgagor's default to pay. In the case of Adetona & anor, v. Zenith International Bank Limited [39] the term 'receiver' was defined as a person appointed by the court for the purpose of preserving the property of a debtor pending an action against him or applying the property in satisfaction of a creditor's claim whenever there is a danger that in the absence of such appointment, the property will be lost, removed or injured.

The mortgagee could institute an action in court against the mortgagor to claim the principal sum advanced to the mortgagee and the Interest that has accrued on it. This ls common remedy where the mortgage instrument does not confer an express power of sale on the mortgagee. Although in leg mortgage does not need to contain an express power of sale before it is exercised.

An order of foreclosure is a common remedy for equitable mortgagees since a legal mortgagee would rather exercise the power to sell the property in the event of a default. Foreclosure is an order of court by which the equity of redemption of the mortgagor and all persons claiming through him including subsequent encumbrances are extinguished so as to vest the mortgaged property absolutely in the mortgagee. The equitable right to redeem is the right granted by equity to the mortgagor to still recover his security by paying the money under the mortgage although the time fixed for the payment of that money has passed and even if this is against the expressed intention of the parties. In foreclosure, equity by equity destroys the equitable right to redeem. Under foreclosure, a mortgagee applies to transfer the mortgagors' title to him. The court may exercise its powers pursuant to a judgment made by it to order for a sale of a property. The court would then issue a certificate of purchase which is a certificate usually issued to purchasers in case of a judicial sale. A certificate of purchase in certain jurisdictions is an instrument that is required to be registered and failure to register it will make it inadmissible in evidence [40].

Right to sell property is another power granted to a legal mortgagee. However, this is exercised on condition that the mortgage is by deed; the mortgage money has become due and there is no contrary intention in the mortgage deed.

As for the mortgagors they have the right to redeem the property upon full repayment of the secured debt (equity of redemption). They also have the right to quiet enjoyment of the property, subject to the terms of the mortgage. They equally have the right to seek judicial intervention where the mortgagee acts oppressively or unlawfully.

Mortgagee and mortgagor alike are subject to duties imposed by law and implied in the transaction. The mortgagor must disclose material facts, ensure valid title, and comply with agreed payment terms [41]. The mortgagee must exercise powers in good faith and according to the lawful terms of the mortgage. Both parties must respect statutory frameworks that govern notices, valuations, and equitable obligations

Remedies in Mortgage Transactions

Mortgage transactions in Nigeria create reciprocal rights and obligations, and the law provides various remedies for both mortgagees and mortgagors to protect their interests. These remedies are critical in maintaining balance between enforcing security and protecting the equity of the mortgagor. Nigerian courts have consistently emphasized that while mortgagees are entitled to enforce their rights, they must do so in accordance with statutory provisions, contractual terms, and equitable principles.

Remedies for Mortgagee

Mortgagees in Nigeria are provided with several remedies to enforce repayment of the debt secured by the mortgage. These remedies inter alia include power to sell the property, foreclosure, appointment of receiver and action for debt. The mortgagee may sell the mortgaged property in the event of default, provided the mortgage deed grants this power and statutory or equitable notice requirements are met. This fundamental principle was clearly seen in the case of Abdulkadir v. Mohammed [42] The sale must be conducted in good faith and for the best obtainable price. Courts have intervened where mortgagees act oppressively or fail to obtain a fair valuation, ensuring that mortgagors' rights are protected. Foreclosure is a remedy whereby the mortgagee seeks a court order to extinguish the mortgagor's equity of redemption, effectively transferring ownership to the mortgagee. In practice, foreclosure is rare and is considered a last resort, as courts often prefer to preserve the mortgagor's right to redeem, consistent with equitable principles. A receiver may be appointed to manage the mortgaged property and collect rents or profits, which can then be applied toward repayment of the mortgage debt. This remedy is particularly useful where the property is income-generating, and it allows the mortgagee to secure repayment without immediate sale or foreclosure [43]. Where the mortgagor defaults, the mortgagee may also bring an action for the recovery of the outstanding debt. This remedy is independent of property-specific remedies and may be pursued in parallel, ensuring the mortgagee can recover the loan while enforcing the security interest.

Remedies for Mortgagor

In the same vein, mortgagors are not left without protection. The law provides remedies to safeguard their equity and prevent abuse by mortgagees. Part of the remedies available to the mortgagors are right to redemption, relief against foreclosure and court injunction. Accordingly, the mortgagor retains the equity of redemption, which allows them to reclaim the mortgaged property by repaying the principal debt and any agreed interest, even after default, before foreclosure or sale is completed. Nigerian courts strongly protect this right as a fundamental equitable principle. The case of Krelinger v. New Patagonia Meat and Cold Storage Co. Ltd [44] best illustrates it. Where a mortgagee seeks foreclosure, a mortgagor can petition the court for relief, arguing that full repayment, partial payment, or alternative arrangements can satisfy the debt. Courts generally grant relief to preserve the mortgagor's equity, unless it is clear that the mortgagee has acted lawfully and the mortgagor has no realistic prospect of repayment. See the case of Afribank v. Alade [45]. A mortgagor may also seek an injunction to restrain unlawful actions by the mortgagee, such as an improper sale or foreclosure, or to challenge actions taken in bad faith. Nigerian courts have consistently held that mortgagees must act within the powers granted under the deed and statutory provisions, and injunctions serve as a critical check against overreach.

Generally, Nigerian courts adopt a balanced and equitable approach when adjudicating disputes over mortgages. Courts recognize the mortgagee's legitimate interest in securing repayment but also strongly protect the mortgagor's equity of redemption. Judicial interventions often focus on ensuring that mortgagees act in good faith, avoid oppressive behaviour, and comply with statutory and contractual formalities.

To sum up, in deciding any case connected to mortgage remedies, the courts adopt many principles so as to protect the interest of the parties to the transaction. These inter alia include the principle of equity of redemption is sacred; foreclosure should be a last resort; mortgagees must act in good faith; power of sale or appointment of receivers must be exercised transparently and fairly; statutory compliance is essential and remedies are valid only when exercised in accordance with statutory provisions such as the Land Use Act and Registration of Titles Laws. In fact, courts weigh the interests of both parties, often providing remedies that allow repayment without stripping the mortgagor of their property unfairly. See the case of Union Bank v. Adebayo [46].

Conclusion

It was found that while Nigerian mortgage law is anchored in statutes of which inter alia include the Land Use Act 1978, the Property and Conveyancing Law, and Registration of Titles Laws, as well as relevant case law, the system faces significant hurdles. These inter alia include, bureaucratic delays in obtaining Governor's consent, high transaction costs, weak foreclosure enforcement, inefficiencies in land registration, and limited borrower awareness. It was therefore recommended that effective mortgage regulation is essential to balance the rights and obligations of lenders and borrowers. Further, mortgagors' equity of redemption must be protected. Transparency in in mortgage documentation must be ensured. Furthermore, reforms such as digital land registries, specialized mortgage tribunals, and supportive housing finance policies are necessary to enhance access to mortgages and foster confidence in the system.

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