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**MORTGAGE OF LAND AS SECURITY UNDER THE LAND USE
ACT 1978 *****ABSTRACT**

The mortgage of land as security is undoubtedly a nightmare to banks, corporate organizations, individuals and other financial institutions in contemporary times because of the multifarious problems posed by the Land Use Act at both the time of creation and the enforcement of landed security. Since the radical title to land has been vested in the Governor with the power to revoke a Right of Occupancy for overriding public interest, the security in the hands of the lender may vanish overnight as a result of the revocation. This article examines the various areas where the Land Use Act has had its impact on mortgage of land as security in Nigeria. It analyzes the hurdles that impede the use of land as security for mortgages. Suggestions are proffered in this paper to the Government policy makers, land administrators and other researchers in this area of the law with the aim of addressing the perceived lapses in the law.

1. Introduction

Land is the very basis of commercial and industrial enterprise in Nigeria. It is the most important factor of production in industry as well as agriculture. Its usefulness and importance cut across all forms of businesses and professions: ¹ Businessmen require land for buildings, factories and warehouses; professionals in practices such as law, medicine,

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¹ Enefiok E. Essien, *Law of Credit and Security in Nigeria*, 2nd edition (Uyo: Toplaw Publishments Ltd, 2012), p. 1.

etc, need land to locate their offices, chambers, clinics, etc. Indeed, every citizen in Nigeria and all over the world needs a piece of land to use for one purpose or the other.

Accordingly, everyone stands in some relation to the land either as occupier, holder, tenant, licensee, pledgee or mortgagee. In this way, land law touches upon a vast area of social orderings and expectations, exerting a fundamental influence on the life-styles of the people.² Every person requires land for his support, preservation and self-actualization within the general ideals of the society. Land is the foundation of shelter, food and employment. Man lives on land during his life and upon his demise, his remains are kept in it permanently.³ It is as a result of this great value attached to land that man craves its use as subject matter of mortgage transactions.

Mortgage transactions and the taking of land as security dates back to ancient history.⁴ In early Nigeria, pledges were encouraged, rather than outright sales, as land was held to belong to the community or family rather than the individual.⁵ This went on smoothly as the indigenous people had their indigenous ways of resolving their issues, until the promulgation of the Land Use Act 1978,⁶ which overhauled mortgage transactions in a tremendous manner.

² Enefiok E. Essien 'Land Use and Security in Real Estate in Nigeria' in Smith, I. O. (ed) *The Land Use Act – 25 Years After* (Lagos: University of Lagos Press. 2003) p. 279.

³ J. Omotola, "Law and Land Rights: whither Nigeria" University of Lagos Inaugural Lecture series, p. 6.

⁴ Landed Security may be said to be of great antiquity globally, see Cousins, E. and Rose, S., *Law of Mortgages* (London: Sweet and Maxwell, 1989) p. 8.

⁵ *Amodu Tijani v. Secretary Southern Nigeria* [1921] AC 339.

⁶ Formerly 'Land Use Decree No 6 of 1978', but by s. 1 of the Adaptation of Laws (Re-designation of Decrees) Order No. 13 of 1980, it became known as the Land Use Act Cap L. 5 Vol. 8, LFN 2004, hereinafter referred to as the Land Use Act or the Act.

2. Application of the Land Use Act to Land Use and Management in Nigeria

The Act sets out in its section 1 to assert the state ownership of land. Hence, the power of control and management over land in Nigeria is conferred on the government. Section 1 of the Act provides thus:

Subject to the provision of this Act, all lands comprised in the territory of each state in the Federation are hereby vested in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provision of this Act.

The implication of the foregoing provision is that the erstwhile owners are divested of their ownership of land whether occupied or unoccupied. Thus, by virtue of section 1 of the Land Use Act the concept of radical title to land existing in the owner prior to the Act has been abolished and substituted with the limited title in the form of a Right of Occupancy. By section 5 of the Act, the governor is empowered to grant statutory right of occupancy to any person for all purposes, and any such grant by the governor operates to extinguish all existing rights to the use and occupation of the land⁷ From Sections 21-23, the Act firmly established the Governor's supervision and control over all land in the urban area of the state such that no transaction would take place in property without his consent having first been sought and obtained⁸

The effect of this is that individuals, communities and families who hitherto had the freedom to do as they pleased with respect to their portions of land were stopped in their tracks. All of a sudden they now hold the land at the mercy of the Governor. However, by the combined effects of Sections 34, 35, 36 And 51(1) Paragraphs 3 And 15 Of Act, the rights of any person or community using or occupying land in accordance with customary law are preserved though in a limited form of a Right of Occupancy under the Act. Also, the devolution of right under customary law upon death of the holder of a Right of Occupancy is preserved subject to section 24 of the Act, thereby sustaining the concept of family property.

⁷ Section 5(2).

⁸ See Section 22.

3. Mortgage of Land

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.⁹ Generally, whenever a disposition is 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. Mortgage is a form of security created by contract, conferring an interest in property defeasible (that is annulable) upon performing the condition of paying a given sum of money, with or without interest or performing some other obligation.¹⁰

Lindley, M.R. in *Santley v. Wilde*¹¹ has defined a mortgage as a conveyance of land or an assignment of chattels as security for the payment of a debt or the discharge of some other obligation for which it is given. The definition of mortgage by Lindley above refers to the mode of creating a legal mortgage at Common law and under the English Conveyancing Act 1881. The modes of creating a legal mortgage have grown beyond that in recent years. It is now valid to create a legal mortgage by charge expressed to be by way of legal mortgage.¹² Such a mortgage, when created does not convey title to the mortgagee. It merely represents an agreement between the mortgagee and the mortgagor that the mortgagee shall be entitled to look to the proceeds of the asset charged to discharge the indebtedness.

