

**MORTGAGE TRANSACTIONS IN NIGERIA: IS THE SECURITY OF INTERESTS OF THE MORTGAGEE UNDER THE LAND USE ACT 1978 GUARANTEED?\***

**Abstract**

This paper argues that mortgage transactions under the Land Use Act 1978 are hazardous especially for the mortgagee whose security of interests is somewhat compromised by the provisions of the Land Use Act 1978. It examines the mortgagee as the lender in a special contract arrangement protected by law who enters into the transaction as a prudent man of business essentially intent on profit making and not for other altruistic reasons. He sets out within the confines of the law to deploy his resources upon an offer from the borrower called the mortgagor upon conditions which while opening up opportunities for financial growth and increased wealth also ties up his resources in the hands of another for a stipulated period backed by the conveyance of a mutually approved property as security. The paper posits further that the deployment of the mortgagee's resources is an investment from which he hopes to reap appropriate dividends but like most investments though protected by law it is fraught with risks and uncertainties. The paper queries the protection of the interests of the mortgagee by the Land Use Act 1978 by examining two major provisions of the Land Use Act 1978 namely sections 21 & 22; and Section 51(1) that threaten the security of the mortgagee's interest and concludes that the mortgagee's security of interests under Nigerian law is not clearly guaranteed and therefore recommends amongst others the amendment of the Land Use Act 1978.

**1. Introduction**

Lending and borrowing transactions fuel economic activities in society as no business man can validly have all the resources needed to promote a

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viable enterprise at all times but may have the need to rely on credit advanced by someone else or an institution that has a legal mandate to advance credit on regulated interest rates. Most nations thrive on credits as the wheel of various business ventures are continually oiled by instruments of credit borrowing and lending on agreed terms. The emphasis on global economy and commerce therefore is on investments, both monetary and otherwise as monetary investments in real estate generate resources which become deployable to various business men who need to borrow credit to remain afloat in business. This borrowing which is within the purview of mortgage transactions is guided by relevant laws and demands that the borrower confines himself to his ability to repay loans advanced in addition to the accrued interest agreed upon by the parties. Sadly however this ability to readily repay loans advanced is not always achieved; and which factor discourages lending and so underscores the need to further protect the lender via the instrumentality of the law. Borrowing from willing creditors is not new although the quantum, nature and reasons for borrowing have increased and changed with the passing years and mostly due to the complexity of human society and economic activities. Since investments generally by their nature are fraught with uncertainties, a creditor who invests his money in form of lending credits also faces great challenges of recovery of advanced capital which may become frittered away by the borrower on both spurious and possibly genuine reasons. No matter the reasons advanced, the fact remains that the risk of loss of credit is real which informs the deployment of legal instruments to streamline borrowing and lending of credit in the nation to reduce calculable risks. The question that seeks answer is the extent to which relevant laws are actually or have actually assisted the mortgagee creditor in protecting his interest so that he is encouraged to continue investing his funds for both personal and national economic growth. How can the inability to pay back the loan borrowed for reasons outside the control of the borrower such as failure of the venture to which the borrowed funds were deployed or the refusal of some contracting institutions especially the government to perform their obligations to a contractor who has borrowed money to execute the contract for whatever reasons, or unforeseen harsh economic reversals and mismanagement of borrowed funds which are inexplicable be addressed to give the lender further assurance of recoverability of

advanced credits?

Credits need to be secured by law to be more meaningful to the Nigerian creditor who by advancing credit to a borrower is encouraging commercial transactions and growth and so is not himself be driven out of business. This paper therefore considers how secure and protected the mortgagee's interest is in Nigeria. Is the principal legislation on land; the Land Use Act 1978 actually protective of the interest of the mortgagee? Is this law really encouraging or discouraging the growth of investments and ultimately national economy through the mortgage transactions in Nigeria? These questions will guide the subsequent discussions.

## **2. Relevant Concepts of Secured Credit Systems and Mortgages**

Although detailed definition of concepts is not the focus of this paper, it is important to draw attention to specific meanings ascribed to major concepts under consideration in this work as a guide to the proper appreciation of the issues herein canvassed.

