



ENFORCEMENT OF REAL SECURITY IN NIGERIA: A JOURNEY IN CONTRADICTIONS, CONFUSION AND OBFUSCATION*

Abstract

This paper examines the efficacy the use of a real property as security for mortgagee transactions. The paper finds that there are bottlenecks foisted on mortgage transactions by extant laws. While these bottlenecks aim at protecting the hapless mortgagor against the excesses of unscrupulous mortgagees, they end up becoming a nightmare for the mortgage in an effort to recover his funds in case of default by the mortgagor. The paper finds that the consent provisions and the power of revocation granted the Governor under the Land Use Act could be an obstacle to the mortgagee's right to the enforcement of real security. Finally, the paper finds that despite the obstacles, real security remains the most attractive form of security for mortgage transactions as they strike best the delicate balance between the interests of the mortgagor and that of the mortgagee.

Key words: Mortgage, Fixed and Floating Charges, and Pledge

1. Introduction

Real security can be defined as proprietary interests created in favor of creditors over property that includes land, buildings and anything affixed on the land; that is anything in the nature of real property.¹ A better understanding of what constitutes real security would be facilitated by the characterization of real property as property that does not move. That is to say, property that is not capable of physical transfer by a creditor for the purpose of the realization of money as for repayment when there is a default by the debtor. This is in contrast to personal property which can be moved or transferred physically.²

Due to the very nature of secured credit transactions and the uncertainties arising from the grant of unsecured loans to debtors, security interests are created by various devices in order to better assure the creditors of the certainty of repayment by the debtors or at least property upon which the former may fall in the event of a default by the latter.³ It is this right to proceed against the property

International Labour Organization Conventions: Ensuring their Compliance and Enforcement under Nigerian Law **E.A Kenen**

The Quest for Economic Growth in Nigeria: The Imperative of Enacting an Antitrust or Competition Legislation **C.K Uwadineke, J.O Ezeanokwasa and F.E Okaphor**

Tracing the Origin and Legal Status of Individual as Subjects of International Law **M. Ogwezey**

An Analysis of Jurisprudential Issues on Criminal Law in the 199 Constitutional of Nigeria **A. J Ikpang**

An Appraisal of the Legal Framework for the Ownership and Control of Oil and Gas Resources in Nigeria **T.C Eze**

The Partnership Law of Lagos State (with Limited Liability Amendments) 2009: An Exercise in Legislative Impertinence **O. A Leigh**

Enforcement of Real Security in Nigeria: A Journey in Contradictions, Confusion and Obfuscation **A.G Eze & E.E Ntekim**

Issuance of Compulsory Licenses in Nigeria: Practice and Procedure under the Patents and Designs Act **A.S Amaramiro & B.G Toby**

Legitimation is an Affirmation of the Right to Non Discrimination in Nigeria **C. Ojiaka**

Towards Efficient Taxation in Nigeria: The Case for one man Companies **P. Sobai C.S Ibekwe**

Responsibility for Product Liability in Nigeria **T. Okonkwo & F. Okaphor**

Collective Agreement and Industrial Action in the Nigerian Jurisprudence: An Advocacy for Legislative Change **C.Q Umeobika, M.I Anushiem & Obinna Mbanugo**

Culture Imposition as a Negation of Human Rights: A Critical Appraisal of Anthropologists' View Point **M.C Obi**

Inheritance Rights to Real Property under Igbo Land Customary Law: Did the Supreme Court ever Symmerize Gender? **C.N Uwaezuoke**

* Eze Amaka .G Ph.D, B.L Senior Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria and Eyakandue Ekpeyoung Ntekim LL.M, B.L; Lecturer Faculty of Law University of Uyo, Nigeria.

¹ J Murray "Real Property" in ' Legal Definition of Real Property' at www.legalmatch.com last accessed on 20th June 2016

² *Ibid* at page 2

³ The security interest created in favour of the creditor has been defined by Browne-Wilkinson in the case of *Bristol Airport v Powdrill* (1990) Ch at page 744 as follows 'Security is created where a person (the creditor) to whom an obligation is owed by another (the debtor) by statute

as opposed to proceeding against the creditor either by judicial or extra judicial means that distinguishes the secured creditor from the unsecured creditor.⁴ According to Mann,⁵ security provided by the debtor to the creditor has two basic direct and indirect advantages, the direct advantage being the lender's legal right to enforce payment by taking collateral and the indirect advantage being that the value of the collateral (which by far exceeds that of the loan), gives a powerful incentive to the borrower to repay the loan.