⁹ *Halsbury's Laws of England* 4th Ed., Vol. 32, p. 187.

¹⁰ See E. L. G. Tyler, *Fisher and Lightwood's Law of Mortgage*, (London: Butterworths, 1988), p. 4.

¹¹ [1899] 2 Ch. 474.

¹² This method is provided for in PCL, 1959 (applicable in Edo, Delta, Ogun, Ondo, Osun and Oyo states) and the Registered Land Act 1945 (applicable to those parts of Lagos known as Registration Areas).

From the above it can be submitted that mortgage is a creation of an interest in a property defeasible upon performing the condition of 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 is 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.¹³ 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. An equitable mortgage is a contract, which creates a charge on the real property but does not convey any legal estate or interest to the creditor. Such a charge amounts to an equitable interest.¹⁴ 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 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.

However, an equitable mortgage carries some rights of a legal mortgage and since equity looks on that, as done which

¹³ *Bank of the North Limited v. Bello* [2000] 7 NWLR (Pt. 664) 2442.

¹⁴ 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.

ought to be done, specific performance of the agreement, a right of legal mortgagee could be obtained by an equitable mortgagee. Certain rights only are available in equitable mortgage, thus though equitable mortgage is convenient in the commercial world it is not advisable.

Legal mortgage 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. A legal mortgage of personal property is a conditional assignment to the mortgagee of the mortgagor's legal interest in it. A legal mortgage of land or an interest in land must be by deed.¹⁵ A legal mortgage of an estate in fee simple in land or a term of years absolute is effected by a demise or sub-demise for a term of years absolute, or is a charge by deed expressed to be by way of legal mortgage. The effect of a legal mortgage by demise is to vest the legal estate in the term of years created by it in the mortgagee, who unless the deed expressly provides for possession by the mortgagor until default, is immediately entitled upon the execution of the deed to possession of the property, but the mortgagor's legal estate in the reversion of the term of years is not transferred to the mortgagee until the right of redemption is destroyed by foreclosure or sale or otherwise.

Mortgage of land entails transfer or conveyance of title or interest in land by a debtor or a third party to the creditor as an assurance for repayment of debt or discharge of any obligation. It is a transaction whereby, as security for a loan of money, the borrower transfers to the lender an interest in some property of the borrower on the condition that the lender's interest in the property will be terminated on repayment of the loan. By the operation of the Land Use Act, fee simple estate does not exist anymore but in its place now is a Right of Occupancy.¹⁶

¹⁵ Ss. 52 (1) and 205 (1) of the English Law of Property Act 1925.

¹⁶ Provided for in Sections 1, 5 and 6 of the Land Use Act, 1978.

4. Problems of mortgage of land as security under the Land Use Act

(a) *Uncertainty of Title*

In the place of the allodial title formerly held, the Act confers on any person or group of persons the 'Right of Occupancy.' The Land Use Act does not define a 'Right of Occupancy'; but its precursor, the Land Tenure Law (of Northern Nigeria), defines it as "a title to the use and occupation of land"¹⁷ This right can be statutory or customary; expressly granted or deemed granted. The Right of Occupancy created by the Land Use Act to replace the fee simple, fee tail and other pre-existing interests in land which is a right that a person can mortgage, pledge, charge or transfer for security, has been a source of extensive academic and judicial debates.¹⁸ Apart from other problems in the Act, the debate has always centered on the nature of the Right of Occupancy- whether it is a lease,¹⁹ a licence, an absolute right.

Lord Templeton laid down the hallmark in *Street v. Mountford*²⁰ that for a lease to be valid there must be exclusive possession at a rent and for a term. But a holder of right of occupancy under the Act does not enjoy exclusive possession

¹⁷ Cap. 59 Laws of Northern Nigeria, 1962; S. 1 thereof.

¹⁸ I. Smith "Security of Title in Nigeria: Any Hope for the future?" in I. Ikhariole (ed.) *Law and Development* (Lagos: LASU Law Seminar Series) p. 49; P. Adeoye, "The Use of Right of Occupancy as Security for Advances: A Caveat" (1989) *JPPL* at 17; A. Utuama, "The Crocodile Tears in Savannah Bank v. Ajilo" (1989) 2(4) *JRBPL* 20; E. Essien, *Law of Credit and Security in Nigeria* (Uyo: Golden Educational Press, 2000) at 118; I. Chukwu, "Practical Implications of Deemed Grant under the Land Use Act" in I. Smith (ed.) *The Land Use Act - Twenty Five Years After* (Lagos: University of Lagos Press, 2003) at 140.

¹⁹ Some authorities equating the right of occupancy with a lease are *Majiyagbe v. Attorney General* (1957) N.R.N.L.R 158 at 163, *Ciroma v. Suwa* [1986] 1 NWLR (Pt. 19) at 756, *Savannah Bank v. Ajilo* [1989] 1 NWLR (Pt. 97) 305 at 328; I. Adeoye "The Nature of the Right of Occupancy Under the Land Use Act 1978" in J. Omotola (ed.) *Issues in Nigerian Law* (Lagos: University of Lagos Press, 1991) at p. 105 and *Director Of Lands And Mines v. Sohan Singh* (1952) I T.L.R 631.

²⁰ [1985] 2 All E. R 289.

against the Governor. The Governor or any public officer authorized by him has unfettered access to and can freely enter upon and inspect the land comprised in any statutory right of occupancy or any improvements effected thereon for inspection at any reasonable hours in the day time.²¹

Also, despite the easy revocability and the lack of prospective certainty of duration which are characteristics of a license, the right of occupancy is not a licence because, unlike a licence, it is alienable, transferable and transmissible.²² The right of occupancy has also been thought of as a freehold; but it is not a freehold because, as already stated above, the Right holder has no exclusive right to possession, and in the case of actual grant of statutory right, it is not indefinite in duration but rather it is for a term of years certain and is subject to the payment of rent to the Landlord (Governor). This made The Privy Council in *Premchand Nathu and Co. Ltd. v. The Land Officer*²³ to hold that the Right of Occupancy under the Land Ordinance of Tanzania (similar to the Nigerian version) is a right *sui generis*²⁴ and that the intention of the lawmakers in introducing the Right of Occupancy system was to establish an entirely new interest in land.