Secured credit systems in this work concern financial transactions between parties who engage in the business of borrowing and lending of credit on agreed terms backed by approved and verifiable collateral. A credit system which involves trading in money would thus be termed secured when the contract evidencing the trade legally incorporates assets of the borrower which are willingly offered to the lender to hold and as security for a loan and upon a specific agreement of the assets' return to the owner upon the satisfaction of his obligations. According to the court in *Bristol Airport Plc v Powdrill*<sup>1</sup>, a credit security is created where a person (the creditor) to whom an obligation is owed by another person (debtor) by statute or contract in addition to the personal promise of the debtor to discharge the obligations, obtains rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtor's obligations to the creditor.

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<sup>1</sup> (1990) 2 All ER 493

A security transaction is thus used to describe property to be appropriated by the lender/creditor for the payment of the sum of money borrowed by the debtor although legally speaking however, this is not correct because the property itself is not the security rather the right to the property is the security. The purpose of a credit security is to put the creditor in a position to recover the debt in the event of default in payment by the debtor by allowing him/her to legally impound the borrower's property used as security to defray his interests. Securities may therefore be generally be divided into personal securities such as undertakings, guarantees and sureties whilst real securities include mortgages, pledges and charges.

A mortgage on the other hand has no single and universally accepted definition. In fact the difficulty in defining the term was acknowledged by the court in *Samuel v Jarrah Timber and Wood Paving Corporation*<sup>2</sup> where it pointed out that “no one by the light of nature ever understood an English mortgage of real estate.” This paper would however consider the various meanings ascribed to this word by various scholars. It has been described as a transfer of rights to a piece of property usually as security for the payment of a loan. It is any loan for which property is used as security<sup>3</sup>. It is the conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to stipulated terms<sup>4</sup>. Lindley M R in *Santley v Wilde*<sup>5</sup> defined a mortgage as “ a conveyance of land or assignment of chattels as a security for the payment of a debt or the discharge of some other obligations for which it is given” From this definition it is deduced that personal property (chattel) other than land can also be a subject of mortgage; although the entire definition has been criticised<sup>6</sup> as being inappropriate for the Nigerian Legal system where land rights do not amount to title to be

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<sup>2</sup> (1904) AC 323 at 326

<sup>3</sup> M Robinson & G Davidson; Chambers 21st Century Dictionary (edited; Great Britain: Chambers Harrap Publishers Ltd, 1999)p. 890; Merriam-Webster's Dictionary and Thesaurus; ( 2007) p.527

<sup>4</sup> B A Garner, Black's Law Dictionary (7th edition, 1999)p.1026

<sup>5</sup> (1899) 2 CH 474

<sup>6</sup> See generally, Essien Enefiok; Law of Credit and Security in Nigeria(second edition; Uyo: Toplaw Publishments Ltd,2012)pp68-76

conveyed or transferred as in ownership cases because the Land Use Act 1978 grants only a usufructual right or interests in land although such rights are still transferable. It is important to take a moment to highlight the case of *Santley v Wilde* which looks at mortgage as a conveyance. But is it actually a conveyance? What is a conveyance? It is a legal document that transfers title of a person in real property to another person. In Nigeria under the Land Use Act 1978, radical title to land resides with the governor and the people have only an interest which is transferable. So a mortgage in Nigeria cannot be a conveyance because a conveyance transfers title to land which Nigerians under the Land Use Act do not have. This is the crux of the argument of Enefiok Essien who prefers to view a mortgage as just a charge on land as security for credit and not as a form of conveyance of title for repayment of debt. He derives support for his position from the Ghanaian Mortgages Decree<sup>7</sup>.

However one looks at a mortgage transaction, what is central and common to the definitions is the fact that the transfer of the property or the totality of the interest of the borrower to the creditor is to give him (the latter) assurance that his credit will be repaid. This is possibly why the Mortgage and Property Law of Lagos State 2012 describes a mortgage “to be the transfer of any interest of any in a specific movable or immovable property for the purpose of securing the repayment of a loan against an existing or future debt or the performance of an engagement which may give rise to pecuniary liability. For Chesire<sup>8</sup> a mortgage arises where land is conveyed or otherwise dealt with in order to secure the payment of a debt or the discharge of some other obligation and Megarry<sup>9</sup> maintains that 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. He defined it generally as:

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<sup>7</sup> S.1(2) Decree of 1972 which defines a mortgage as a contract charging immovable property as security for the due repayment of a debt and an interest accruing thereon or the performance of some other obligations for which it is given in accordance with the terms of the contract...