Various contrivances have been created in order to assure a safe landing for creditors in the event of default by debtors. The most typical forms of security interests which can be created over real property include mortgages (whether legal or equitable), charges, and to a lesser extent pledges and liens. The purpose of this discourse is to analyze the problems of enforcement of security interests created over real property.

This paper shall therefore examine the nature of the various security devices listed above, identify the advantages of each over the others as well as highlight the problems facing creditors on the issues of realization of the security interests created thereby. In the first segment of this paper, mortgages as a form of real security interest shall be examined; the second section will look at charges created over real property. Thirdly, the pledges and liens will be viewed *pari passu* in an effort to assess the problems of enforcement. The effect of the provisions of the Land Use Act⁶ and its effect over security interests created over real property shall be examined in the fourth section of the paper. Recommendations shall be given in the concluding segment of the paper.

2. Mortgages; a Lender's Nightmare?

By nature, a mortgage is a transfer of title to an asset to a lender as security for the repayment of indebtedness.⁷ This transfer is made subject to the mortgagor's right to redeem. The nature of the interest transferred determines whether the mortgage

is legal or equitable. The mode of creation of the mortgage depends generally on the nature of the mortgage created.⁸

In the states where the Conveyancing Act applies,⁹ a legal mortgage may be created by an assignment of interest in real estate (with a covenant for re-assignment),¹⁰ by a sublease of the mortgagor's interest to the mortgagee (with a covenant for re-conveyance)¹¹ or by a deed of statutory mortgage.¹² In the Property and Conveyancing Law states, a legal mortgage can be created by a sub-demise of the property¹³ or by a legal charge by deed expressed to be by way of a legal mortgage.¹⁴

In Lagos State where the Mortgage and Property Law (2010) applies, a mortgage can be created either by a demise for a term of years absolute; or by a sub-demise or a sub-demise for a term of years absolute, at least one day less than the term vested in the mortgagor; or by a charge by deed expressed to be by way of legal mortgage or a deed expressed to be by way of statutory mortgage.¹⁵ Apart from the foregoing, in parts of Lagos State where the Registration of Titles Law applies, a mortgage is created by completing Form 5 annexed to the Registration of Titles Law.

As opposed to a legal mortgage, equitable mortgages can be created by a mortgagor with only an equitable interest in the property, it can also arise in the presence of an agreement to create an equitable mortgage, it can come into operation by the delivery of title deeds back with the requisite intention to create an equitable mortgage and it also arises by operation of the law.¹⁶

In addition to legal and equitable mortgages, there arise situations where the court can infer the existence of a mortgage relationship from the conduct of the parties especially where the relationship is predicated on payment of installments by an allottee of a premises in situations where it would be unjust to revoke such allotment because such allottee defaulted in the payment of an

⁸ In Nigeria, state specific regulations as well as the overriding stipulations of the Land Use Act apply. In northern and Eastern states, the Conveyancing Act (1881) applies while in western states the Property and Conveyancing Law (1959) applies. In Lagos State the Mortgage and Property Law (2010) applies.

⁹ See footnote 7 above.

¹⁰ Section 15

¹¹ Section 18

¹² Section 26 (1)

¹³ Section 108 (1)

¹⁴ Section 109 (1)

¹⁵ Section 15

¹⁶ I O Smith, *Nigerian Law of Secured Credit* (Lagos, Ecowatch Publications, 2006) at pages 38-42 for a more detailed analysis of the modes of creation of equitable mortgages.

or contract, in addition to the personal promise of the debtor to discharge the obligation, obtains rights exercisable against some of the property in which the debtor has an interest in order to enforce the discharge of the debtor's obligation to the creditor'.

⁴ The secured creditor has a priority right as opposed to the unsecured creditor who first has to seek judicial intervention before he can levy execution on the property of the debtor.