As part of the Right of occupancy system the Act introduced the issuance of a certificate of Occupancy by the Governor of a state. Section 9(1) (a)-(c) of the Land Use Act provides as follows:

- 9(1) It shall be lawful for the Governor -
- (a) When granting a statutory Right of Occupancy to any person; or
 - (b) When any person is in occupation of land under a customary Right of Occupancy and applied in the prescribed manner; or
 - (c) When any person is entitled to a statutory Right of Occupancy, to issue a Certificate of Occupancy under his hand in evidence of such Right of Occupancy.

²¹ Section 11.

²² Sections 21, 22, 24 and 34 of the Act.

²³ [1963] A.C. 177 at 189.

²⁴ Because it partakes partly of a freehold and yet also takes on the semblance of a license.

It should be noted that a certificate of occupancy is merely an evidence of a Right of Occupancy and does not on its own confer a title or interest in land. The Act has not provided any conclusive means of proving ones entitlement to a Right of Occupancy.

The certificate raises a presumption of title.²⁵ In *Aziv. Registered Trustees of The Evangelical Churches*,²⁶ the court held that the issuance of Certificate of Occupancy in respect of any land would not validate defects, if any in the title of the holder. It, therefore, held that a Certificate of Occupancy granted to one of the claimants who had not proved a better title was invalid.²⁷

This means that a Certificate of Occupancy may be set aside if it turns out that the holder had no right to the land;²⁸ or in favour of a pre-1978 conveyance or deemed grantee of Right of Occupancy under section 34 of the Act.²⁹ Thus a Certificate of Occupancy issued pursuant to the Act only gives the right to use and occupy land, it neither confers nor is it necessarily an evidence of title.

The horror and hellish implication of this is that where the Certificate of Occupancy is set aside for any reason, the mortgagee who has accepted it as security realizes he has burnt his own fingers. The certificate he is holding automatically becomes “a piece of paper having no value”³⁰

Thus, where it is shown that another person has a better right to the grant, the court will if asked to do so set aside the grant. In *Ogunleye v. Oni*,³¹ the Supreme Court held that a certificate of occupancy issued pursuant to the Land Use Act only gives right to use and occupy land.

²⁵ See: *The Registered Trustees of the Apostolic church v. Olowoleni* [1987] 4 NWLR (Pt 58), held No 4 (Sc), *Ogunleye v. Oni* [1990] 2 NWLR (Pt 135) 745.

²⁶ [1991] 6 NWLR, Pt 195 121.

²⁷ *Ibid* at page 126.

²⁸ *Adedeji v Williams* [1989] 1 NWLR (Pt. 99) 811.

²⁹ *Sir Adetokunbo Ademola v. Amao & Ors* (1982) CGSLR p. 273 reported in Omotola J. A. “*Cases on the Land Use Act*” p. 132.

³⁰ Per Belgore, JSC in *Ogunleye v. Oni*, I.O. Smith, op. cit. at page 28. The effect is that, a Bank who takes the certificate of occupancy as security only gets a document of transfer but which in reality, transfers no interest in the land to the Bank.

³¹ [1990] 2 NWLR (Pt. 135) 745.

(b) Requirement of Consent and its Attendant Problems

It is doubtful if there is any step in the mortgage transaction process that gives mortgagees as much nightmare as obtaining consent. It is worse when one considers that each state in the federation has its own conditions and procedure for obtaining consent. Few, if any, of these can be said to be founded on the Act. Each Lands Officer fashions what he deems suitable. Thus, an appraisal of the hardship caused by the consent provisions is pertinent. Sections 21 and 22 provide as follows:

- 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 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 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 Governor first had and obtained.

The judicial construction of this section has burdened Nigerian judges like no other statutory provision in the area of real property.³² By section 22(1) the Governor's consent must be "first had and obtained." Thus in *Savannah Bank (Nig.) Ltd. v. Ajilo*,³³ the Plaintiff executed a deed of mortgage dated 5th September, 1980 in favour of the 1st Defendant. Upon default by the Plaintiffs, the 1st Defendant sought to sell the property involved by advertising the Auction sale. The Plaintiffs sued for declaration that the Deed of Mortgage was void and also that

³² Emeka Chianu, *Law of Sale of Land* (Benin City: Oliz Publishers, 2009) at p. 196. See generally, *P.I.P. Ltd. v. Tradebank (NIG.) PLC.* [2009] 13 NWLR (Pt. 1159) 577 (CA) and *E.A. Industries Ltd. v. Nerfund* [2009] 8 NWLR (Pt. 1144) 535.

³³ [1989] 1 NWLR (Pt. 97) 305

the Auction Notice was void. The grounds of the action were that -The property involved was situate in an urban area in Lagos; The property was already vested in the 2nd Plaintiff before the Land Use Act 1978 came into force; By Section 22 of the Land use Act, the consent of the Governor of Lagos State ought to have been first sought and obtained before the execution of the Deed of Mortgage and also the Public Auction; and as no consent was sought as aforesaid both the Deed of Mortgage and the Auction Notice were void.

The Supreme Court held that consent must be obtained prior to the mortgage; any failure by a holder under Sections 34(2) or 36(2) of the Act to comply with the provisions of Section 22 would attract the full rigor of section 26 of the Act and render a transaction or an instrument arising out of it void.