<sup>8</sup> Chesire and Burn, *Modern Law of Real Property* (9th edition)p.547

<sup>9</sup> *A Manual of the Law of Real Property*, 4th edition, p. 460

An agreement which may be expressed by deed between persons in which a borrower of a sum of money puts up his property (real or personal) as collateral for the money given with the understanding that the property will be conveyed back to him upon repayment of the money and any interest on it.

The Nigerian courts have also defined the concept in *Olowu V Miller Bros Ltd*<sup>10</sup> to mean “a security created by contract for the repayment of a debt already due or to become due.” It “is a legal or equitable conveyance of the title as security for the payment of debt or the discharge of some obligations which it is given subject to a condition that the title shall be re-conveyed if the mortgage debt is liquidated<sup>11</sup>”; and it is defined further as “a conveyance or other disposition of land designed to secure the payment of money or the discharge of some other obligations<sup>12</sup>”. It creates a proprietary interest in the mortgagee over the security which helps him to prevail over other creditors in the event that the mortgagor goes bankrupt.

Inherent in a mortgage transaction are the interests of two principal characters, the mortgagor borrower and the mortgagee lender; and which interest is evidenced by a deed. A mortgage deed therefore is that instrument showing a mortgage transaction that is, loans secured by collateral where the borrower or the mortgagor is obliged to pay back on predetermined terms. For the purposes of this paper, a mortgage transaction concerns the transfer of interest in land as security for the discharge of a debt or the performance of an obligation subject to the right to redeem same upon the discharge of the debt.

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<sup>10</sup> (1922) 3 NLR 110

<sup>11</sup> IO, Smith, Practical Approach To Law of Real Property in Nigeria (Nigeria: Ecowatch Publications Limited, 1999)p. 236

<sup>12</sup> EH Burn; Cheshire's Modern Law of Real Property (12th edition; London: Butterworths, 1976)p. 636

**3. Examination of Mortgage Transactions in Nigeria Forms & Nature of Mortgage Transactions:**

The two major forms of mortgage transactions are the legal and equitable mortgages which are basically borne out of their modes of creation. A mortgage may be likened to some other forms of credit security systems such as charges but it is not a sale. It is only a conveyance or transfer of interest in land or any other chattel for a definite purpose (security for loan) and within a specific duration (until the legal due date). The transfer of interest is not absolute but subject to redemption upon fulfilment of obligation. The interest to be conveyed may be a legal or an equitable interest upon the payment of consideration by the parties. In a mortgage both parties have mutual rights of action; that is, while the mortgagor can sue for the return of the security that is to recover his property, the mortgagee has the right to sue for the outstanding sum and interest or to foreclose or exercise any of his rights against the borrower.

**4. Creation of Legal and Equitable Mortgages:**

The methods of creating legal mortgages in Nigeria depend on the location of the property which is subject to a mortgage and the nature of interests to be mortgaged; that is, whether it is a freehold, leasehold/statutory right of occupancy or a sublease.. Generally under the Conveyancing Act States which cover the Nigerian states in the north, east and south with exception of states like Bayelsa that have enacted their own laws, it is the common law principles that are applicable subject to the provisions of the Land Use Act 1978. The legal mortgage can be created by assignment of the mortgagor's unexpired interest in the land with a covenant for reassignment or re-conveyance of the mortgage. This is especially so in a freehold which can be likened to the deemed right of occupancy under the Land Use Act for persons who held land before 1978. The advantage of this mode is that there is no reversionary interest in the mortgagor so where he is in default, the mortgagee can pass his entire interest to a purchaser without problem while it has the disadvantage of tying the mortgagee to the restrictive covenants that run with the land as there is privity of estate between him and the Governor who is the head lease or even if there is no privity of contract.

It can also be created by sub demise of the mortgagor's leasehold interest for a term at least one day shorter than the term of the original lease with a proviso for re-conveyance on the redemption of the mortgage or by a Deed of Statutory Mortgage which is made in a particular form stated in Part 1, schedule 3 of the Act<sup>13</sup>. This method of creating a mortgage over a freehold or leasehold interest simply requires the use of a Form provided in the part 1 to the 3rd schedule of the Conveyancing Act 1881.