⁵ R J Mann "Explaining the Pattern of Secured Credit" (1997) Volume 110 *Harvard Law Review*, Page 625 at 638-639

⁶ Cap L5 Laws of Federation of Nigeria (2004)

⁷ See also S. 2(vi) of the Conveyancing Act (1881) which defines a mortgage as including 'any charge on any property for securing money or money's worth...'

installment.¹⁷ Even though the Land Use Act does not stipulate expressly the creation of a mortgage, it however diminishes the nature of interests to be held in land. As will be seen subsequently, the Act has significantly whittled the ambit of interests that can inure to a mortgagor which in turn can be transferable to the mortgagee.¹⁸ This reduction has to a large extent affected the efficacy of the enforcement of the security interests accruable to a mortgagee.¹⁹

Mortgages as vehicles of security interest in real property are afflicted with problems arising from creation, enabling laws, and realization. The mortgagee's rights which come into operation upon default by the mortgagor are the subject matter of strict regulation.²⁰ While the restrictions imposed on the mortgagee in his dealing with the *res* is well understood when viewed from the prism of protecting a hapless mortgagor from unconscionable bargains and any attempt to deprive him of his property, the same protection granted the mortgagor has the effect of making it difficult for the mortgagee to realize his security.

¹⁷ In *Anambra State Housing Development Corporation v Emekwue* (1996) 1NWLR (Pt 426) page 506; the Supreme Court held that a statutory corporation with authority to build houses and sell these on terms to people, was in some way a mortgagee to the buyer whom the court considered a mortgagor. For this reason the Court surmised that as a mortgagor, the buyer was entitled to retain his equity of redemption even after the contractual date for the payment of an installment had passed. The Court therefore held that in the capacity of a mortgagee, the statutory corporation could not revoke an allotment when the allottee failed to keep up with his installment payments for some weeks. (This case has however been criticized by Prof Smith as conflicting with the established concept of mortgages as laid down by Lord Lindley in *Santley v Wilde* (1899) Ch page 474.

¹⁸ For instance, by virtue of Section 1 of the Act, absolute ownership of land has been abolished and what remains in a usufructuary right in landed property as denoted by the rights of occupancy which the Governor of a state is empowered to grant. The implication of the vesting of land in a state on the governor to 'hold in trust' is a divesting of absolute ownership of land or what could be known as interest in fee simple. The nature of this right of occupancy remains unclear as the Act does not define it. In *Abioye v Yakubu* (1991) 5 NWLR (Pt 190) page 130; the Supreme Court was of the view that 'Rights of occupancy bear resemblance to leases, they can be assigned, they can be mortgaged and they can be underlet or sublet'.

¹⁹ I.O Smith *op. cit* at page 73. The learned professor of law in this work has highlighted the ways by which mortgage security can be enforced to be through the enforcement of covenant to repay, entering into possession, sale of mortgage property in satisfaction of the mortgage debt, appointment of a receiver or foreclosure of equity of redemption.

²⁰ For instance, a mortgagee in possession is obliged to keep the property in a reasonable state of repairs and is liable for deterioration of the property where it is left to degenerate, he is under a strict duty in equity to give account, he should be diligent in collecting rents and profits and is liable in sums not collected due to his own default, where the mortgagee is in actual physical possession, he is liable for occupation rent.

The multifaceted legal regulation²¹ applicable in the very creation of mortgages as well as judicial interpretations²² of what constitute mortgages makes for uncertainty and exposes the secured creditor to the risk of non enforceability of the transaction to recover the mortgage sum where the strict letter of the law has not been complied with. Furthermore administrative and judicial bottlenecks extant in the creation and perfection of mortgages make the initiation of the mortgage technical enough to defeat the goal of ease of transactions.²³ The remedies available to a mortgagee upon default by the mortgagor are unsatisfactory as they are fettered by duties so onerous that the mortgagee is placed between the proverbial rock and hard place.²⁴ This calls into question the efficacy of mortgages as security instruments even though they are by and large the preferable instruments for creating security in real property in favour of creditors.

A subsequent section of this study shall examine the effect of the Land Use Act on all the modes of security interests. The next segment of this paper shall examine the nature of charges and the problems of enforcement of securities created thereby.