However, this was an *obiter dictum* as the stage of obtaining consent was really not an issue before the court. In subsequent cases, the Supreme Court and Court of Appeal have been of the view that consent may be applied for at any time after a concluded transaction.³⁴

Thus in *Awojugbagbe Light Industries Ltd. v. Chinukwe*,³⁵ the Supreme Court held that 'there is nothing unlawful in entering into or execution of a document of transfer before the Governor's consent is obtained as this procedure is expressly covered by section 22(2) of the Act. The legal consequence that arises³⁶ is that no interest in land passes under the agreement until the necessary consent is obtained. Such an agreement so

³⁴ "Consent includes an approval or concurrence to a transaction either before or after its execution": *City Property Development Ltd. v. A.G. Lagos State* (1976) NSCC 43 57, Per Fatayi-Williams J.S.C; compare, *Ogbo v. Adoga* [1994] 3 NWLR (Pt. 333) 469, commented on by U. Osimiri, "Post-Land Use Act 1978 Conveyancing: *Ogbo v. Adoga* Revisited", (1995) 2 (1) *Lawyers Bi-Annual* 208.

³⁵ [1995] 4 NWLR (Pt. 390) 279.

³⁶ "A document may be delivered to take effect on the happening of a specified event, or upon condition that it is not to be operative until some condition is performed, then pending the happening of the event or the performance of the condition, the instrument is called an escrow. Until the specified time has arrived or the condition has been performed, the instrument is not a deed: Norton on Deeds p. 15" quoted in *Brossette Manufacturing (NIG.) Ltd. v. N/S Ola Illemobola Ltd.* [2007] 14 NWLR (Pt. 1053) 109, 147.

executed becomes inchoate until the consent of the Governor is obtained after which it can be said to be complete and fully effective.³⁷

Where the consent is not obtained at all, it appears that the transaction will be rendered null and void under section 26 of the Act.

Section 26 provides thus:

Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void.³⁸

The position of the statute seems to be very clear that it is the duty of the 'holder' to obtain the requisite consent before alienation. But in practice there exist situations where the holder who ought to have obtained such consent would turn around seeking to avoid the transaction on the basis of lack of consent, shedding what has been described as 'The Crocodile tears'³⁹ as in *Savannah Bank v Ajilo*.⁴⁰ The Courts have by judicial activism given the statute a human face. Instead of nullifying transactions outrightly on the basis of lack of consent, the courts have sought to know whose duty it is to obtain the consent. The one question the courts have asked has been: was it the mortgagor's duty to have obtained the consent? The answer has invariably been in the positive because he is the holder⁴¹ under the Act.⁴² Thus in *Solanke v.*

³⁷ Per Iguh J.S.C. Op. Cit. at p. 436 & 438.

³⁸ See also *Calabar Central Co-Operative and Credit Society Ltd. v. Ekpo* [2008] 6 NWLR (Pt. 1083) 362; *Iragunima v. Rivers State Housing and Property Dev. Authority* [2003] 12 NWLR (Pt. 834) 427.

³⁹ A.A Utuama: The Crocodile Tears in *Savannah Bank v. Ajilo* (1989) 2 GRBPL No. 7 p. 29; R.C. Okoli: 'Crocodile Tears at the Supreme Court?' 1989 2 GRBPL No. 7 p. 37.

⁴⁰ *Savannah Bank v. Ajilo* above note 33.

⁴¹ A "holder" in relation to a right of occupancy means "a person entitled to a right of occupancy": Section 50(1) of the Act. The Act expressly excludes a mortgagee from the definition of a "holder".

⁴² Enefiok Essien, *The Land Use Act and Security in Real Estate in Nigeria* above note 2 at p. 291.

Abed,⁴³ the document was defective in such a manner as to make the transaction void under the Land Tenure Law.⁴⁴ The Court held that the defendant would not be allowed to take advantage of his own wrong and avoid the transaction.⁴⁵

The dictum of Kayode-Eso JSC in *Oil Field Supply Centre Ltd v. Johnson*⁴⁶ is also in point here. The Learned Justice observed that “certainly equity will not permit the company to benefit from their own illegality”

Similarly, in *Adedeji v. National Bank*,⁴⁷ the mortgage transaction was without the Governor’s consent. Mr. Adedeji defaulted and in an attempt to prevent the enforcement of security he contended that the transaction was void. This contention was dismissed by the court as it was his duty to obtain the consent in question. In the words of Akpata JCA, (as he then was) “apart from the principle of law involved, it is morally despicable for a person who has benefitted from an agreement to turn round and say that the agreement is null and void.” These decisions are in line with the maxim *ex turpi causa non oritur actio*, meaning that no action arises out of a wrongful consideration.

However, in *Savannah Bank v. Ajilo*⁴⁸, the Supreme Court considered the wordings of section 26 and took the view that it was undesirable to invoke the maxim *ex turpi causa non oritur actio*. The court said:

Although the first Plaintiff/Respondent by the tenor of the Land Use Act committed the initial wrong by alienating his Statutory Right of Occupancy without prior consent in writing of the Governor, the express provision of the Land Use Act makes it undesirable to invoke the maxim *ex turpi causa non oritur actio*.

⁴³ *Supra*

⁴⁴ with similar provision as section 22 of the LUA.

⁴⁵ See also *Barclays Bank Ltd. v. Ibiro* (1967) Nig. Comm. L.R 168.

⁴⁶ [1986] SC 30.

⁴⁷ [1989] 1 NWLR 212.

⁴⁸ *Savannah Bank v. Ajilo* above note 40 at page 324.

In *Onamade and Ors. v. A.C.B.*⁴⁹ the Supreme Court emphasized that no alienation of a statutory Right Of occupancy whether by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained shall be lawful.