A legal mortgage under the Property & Conveyancing Law (PCL) States may be created by demise for a term of years absolute, subject to a provision for cesser upon redemption; by a sub-demise which conveys the unexpired leasehold interest for at least a day shorter than the lease term and by way of a Charge by Deed expressed to be by way of a legal mortgage which is just a legal charge where the mortgagor or chargor conveys no possessory or proprietary interest to the mortgagee but creates rights in the property in favour of the mortgagee equal to the right of a legal mortgagee created by assignment or a sub-demise. But under the Mortgage and Property Law of Lagos State, a mortgage is created in two ways namely;

- i. The temporary passing of title to a property to a lender for a term of years with the Mortgagor/Borrower's right of redeeming or repaying the loan, or
- ii. By the execution of a Deed of Legal Mortgage.

Equitable Mortgages on the other hand are generally created by the mere deposit of title deeds with the mortgagee for loan. This deposit can however be construed to mean something other than a mortgage<sup>14</sup> so it is advisable that such a deposit be accompanied by a memorandum stating the purpose of the deposit. Under the Lagos State Mortgage and Property Law 2012, an equitable mortgage of a statutory right of occupancy is created by an agreement to create a legal mortgage.

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<sup>13</sup> S. 26(1) Conveyancing Act 1881.

<sup>14</sup> (1961) ALL NLR 849

It cannot be created by a mere deposit of the title deed or a mere deposit of the charge on property unless such a title deed is accompanied by an agreement to create a legal mortgage in favour of the mortgagee. It should be noted however that where the agreement to create a legal mortgage is not executed within 30 days, the mortgagee may commence legal proceedings to compel the mortgagor to execute the legal mortgage. An equitable mortgage can be further created by an agreement to create a legal charge or by the mortgage of an equitable interest as upheld by the Supreme Court in *Ogundiani v Araba*<sup>15</sup>.

The rights of the parties to a mortgage transaction are derived from Statute, common law and equity and these rights depend on whether the mortgage is legal or equitable. For instance, the Mortgagor has the right to apply for an injunctive relief against the mortgagee exercising any of his rights subject to the court's demand of mortgagor's deposit of any outstanding unpaid balance of the loan into an interest yielding account in the name of the Registrar of the High court<sup>16</sup>. Under the same law, the mortgagor has the right to redeem any one mortgage at a time without necessarily redeeming other mortgages on the same property at the same time although this right of the mortgagor does not remove the mortgagee's right to consolidate mortgages<sup>17</sup>. Where the mortgagee leaves possession of the mortgaged property in the hands of the mortgagor, the mortgagor is entitled to assign the mortgage debt and the mortgaged property to a third party. The mortgagor who is in possession has the power to lease the mortgage property although the mortgagee can restrict this right by demanding a prior mortgagee's consent. So the mortgagor generally has the right to redeem his property under mortgage and be entitled to his property upon payment of the debt owed. He has the right upon the agreement of the parties to take more than one loan out on the same property and the right to claim damages from the mortgagee who is in possession of the property in cases to damage.

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<sup>15</sup> (1978)11 NSCC 334

<sup>16</sup> See S. 26 Mortgage and Property Law of Lagos State 2010.

<sup>17</sup> S.28 (1) *ibid*

The Mortgagee on the other hand has the right to sue the mortgagor to recover the mortgage loan. Where the mortgaged property is insufficient to settle the loan, or has become wholly or partly destroyed and the mortgagor is unable to provide additional security for the credit advanced, the mortgagee reserves the right to sue the mortgagor personally for the repayment of the loan and the interest<sup>18</sup>. He has the right to formally consolidate two or more mortgages, transfer his or her interest to a third party and lease the mortgaged property once he has taken possession. He also has the right to sue the mortgagor personally where he is in default and so in breach of his covenant to repay the loan and enter into possession of the property once the mortgage is created and where this is done, he has the duty to account to the mortgagor<sup>19</sup>. The mortgagee may take possession of property for reasons such as (a) to protect the security<sup>20</sup>; (b) to intercept the profits from the mortgaged property and utilise same to discharge the mortgage debt or interest; (c) to ensure proper management of the mortgaged property. The mortgagee has the right to exercise the power of sale where mortgagor is in default of payments, right to sub-mortgage; charge an interest on the mortgage debt as agreed by the parties and is entitled to payment of the full principal sum, agreed interest, costs and expenses and nothing more. Furthermore, the mortgagee has the right to custody of the title deeds such as a certificate of occupancy to prevent the mortgagor from creating later interests in the property without the knowledge of the mortgagee except where the mortgage is over a leasehold interest and created by a sub demise. A mortgagee who has taken possession has the right to grant leases so long as the lease does not contain any condition that would act as a clog on the mortgagor's equity of redemption. Legal requirements for a valid mortgage transaction include reducing the transaction into a deed duly signed by the parties to be enforceable and stamped according to the requirements of the law<sup>21</sup>. It should also be in compliance with the consent provisions<sup>22</sup>, and registration<sup>23</sup>.