3. Fixed and Floating Charges: Creation, Perfection and Enforcement; Whither the Secured Creditor?

The Fixed Charge

A fixed charge is a charge over specific property of a company which clings to the property as soon as it is created. According to Otubu, the creation of a fixed charge gives the chargee the right to immediately acquire the charged assets in satisfaction of the debt or if the charge is fixed upon future assets, upon the chargee acquiring interest in the assets.²⁵

²¹ For instance transactions in the PCL, CA and Lagos States have to be in conformity with these laws as well as the overriding provisions of the Land Use Act which applies throughout Nigeria and has constitutional flavor.

²² See footnotes 17 and 18 above

²³ E Essien; *Law of Credit and Security* (Uyo: Topwatch Publications, 2012) p.262

²⁴ For instance the right of sale and entry into possession are weighed by the duty to give account of the proceeds of sale and make reasonable improvements on the property but not to make improvements not in the contemplation of the mortgagor thereby improving him out of his estate. *Sandon v Hooper*

²⁵ T Otubu : 'Security Other than Land, Whither Nigeria' in I O Smith (Ed) *Secured Credit in a Global Economy, Challenges and Prospects* (Lagos, Department of Private and Property Law, Faculty of Law, University of Lagos, 2003) pg 90.

Smith also gleans from the characteristic features of a fixed charge as outlined by statute²⁶ that a fixed charge could be made over land, machinery, stock in trade, raw materials, goods in process, book debts, future and after acquired property.²⁷ He goes further to say that incidental to creating a fixed charge on future assets is the implicit restriction of the right of the creditor to manage such assets in the normal course of business not really the fact that such assets are ambulatory in nature.²⁸ In other words, the fact that the assets over which the fixed charge has been created are ambulatory in nature does not transform a fixed charge into a floating one, what is paramount is that there is a restriction on what would have otherwise been the absolute freedom of the debtor to deal with the assets in any way he chooses.

The effect of this restriction is important when one acknowledges the fact that even though the proprietary interest of the creditor rests upon the specified assets when the fixed charge is created, when the assets in contemplation come into existence, the creditor/chargee may give the debtor/chargor license to deal with the assets in the normal course of business and only restrict his right to transfer the asset which is an incidence of absolute ownership.²⁹ This has led to learned authors concluding that in the light of this feature of a fixed charge, the difference between a fixed and a floating charge may lie more in semantics than actual delineations.³⁰ A debenture upon whose foundation a fixed charge comes into existence usually takes the characteristics of a mortgage whether legal or equitable and a chargee has all the rights and obligations of a mortgagee.³¹ Indeed if a fixed charge is created by way of deed, it is a legal mortgage. According to Smith, the mode by which a fixed charge is created is the same way a mortgage is created, that is, the transfer of proprietary interest to the fixed chargee subject to cesser on redemption.³²

Otubu explains that a fixed charge basically stops the company from disposing of the assets which are the subject of the charge without the consent of the chargee, and affords the chargee the right to have the debt satisfied from the proceeds of the charged assets. He points to the disadvantage of the fixed charge as being the incapacitation of the fixed chargee as regards the satisfaction of his

debt if for any reason the particular asset upon which the charge was fixed is destroyed loses its value or is insufficient to meet the debt.³³

This implies that in the event of the depreciation of the assets, the fixed chargee cannot cast his eyes on any other asset of the company for the satisfaction of his debt and this would reduce him to the status of an unsecured creditor. However, sections 208 and 209 of the Companies and Allied Matters Act have outlined the means by which a fixed chargee may realize his securities as well as the remedies open to him. Perfection of charges is as applicable under the relevant laws governing Governor's consent (with regards to fixed charge on land)³⁴ and the registration requirements codified by the CAMA.³⁵

Floating Charges

Relying on the case of *Union Bank Limited v Tropic Foods*³⁶, Otubu defines a floating charge as an equitable charge upon all or any of the assets or property of a company, the particular items of which are always changing.³⁷ It is a hovering charge which does not fasten on the assets of a company until an event happens which causes it to so rest.