Similarly, in *International Textile Industries v. Aderemi*⁵⁰ the court held in accordance with savannah bank's case that by virtue of section 22 of the 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, the transaction is null and void under section 26 of the Act.

Lastly, in *U.B.N. PLC. v. Ayodare & Sons (Nig.) Ltd*⁵¹ Oguntade, JSC in abiding by the decision in *Savannah Bank's* case stated as follows:

I am satisfied that the two courts below were right in following the decision in *Savannah Bank (Nig.) Ltd. v. Ajilo* in view of the fact that this court had directly adverted its mind to the state of the law and judicial authorities on the equitable doctrine in the maxim *exturpi causa non oritur actio*. It may seem wrong that the Plaintiffs/Respondents who had procured exhibits 1 and D later turned round to rely on the supposed invalidity of the exhibits but the decision of this Court in *Ajilo* is still binding on this Court. I have not been called upon to consider overruling same.

Section 22 demands the Governor to approve the transfer of a statutory right of occupancy, and under section 21 the Local Government Chairman is to approve where a customary Right of Occupancy is transferred. Section 45 of the Act provides that the Governor may delegate any of his powers to "the State Commissioner" presumably the one in charge of lands.⁵²

The courts have been called upon to decide the value of a consent document that a person other than the Governor or Commissioner signed. In *Union Bank of Nig. Plc. v. Orharghue*,⁵³

⁴⁹ [1997] 1 NWLR (Pt 480) 123

⁵⁰ [1999] 6 SC (Pt 1) 1

⁵¹ [2007] 13 NWLR (Pt. 1052) 567

⁵² Emeka Chianu, *Law of Sale of Land*, above note 32 at p. 210.

⁵³ [2000] 2 NWLR (Pt. 645) 495.

the Court of Appeal upheld a Commissioner of Lands' writing to convey Governor's consent even where there was no delegation; and in *Nigerian Industrial and Development Bank v. Oladunmi Industries Ltd.*,⁵⁴ a consent conveyed in a letter signed by an Acting Chief Lands Officer was upheld even though the Governor had delegated the authority to grant consent to the Permanent Secretary, Ministry of Lands.

However, the consent question assumed an interesting twist in the Supreme Court decision in *Union Bank of Nig. PLC. v. Ayodare and Sons (Nig.) Ltd.*⁵⁵ In that case, an Acting Chief Lands Officers signed the consent letter whereas the Governor had delegated the duty to the Commissioner for Lands. By a majority of 4:1, the Court applied the Agency principle of *delegatus non potest delegare* to annul the consent.⁵⁶ The case now places a further burden on the secured creditor even where consent has been obtained, to make further inquiries to ensure that the "respective appropriate authority" properly empowered the consenting authority.⁵⁷ Consent in itself is therefore not enough; the source of the consent is of great importance. In the words of the court, "the appellants should have checked the source of the consent before executing the deeds and parting with their money."⁵⁸

A question arises here whether the Governor can be compelled to give Consent? It is regrettable that the answer is in the negative. In *R v. Ministry of Land and Survey, Ex Parte Bank of the North*,⁵⁹ where an order of mandamus was applied to compel the Minister to give consent, Reed Ag. SPJ stated that:

Since the order of mandamus does not lie to compel the exercise of a discretionary power conferred by a statute, it will not lie to compel the Minister to give his consent ... if the applications have no other remedy, that is unfortunate for

⁵⁴ [2002] 5 NWLR (Pt. 761) 532.

⁵⁵ [2007] 13 NWLR (Pt. 1052) 567 (S.C)

⁵⁶ See also, "Mortgage transactions without governor's consent is void (2)", *The Guardian*, Tuesday, May 26, 2009 at 97.

⁵⁷ Enefiok Essien "The Secured Creditor: In Word or in Deed?" (2000/2001) 3 & 4 *UULJ* 69 at 74.

⁵⁸ This was at the Court of Appeal level in *Union Bank Of Nig. Plc v. Ayodare & Sons (Nig.) Ltd.* [2000] 9 WRN 101 at 109.

⁵⁹ (1963) NCLR 38. Also, in *Ogba v. Nwapa* (1966-67) E BLR 26, Nkemena J., opined that a minister could not be compelled to consent to an assignment of State Land.

them but the absence of other remedies would not enable the court to grant an order of mandamus to compel the exercise of a discretionary power.⁶⁰

Similarly, in *Majiyagbe v. A.G. & Ors*,⁶¹ the court maintained that the affected party cannot compel the Governor or the Local Government as the head of the family or the community to grant consent. Consequently, the Governor may not be compelled by an order of mandamus to give his consent.

Thus in spite of the short-term remedial measures that have been devised by equity and by the courts, the issue of Governor's consent as enshrined in the Land Use Act has posed the greatest threat to the use of land in security transactions in Nigeria.

(c) Revocation and the Problem of Compensation

Under the Land Use Act, the right of occupancy may be revoked where the government wants to use the land for overriding public interest.⁶² The injudicious administration of the Land Use Act, particularly the revocation power has led to the great voices in the wilderness calling for the reformation of the Act.⁶³

⁶⁰ Ibid. at p. 61. *Section 11* of Land and Native Rights Ordinance 1913 which was being construed has essentially the same verbiage as *section 22 of the Act*.

⁶¹ (1957) NRNLR 158.

⁶² Section 28 (3) (a) and (c) of the Act.

⁶³ See the Editorial comments of *The Guardian Newspaper*, Monday, December 16, 2002. See also T. Idudu, "Amending Land Law, A Must" *Guardian Newspaper*, Monday, February 4th, 2003. Similarly, many professionals including bankers, lawyers and estate surveyors have on diverse occasions called on the government to review this Act. See "Estate Surveyors Pick Holes on Mortgage Set -Up & N.H.F" *Guardian Newspaper* of February 2nd, 2003 at p. 33. A team of African NGOs as part of its contribution to World Conference on sustainable Development canvassed for land resource rights for the poor. They called for democratization of institutions of land and resources governance at all levels. They also recognized that security of tenure is a necessary condition for sustainable development in rural Africa. See *Guardian Newspaper*, Monday, July 22nd, 2002 at p. 41. Another N. G. O, *Shelter Rights Initiative* has lent its support for the call to review the Act. For academic comments see J. Omotola, "*Law and Land Rights: Whither Nigeria*" Text of Inaugural Lecture (Lagos: Unilag Press, 1998); I. Oshiptan, "Public Law and Land Use Act" in J. Omotola, *Issues in the Nigerian Law* (Lagos: Faculty of Law, University of Lagos, 1991).

The right of occupancy may be revoked⁶⁴ before ever the mortgagee would have the opportunity of realizing his security or exercising his power of sale⁶⁵ or foreclosure⁶⁶ of the mortgaged property; considering the fact that the legal date of redemption may still be subsisting and unexpired at the time of revocation.

⁶⁴ On the authority of *Olomada v. Mustapha* (2011) All FWLR (Pt. 559) 1080 at 1120, to constitute a proper revocation of right of occupancy, the revocation shall be signified under the hand of a public officer duly authorized by the Governor after which notice shall be served on the holder of the right of occupancy sought to be revoked (section 28(6) of the Act); see also, *Ononuju v. A.G. Anambra State* [2009] 10 NWLR (Pt. 1148) 107 at 111 and *Admin./Exec. Estate, Abacha v. Eke-Spiff* [2009] 7 NWLR (Pt. 1139) 97 (SC).

⁶⁵ The power of sale in mortgage in favour of a mortgagee is an authority to defeat the mortgagor's equity of redemption. The mortgagee's power of sale may be conferred on him expressly by the mortgagor by a stipulation to that effect in a mortgage. Such express conferment of the power of sale was initially rare because it was feared that it would be a clog on the equity of redemption. This practice became common in the early years of the nineteenth century – C. Waldock, *The Law of Mortgages* (London: Sweet and Maxwell, 1950) 253-254; G. Tyler, *Fisher And Lightwood's Law Of Mortgage* (London: Butherworths, 1988) 379, quoted in E. Essien, *Law of Credit and Security in Nigeria*, Op. Cit at p. 235. Apart from an express conferment by the mortgagor, the mortgagee's power of sale may be derived from statutes such as section 101(1) of LPA (1925) and section 123(1) of Property and Conveyancing Law of (1959).

⁶⁶ Foreclosure is the judicial process by which the mortgagor's equitable right to redeem is extinguished and the mortgaged property is vested absolutely in the mortgagee. Unlike a sale which is aimed at recovering the money owed to the mortgagee, foreclosure is aimed at obtaining the mortgagor's property for the mortgagee. Foreclosure can only be made by the court In *Re FarnolEades Irvine and Co. Ltd.* [1915] 1 Ch. 22 at 24, Warrington, J., held that "foreclosure as a thing which can be done by a person has no meaning. Foreclosure is done by the order of the court, not by any person." See generally, *Ness V. O' Neil* [1916] 1 K. B. 706 at 709; F. Maitland, *Equity*. (Cambridge: Cambridge University Press, 1969) at p. 183; G. Tyler, *Fisher and Lightwood's Law of Mortgage*, Op. Cit at p. 407; "Foreclosure is the act of the court, not of any person":C. Waldock, Op. Cit. at pp. 250- 251 quoted in E. Essien, *Law of Credit and Security in Nigeria*, Op. Cit. at p. 261.

The compensation provision⁶⁷ under the Act is grossly inadequate and can be described as unjust. This is because under the Land Tenure Law,⁶⁸ compensation was paid for the value of the inconvenience caused by the disturbance, and disputes were allowed to be referred to the High Court. The Public Lands Acquisition Act⁶⁹ also provided for compensation to be paid for the land and the unexhausted improvements thereon.

Curiously, the Land Use Act promulgated much later provided that compensation is payable only on unexhausted improvements on land and no value and compensation is attached to the land itself. The jurisdiction of the court has also been ousted to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under the Act. In other words what the Governor decides to pay as compensation is not a debatable issue.

(d) Restrictive Definition of Holder

Another major upsetting provision under the Act as it affects mortgage transactions is the definition given to a “holder” of a right of occupancy. A “holder” in relation to a right of occupancy means, “a person entitled to a right of occupancy.”⁷⁰ Section 50(1) of the Act defines “holder” thus:

A person entitled to a Right of Occupancy and includes any person to whom it has been validly assigned or has validly passed on the death of the holder but does not include any person to whom it has been sold or transferred without a valid assignment nor a mortgagee, sub-lessee or sub-underlessee.

⁶⁷Section 29 of the Act.

⁶⁸ Of Northern Nigeria, 1962.

⁶⁹ 1976.

⁷⁰Section 50(1) of the Act expressly excludes a mortgagee from the definition of a holder

Under Section 29 of the Land Use Act, the holder of a right of occupancy is entitled to compensation at the date of revocation for the value of his unexhausted improvement on the land⁷¹. The unpalatable effect of this is that although the mortgagee may have been preserving his interest in the mortgage security, the right of occupancy and improvements there on; although he may even be ensuring periodic payment of stipulated rents, once the Right of Occupancy is revoked, his security is gone and cannot attach automatically to the mortgagor's interest in any changed form. So, whereas, the mortgagor may be entitled to compensation for the value of his unexhausted improvements⁷² on the land, the mortgagee cannot lay claim to such compensation money.