A floating charge has been described as 'one of equity's most brilliant creations'³⁸ and 'a further manifestation of the English genius for harnessing the most abstract conceptions to the service of commerce.'³⁹ In one of the earliest decisions which threw more light on the characteristics of a floating charge, it was described in the following words;

A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is the essence of such a charge that it remains dormant until the undertaking ceases to be a going concern, or until the person in whose favor the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default.⁴⁰

The definition of a floating charge lies more in actual description than in a concise definition. In keeping with that, in *National Westminster Bank PLC v*

²⁶ Section 173 (2)

²⁷ (*Ibid*) at page 298

²⁸ (*ibid*) at page 299

²⁹ *ibid* at page 298

³⁰ Davies *ibid* at page 816,

³¹ These are the right to sell, foreclose, enter into possession, appointment of a receiver and also all the attendant duties inherent in the exercise of these rights.

³² *Ibid* at page 299

³³ Otubu *ibid* at p. 91

³⁴ Section 22 of the Land Use Act (Cap L5, Laws of the Federation of Nigeria 2004) when taken with Section 51 of the same Act

³⁵ Sections 190-203 of CAMA

³⁶ (1992) 3 NWLR (Pt 228) 231 at 244

³⁷ (*ibid*) at page 91

³⁸ Roy Goode in Getzler and Payne's "Company Charges- Spectrum and Beyond"

³⁹ *Ibid*

⁴⁰ Per Lord Macnaghten in *Government Stocks and Other Securities Investment Company v Manila Rly Company* (1897) AC at page 86

*Spectrum Plus Limited and Others*⁴¹, the House of Lords elected instead to describe the essential characteristic of a floating charge rather than define it, and they described it thus:

the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime the chargor is left free to use the charged asset and to remove it from the security.⁴²

In the opinion of Davies, floating charges gained popularity after the repeal of the Bills of Sale Acts as it was a business device which enabled businesses to raise additional capital over general assets without constraining the dealings in those assets until something happens which could be construed as a crystallizing event.⁴³

He states that in the light of the need to continually deal in company assets and the very real possibility of the acquisition of assets of generic description by a company, a fixed charge is somewhat impracticable since the consent of the chargee would be needed every time any asset was disposed of and a new agreement entered into each time a company acquired more assets. It is his submission that a floating charge takes care of these difficulties as it enables new stock to be turned over but attaches to whatever it is converted into whenever new stock is acquired.⁴⁴

Otubu opines that as a form of hypothecation,⁴⁵ the creditor has no rights exercisable in the assets charged until default by the debtor.⁴⁶ The CAMA defines a floating charge in Section 178⁴⁷ (1) and this definition is in Smith's view an amplification of the common law definition.⁴⁸

⁴¹ [2005] UKHL 41

⁴² *supra*

⁴³ *op. cit.* at page 40

⁴⁴ *ibid* above

⁴⁵ Hypothecation is a charge on property as security for the payment of a sum of money where the property remains in the possession of the debtor. M Woodley *op cit* at page 208

⁴⁶ *ibid* at page 91

⁴⁷ The section defines a floating charge as 'an equitable charge over the whole or a specified part of the company's undertakings and assets including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until- (a) the security becomes enforceable and the holder thereof, pursuant to a power in that behalf in the debenture or the deed securing the same, appoints a receiver or manager or enters into possession of such assets; or (b) the court appoints a receiver or manager of such assets on the application of the holders; or (c) the company goes into liquidation.

⁴⁸ *Ibid* at page 302

Smith also enumerates the advantages of a floating charge as acting as a shield to the chargee and the chargor contemporaneously.⁴⁹ From the perspective of the chargee, a floating charge protects him against the unsecured creditor as it accords him priority over such creditor.⁵⁰ On the part of the chargor company, floating charge insulates the company from the chargee since the company can go about its normal business on those assets without recourse to the chargor over those particular assets until a default or a crystallizing event.

Charges are important as instruments of repayment of indebtedness due to the fact that their registration gives charge holders priority over other creditors when the security is to be enforced to repay indebtedness. Priority is the order in which the competing claims of creditors in the same assets or the same classes of assets are resolved.

In Nigeria, a fixed charge has priority over a floating charge even if the fixed charge was later in time than the floating charge. This is due to the fact that implicit in the grant of the floating charge is the freedom given to the company in creating a floating charge to continue dealing with the charged assets.⁵¹ In Davies's opinion, this makes the floating charge vulnerable as it can be overtaken by the superior interest as entrenched in the fixed charge.