Moreover, a mortgage is a form of conveyance⁷³ and therefore disposes of, transfers or passes all the estate, right, title, interest, claim and demand which the conveyancing parties respectively have power to convey in, to or on the same land.⁷⁴ Flowing from the foregoing, it is clear therefore, that the conveyance of land would also operate as assignment of the right to receive compensation therefrom. The Supreme Court endorsed this view long ago in *Atunrase v. Federal Commissioner for Works and Housing*⁷⁵ where the issue was a claim for compensation money under the Public Lands Acquisition Act. The original owner to whom compensation was payable for compulsory acquisition had previously

⁷¹ *Aina and Co. Ltd v. Commissioner of Lands (Oyo State)* [1983] 3 FNLR 113; *Obikoya v. Governor of Lagos State* [1987] 1 NWLR (Pt. 50) 385 and *LSDPC v. Foreign Finance Corporation* [1987] 1 NWLR (Pt. 50) 415.

⁷² Section 29 (1) and (2). Uche J. Osimiri, "Award of compensation to holders of undeveloped plots under the Land Use Act – Case for reform," in *Justice, A Journal of Contemporary Legal Problems*, Vol. 3, Number 7.

⁷³Section 2(1) Property and Conveyancing Law 1959 and Section 2 Conveyancing Act 1881 (Compare with Section 205 (1)English Law of Property Act 1925).

⁷⁴ Section 88 (1) PCL 1959 and Section 63(1) CA, 1881. See also *Odukoya v. Oke* (1976) 3 OYSHC (Pt. 2) 260 at 267; *Atunrase v. Federal Commissioner For Works And Housing* (1975) 6 S.C.I; *Edebiri v. Daniel* [2009] 8 NWLR (Pt. 1142) 15 and *Boye Ind. Ltd. v. Sowemimo* [2009] 10 NWLR (Pt. 1148) 136.

⁷⁵ (1975) 6 S.C. Per Elias CJN.

conveyed the land to A who paid him the agreed purchase price and in whose favour a conveyance was also executed. The Law Lords, considering the effect of Section 63(1) of the Conveyancing Act 1881, were unanimous in holding that the conveyance by the original owner/vendor passed all his estates and interests to the purchaser and this necessarily includes receiving the compensation money⁷⁶.

Thus, it is submitted that the mortgagee should be subrogated to the position of the mortgagor in equity for the purpose of receiving compensation for unexhausted improvements⁷⁷ in respect of the revoked Right of Occupancy, so that his rights having transmuted into the compensation money, he becomes entitled to it. Persuasion for this view may be found in *Rex v. Middlesex*⁷⁸ where land subject to mortgage was taken compulsorily by a Railway Company under an Act of parliament. Rowlatt, J. stated thus:

It certainly is a startling proposition that the mortgagees who have precisely the same land in their hands as security should be in a worse position than their mortgagors, and should be unable to demand all the compensation which their mortgagors could have demanded in respect of the mortgaged property.

5. The Implications of the Problems on the Nigerian economy

It was thought that the laudable objectives of the Act would lead to the provision of a uniform land tenure system in the country, make land easily and cheaply available to all Nigerians and the government for developmental purposes, protect the inalienable rights of every Nigerian to partake of the factors of production and check the practice of land speculators, whereby some wealthy individuals indulged in shoddy but lucrative

⁷⁶ (1975) 6 S.C. I. at 9 and 11.

⁷⁷ See U. Osimiri, "Can Power of Attorney Avoid Consent Provisions of Land Use Act 1978" (1990) 3 (13) *GRBPL* 9 at 13.

⁷⁸ [1914] 3 K.B. 259.

trade in land. However events unfolding in subsequent years betrayed these aspirations of its provisions.

Land has become painfully unaffordable to the suffering masses. Private sector participation in Housing, Agriculture and Industrialization cannot be accomplished with the unqualified limitation in the quantum of parcel of land to access, and the rigidity of the consent provisions. General implementation of the Act has undermined its laudable objectives, and the Governor's powers to make Regulations under the Act have been grossly abused to the detriment of Nigerians.⁷⁹

Potential housing developers encounter numerous constraints. Applicants for Certificates of Occupancy have to provide completed application forms, non-refundable prescribed fees, current three years tax clearance certificate, land site/survey plan; agreement of sales of land which must be duly stamped and registered; an affidavit by the Vendor and customary Right of Occupancy in the case of non-urban lands. In cases where the developer has partially or fully developed the land, a valuation certificate is required before granting the Certificate of Occupancy. These procedures are too cumbersome. Going through all these rigmarole stages before a Certificate of Occupancy can be granted has made it impossible for the problems of access to land rights on equal basis to be solved. There is also undue delay in the issuing of Certificates of Occupancy due to the deliberate efforts of some unscrupulous ministry officials who may want to be bribed before processing the forms of applicants.

The great discrepancies between the number of applicants for allocation of plots for all uses and those eventually approved and issued certificate of occupancy to date are manifestations that the implementation of the obvious revolutionary lofty objectives for which the Act was promulgated, are faulty. This has slowed down or reduced the rate of housing development. There have also been instances where land has been used as a potent weapon to fight political

⁷⁹ I. Smith (ed.) *"The Land Use Act: Twenty Five Years After"* (Lagos: University of Lagos Press, 2003) at 176.

opponents. In some cases there have been deliberate refusal to process a political opponent's application. These delays led many who would have invested in housing development purposefully, to divert their resources to other profitable ventures.

The requirement for Governor's consent for land transactions in every state has posed the greatest obstacle to use of landed property as collateral. The Governor also imposes other conditions for grant of the consent which varies from State to State. Even when all conditions have been met by an applicant for consent, the file can stay on the Governor's table or office for more than three years for no justifiable reason.