Where there are two floating charges, the first one to be created ranks first in priority over the subsequently created ones. Even though a company cannot create two floating charges which rank *pari passu*, a floating charge may be created over specific assets which are in a general class of already charged assets charged where the latter was made in contemplation of the former.⁵² An unsecured creditor has priority over a floating charge prior to crystallization.⁵³ That is to say that where for instance an unsecured creditor in exercise of his rights levies execution on the assets, the floating charge holder cannot compel a refund of the money.⁵⁴

This questions the efficacy of the floating charge especially prior to crystallization due to the fact that prior to crystallization the floating charge holder is helpless and even at crystallization his interest may still be postponed to other interests superior to his own.⁵⁵ However, upon crystallization, where the floating charge transmutes into a fixed charge and the holder takes free of any other interest. A floating charge is also subject to any right of lien or set off prior to

⁴⁹ *Ibid* at page 303

⁵⁰ This poses a problem of enforcement for the secured creditor

⁵¹ Section 179 of CAMA

⁵² Smith *ibid* at page 318

⁵³ Davies *ibid* above

⁵⁴ Smith *ibid* above

⁵⁵ Such as the interests of preferential creditors and the interests of a fixed chargee.

crystallization and any other claim by title paramount. It is apposite at this point to emphasize the perhaps obvious fact that holders of charges whether fixed or equitable do not hold such charges for the purpose of the enjoyment of the property or assets held. They do so in order to realize their security. In the instances where the property or assets which comprise the subject matter of the charge is under the control of the chargee, such control is exercised solely for the purpose of working them to realize the security.

It goes without saying therefore that the vehicle of priority should be a tool for the enhancement of the chances of the charge holder realizes his security. However, where the priority of a debenture holder is impeded by in any way by the postponement of his interest to those of other interest or a reduction of a percentage of his interest to those of unsecured creditors as has been briefly examined above, the efficacy of charges particularly the floating charge as security is undermined. Therefore enforcement of a charge on real property a problem irrespective of issues in priority due to the fact that other preferred creditors may be accorded preferential status and thereby postponing the interest of charge holders who are left unimpeded to join the ranks of unsecured creditors. The next section of this study shall examine the efficacy of pledges and liens on real property and problems inherent in their enforcement.

4. Pledges and Liens of Land and Real Property: Is the Secured Creditor on Sinking Sand?

A pledge is created when a land owner known as a pledgor, transfers the possession and use of land to another person known as the pledgee. This transfer is predicated on the guarantee that the loan would be repaid and the land redeemed thereby.⁵⁶

According to Elias however, a pledge is a kind of indigenous mortgage of land and is a device through which the owner-occupier of land in order to secure an advance of money or money's worth, gives possession of and use of the land to the pledge creditor until the debt is fully paid up.⁵⁷ It has however been argued that the above definition given by Prof Elias is not in conformity with the intrinsic characteristics of a mortgage and a pledge in the sense that whereas a customary pledge is perpetually redeemable, the mortgagee's rights of foreclosure and sale arise upon default by the mortgagor.⁵⁸

⁵⁶ Essien *ibid* at page 21 quoting A A Utuama, *Nigerian Law of Real Property*, (Port Harcourt: Shansson Co. Limited 1989) p. 25

⁵⁷ T O Elias, *Nigerian Law and Custom* (London: Sweet and Maxwell Publishers, 1971) p.153

⁵⁸ Essien *ibid* at p. 216.

A lien on the other hand, is a legal right given to another by an owner of property to secure a debt or one arising by the operation of law to secure a debt in favour of certain creditors.⁵⁹ It is an encumbrance on one person's property, given to secure a debt the property owner owes to another person.⁶⁰ In the United States for instance the lien can be enforced by ways similar to the enforcement of a mortgage and the lienee with respect to real property is in a similar position as a mortgagee with all the rights, duties and obligations attaching to him.⁶¹

As regards the Nigerian terrain however, Onuoha ties up the similarities between the pledge and lien by the contention that both come under possessory security in the light of the fact that a pledge and a possessory lien are both possessory securities.⁶³ He highlights the sharp divide between them by stating that awhile the lien merely gives a right to retain the security, a non customary pledge can; if the debt remains unsatisfied after a reasonable time has elapsed, sell the property which is the subject matter of the pledge.⁶⁴

Prof Essien in highlighting the difficulties associated with the realization of security provided by the pledge, avers that the options open to the mortgagee to realize his security, as stringent as they appear, do not avail the pledge.⁶⁵

As shall be seen in the next section, the Land Use Act itself does not do much to ease the realization and enforcement predicament of secured creditors. It is apposite at this juncture to concede that this law has effectively narrowed if not eclipsed the role of pledges and liens as instruments of security interests in real property for the protection of creditors.⁶⁶

⁵⁹ Lien, Legal Definition of a Lien in Legal Dictionary; the Free Dictionary. Downloaded from www.investorwords.com/2800/lien.html

⁶⁰ *Ibid* see footnote 57 above

⁶¹ L R Lieby, Arbitration and Lien Enforcement in Dispute Resolution Journal, Vol. 66 no. 2 May-July 2011 www.thecca.net/.../AAA%20--and%20lien%20enforcem... Last visited on 17th July 2014

⁶³ R Onuoha, 'Problems of the Land Use Act which act as a Clog to the Creation and Enforcement of Security by Consolidated Banks in Nigeria' Page 5

⁶⁴ *Ibid* see footnote 59 above. He however concedes that a customary pledgee has no power of sale but a mere right of retention given the fact that customary pledges are perpetually redeemable.

⁶⁵ *Ibid* at page 263 where he goes further to state that while the mortgagee can enforce his security by exercising his option of suing on the personal covenant to repay, the pledgee has no such option except perhaps the right to sell his interest in the property. He further avers that the English law principle of foreclosure has no place in the customary pledge.

⁶⁶ For instance, Section 1 of the Act which vests all land in the state in the person of the governor of the state has exterminated allodial ownership of land. In other words, land in Nigeria is no longer the absolute property of the occupiers. These occupiers of land have mere rights of occupancy which can be statutory or customary depending on whether the land is situated in an urban or rural area (see sections 3,5, and 6 of the Act)

In Smith's view, the greatest barrier to the creation of a valid pledge is the provision of Section 36(5) of the Act which seems to proscribe any transfer of land in non urban areas deemed granted.⁶⁷ He goes further to state that while the interpretation of the section is indicative of a total bar on the 'transfer of land', in other words proprietary interest in land, nothing suggests a transfer of possessory interest and surmises that this interpretation needs judicial support to make it potent.⁶⁸ These factors have occasioned the realization of security interests over land a difficult terrain indeed for the secured creditor and made the security of a mortgage a better and preferable option in spite of the duties imposed on the mortgagee by law.

5. The Land Use Act and Enforcement of Security in Real Property; An Exercise in Frustration?

As stated earlier, allodial ownership of land has been swept away by the provisions of the Act which vests all land in each state in the person of the governor of each state to hold in trust for the people.⁶⁹ The nature of title capable of being granted under this law is a right of occupancy whether statutory or customary.⁷⁰

In *Abioye v Yakubu*,⁷¹ the Supreme Court stated that 'rights of occupancy bear resemblance to leasehold interests. They can be assigned, they can be mortgaged, they can be underlet or sublet'. Essien has however argued that this position is in error as an incidence of a lease is exclusive possession which a holder of a right of occupancy either does not have or shares his right with the Governor of the state (who enjoys certain rights concurrently with him).⁷²

In *Savannah Bank v Ajilo*,⁷³ the same Supreme Court had earlier stated that 'in terms known to interests in land, the quantum of a right of occupancy remains unclear. To the extent that it can only be granted for a specific term under the Land Use Act 1978, it has the resemblance of a lease'.

Under Section 28 of the Act it shall be lawful for a right of occupancy to be revoked by the governor for 'overriding public interest' the scope of which

⁶⁷ The section reads as follows 'No land to which this section applies which was immediately before the commencement of the Act held or occupied by the any person shall be sub-divided or laid out in plots and no such land shall be transferred to any person by th person in whom the land was vested aforesaid'

⁶⁸ *Ibid* at page 112

⁶⁹ Section 1

⁷⁰ See footnote 63 above.