6. Conclusion

This paper has examined in detail the use and effectiveness of mortgage of land as security for loan transactions in Nigeria. The problems in the pre-Act land laws and tenure necessitated the promulgation of the Land Use Act in 1978. The pre-Act land tenure policies were not satisfactory because of their attendant problems, such as insecurity of title, land litigations, fragmentation of holdings, difficulty in acquisition and alienation of land, etc. All these contributed to housing problems, slum development and general lack of infrastructural developments in Nigeria. With the Act in place, these various pre-Act land laws and land tenure policies were largely done away with, but the principles of those pre-Act laws which are in conformity with the spirit and general intendment of the Act are preserved.⁸⁰

An analysis of judicial opinions in this study has shown that the Act by its policy objectives has improved land tenure and administration in Nigeria. The Act has unified land policy, ensured equitable redistribution of land among the citizens

⁸⁰ See Section 48 of the Land Use Act. See also section 4 of the Act

without discrimination on ground of state origin and facilitated both governments and private industrialists' quick access to land needed for developments. Notwithstanding the foregoing positive impacts of the Act, this paper has figured out the inherent problems in the Act as it concerns mortgage transactions.

It has been discovered that there are gaps between the expectations and the achievements of the Act. For instance, vesting of all lands in the state in the Governor⁸¹ has made acquisition of land more difficult especially for the individuals.

Moreover, compensations payable under the Act⁸² are grossly inadequate. The Right of Occupancy is uncertain and the certificate evidencing it leaves a lot to be desired.⁸³ Furthermore, the consent provisions under the Act⁸⁴ with the rigorous processes and delay usually experienced in obtaining it has stagnated mortgage transactions in the country, and thus has become a clog in the wheel of economic development.

One of the issues that call for concern is the true nature of the Right of Occupancy created by the Act. It is of interest to the mortgagee who accepts the right as security to know the interest he acquires by accepting the Right of Occupancy. Accordingly, there is need for clarity on the meaning of a Right of Occupancy, especially as this is the ultimate right which an individual can have in land and therefore the highest land right which a secured creditor can encumber.

Section 9 of the Act provides that the Governor, when granting a statutory Right of Occupancy shall issue a Certificate of Occupancy as evidence of a Right of Occupancy. The fact that the Certificate of Occupancy is merely evidence, rather than proof, of the Right makes it unattractive to mortgages as a document of title, and the corollary that it is liable to be set aside in favour of a proven prior better right, makes it all the

⁸¹ See section 1 of the Land Use Act.

⁸² See section 29 of the Land Use Act.

⁸³ See section 9 of the Land Use Act.

⁸⁴ See sections 21,22,24, 26, 34(7) of the Act.

more illusory as a security. In spite of sections 9, 34(3), 34(9) and 36(3) of the Act which require the governor to be satisfied that the applicant is entitled to a Right of Occupancy in the land before issuing a Certificate of Occupancy, there is usually no thorough investigation of the claim of the applicant. As such, it is possible that the applicant may make false claims to the Right so as to obtain a Certificate. It is therefore recommended that there should be a system of verifying the applicant's claim, say, enquiries from the occupiers of adjoining lands and obtaining legally admissible title documents where such exist. In this way, by the time the application is advertised all the ground work would have been done and the effect of the advertisement would be to fix the public with notice of the application, with the result that when there is no objection and a certificate is issued, it would be proof rather than mere evidence of a Right of Occupancy to the land. This will give the needed confidence in the Certificate of Occupancy as a useful document for mortgage transactions.

The delay and heavy costs involved in obtaining consent are impediments to the creation of 'immediate' security interests. The delay in granting consent impedes the release of credit facilities resulting in loss of business opportunities.

While the consent provisions may be required as a means of keeping record of land transactions, the procedure for granting it should remain purely administrative at minimum costs and within a specified time frame. It is also important that consent must not be unnecessarily withheld by the Governor. Where the Governor refuses to give consent, the question is whether he should or should not give reasons for his refusal. A provision should be made that in the event of the Governor refusing to give his consent to any landed security transaction, he should give his reasons(s) for the refusal as this will help check a refusal on political, non-legal grounds.

The provision relating to revocation of a Right of Occupancy on grounds of overriding public interest needs to be made more transparent. Information and all the studies

relating to the scope of the project for which the land is required should be scrutinized and available for further public debate by the Land Use and Allocation Committee, such that the Governor's request can be rejected if it does not meet the condition for overriding public interest. This will minimize the instances where a person's Right of occupancy is revoked only to be given to another private person. It should also be provided that where the project sought to be embarked upon by the Governor is no longer undertaken, the land would revert to the original holders. This will also check the frequency of the instances where lands meant for public purpose is fenced round for years and later becomes one of a private person's investments.

Since compensation is generally paid to the holder of a right of occupancy, a mortgagee is expressly excluded under section 51 of the Act. The effect of this on existing security interest is disastrous, for the mortgagor who qualifies takes compensation in addition to the loan already granted him by the mortgagee while the mortgagee is left in the cold wind.

Thus, it would be welcome if the Act is amended to provide for payment of compensation to the persons interested in order of priority. That way, the mortgagee will have a prior right to the compensation money. In the absence of legislation, it is advisable the mortgagee ensures that a covenant is included in the mortgage deed to the effect that in the event of the Right of Occupancy being revoked the mortgage debt shall be secured additionally on any compensation payment due to the mortgagor in respect of the unexhausted improvements, or that the mortgagor shall hold such payment on trust for the mortgagee, to the extent of the mortgagee's claim on the secured debt, or that the debt is additionally secured on any alternative land right which might be granted to the mortgagor in lieu of compensation.

This way, the mortgagor would be compelled, in equity, to claim the compensation on behalf and for the benefit of the mortgagee in preference and priority to other subsequent

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secured and unsecured creditors. This would be the best option as, there is certainly no way the mortgagor can claim the compensation money and retain it for himself when he is accountable to the mortgagee.