⁷¹ (1991) 5 NWLR (PT. 190) page 130 particularly at page 223

⁷² *Ibid* at page 283

⁷³ (1989) 1 NWLR (Pt 97) at 305

remains unclear. The ease with which this right of occupancy can be revoked and the nebulousness of the reason for revocation is not indicative of a lease.

The Court of Appeal in *L.S.D.P.C v Foreign Finance Corporation*⁷⁴ held that 'the right of occupancy is by nature a hybrid between a licence and a lease... on terms and conditions which upon breach by a right holder is subject to revocation by the governor. The efficacy of rights of enforcement of creditors' interest in real property to a large extent depends upon the security of interest. In the light of contradictions as to the exact nature of these rights of occupancy, it is difficult to assert that the nature of interest in real property has been clearly defined.

The consent provisions of the Land Use Act also constitutes a challenge to realisation and enforcement of interests in real property by the secured creditor. By virtue of the Act,⁷⁵ the consent of the Local Government must be obtained before any interest in rural land can be alienated by way of assignment, mortgage, transfer of possession or sublease of a customary right of occupancy.⁷⁶ The process of obtaining this consent is tedious and time consuming as well as expensive. This generally defeats the purpose of the security interest transactions which are predicated of efficiency, consistency and are time bound. Failure to obtain consent shall have the effect of denying the validity of the security transaction in real property.⁷⁷

Apart from the foregoing, the issue of title obtainable under the Act poses some concern. Under Section 9 (1), a holder of a right of occupancy is issued a certificate of occupancy by the grantor of this right. This certificate is a mere evidence of some sort of title to land and not the title itself. In Onuoha's opinion, the statements made in the case of *Chioma v Suwa*⁷⁸ that a certificate of occupancy 'creates a term of years absolute for the number of years stated...' finds no support in statute.⁷⁹

Sections 28 and 29 of the Act which empowers revocation and compensation gives the governor the right to revoke for the purposes mentioned therein as indices of overriding public interest and makes compensation payable to the 'holder and occupier' which upon a perusal of section 51, does not include a creditor. The implication of this is that upon revocation, the creditor will have no other choice than to explore alternative ways of recovering his money.

⁷⁴ (1987) 1 NWLR (Pt 50) 413 at page 444, see also *Osho v Foreign Finance Corporation* (1991) 4 NWLR (Pt 184) at page 154 pp 197

⁷⁵ Sections 21 and 22

⁷⁶ Section 21

⁷⁷ As was obtained in the case of *Savannah Bank v Ajillo*

⁷⁸ (1986) 1NWLR (Pt 19) page 751, 756

⁷⁹ *Ibid* at page 6

As can be deduced from the foregoing, the problems facing the creation of security interests in real property has been further compounded rather than ameliorated by the provisions of the Land Use Act which enactment was predicated on equitable distribution of land among Nigerians. It therefore is safe to surmise that these sections of the Act defeat the purpose for which they were enacted.

6. Conclusion & Recommendations:

This paper has attempted to highlight the problems confronting the enforcement of real security in Nigeria. One would align oneself with Essien's assertion that notwithstanding the problems, real security still remains the most attractive form of security.⁸⁰

This view is apposite due to the fact that security interests over some property of the debtor functions to guarantee repayment and grants the creditor some assurance given the fact that the mere promise of the debtor to repay could be overtaken by supervening events or the intractability of a recalcitrant debtor. Security over real property divides the interests thereby created between the debtor and the creditor and provides the creditor with reassurance in the form of tangible assets upon which he can cast his hands in order to retrieve his money.

On the part of the debtor, real property provides him with tangible assets upon which he can raise capital without necessarily divesting himself of the property completely. This is a favourable situation as the value of the property being in excess of the sum obtained as a loan is a powerful incentive for repayment. The sometimes stringent intervention of enabling laws and statutes guiding these transactions are notionally for the protection of both the creditor and the debtor. Where however the laws defeat the purpose for which they were enacted, there arises an urgent need for review and reform in order to maximise business efficacy. Courts should strictly enforce the right of a mortgagee to sell the mortgaged property without landing same to unnecessary legal technicalities. Also mortgage agreements should be enforced once they are evident in the documents tendered by the parties. Mortgage transactions should be excluded from the consent requirements enacted under section 22 of the Land Use Act.

⁸⁰ *Ibid* at page 284