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<sup>18</sup> See S.23 *ibid*

<sup>19</sup> According to Harman J in *Four Maids Ltd v Dudley Marshall (Properties) Ltd* (1975) CH 317, "before the ink is dry on the mortgage, the mortgagee is entitled to take possession by virtue of his legal interest..."

<sup>20</sup> See *Western Bank v Schindler* (1976)3 W.L.R 34

<sup>21</sup> 21. S.22 Stamp Duties Act, Cap 58, Laws of the Federation 2004

<sup>22</sup> S.S 21 & 22 Land Use Act 1978

<sup>23</sup> *Jules v Ajani* (1980) 5-7 SC 96

## 5. Mortgage Transactions Under the Land Use Act 1978

The Land Use Act 1978 (hereinafter known as the Act) does not define a mortgage transaction but makes references to it<sup>24</sup>. The Act from 1978 became the major monolithic legislation governing land transaction in Nigeria. It altered the nature of land ownership in Nigeria<sup>25</sup> removing allodial rights hitherto enjoyed unhindered by land owners; and introducing a limited usufructual right over land known as a right of occupancy whether statutory or customary. This legal interference with ownership of land has implications for the mortgage transactions to be examined shortly. With this development ensuing from the Act, the greatest interest a person can hold and exercise is right of “ownership” and by implication create a mortgage over is a right of occupancy variously described as a lease<sup>26</sup>. By the further provisions of the Act<sup>27</sup>, on the rights and absolute possession of all improvements on the land by the holder of the statutory right of occupancy, the Act alluded to the right of such a holder to create mortgages over such improvements on the property subject to the prior consent of the Governor. A similar provision prohibiting alienation of a customary right of occupancy and statutory rights of occupancies by various ways including by way of mortgage without the consent of the Governor or approval of appropriate Local Government was made subsequently<sup>28</sup>. Going further in recognising the application of mortgage transactions even before the promulgation of the Act<sup>29</sup>, it went on to state that “where the land to which subsection 2 of this section applies was subject to any mortgage, legal or equitable... valid in law, such land shall continue to be so subject...” (The land referred to here is developed land in urban areas vested in any person before the commencement of the Act).

<sup>24</sup> S.51(1) Land Use Act 1978, Vol.8, Cap 15 Laws of the Federation of Nigeria 2004 which interprets the term mortgage to include a second, and subsequent mortgage and equitable mortgage.

<sup>25</sup> See S.1 of the Act which provides that “subject to the provisions of this Act, all lands comprised in the territory of each State in the Federation is hereby vested in the Governor of the State, and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

<sup>26</sup> Jack-Osimiri; *Modern Law of Landlord and Tenant in Nigeria* (Port Harcourt: Pam Unique Publishers 1994)p.5; *Abioye v Yakubu* (1991)5 NWLR (Pt 190)p 130 where the Supreme court stated that “rights of occupancy bear a resemblance to leasehold interests. They can be assigned. They can be mortgaged and they can be underlet or sublet.”

<sup>27</sup> See SS. 15 *ibid*

<sup>28</sup> See S. 21 & 22 *ibid*

<sup>29</sup> S. 34 (4) *ibid*

The Act in recognizing mortgages also recognized the person transferring his land to another person as security for loan as the holder of the right of occupancy and none other.

It is trite that land by its nature of profitability, durability and accessibility and legal controls have become the most attractive form of security for credit transactions in Nigeria. Essien affirms this position when he stated that:

The preference for and insistence on landed security derive from the fact that unlike personality, land is immovable and so the creditor is sure that except for an act of God – like earthquake- the land is always there to fall back on. Also land generally appreciates in value over the years so that the creditor would rather gain than lose.

#### **6. Security of Interest of the Mortgagee Under the Land Use Act 1970 – is it Guaranteed?**

Critical to the interest of the mortgagee under a mortgage transaction is the right and ability to recover the principal sum and interests advanced to the mortgagor. The law recognizes this fact by its insistence on adequate security moving from the mortgagor to the mortgagee and the right domiciled in the mortgagee in cases of legal mortgages to exercise the right of sale of security to recoup his loss in the event of default of repayment wilful or otherwise by the mortgagor. The law goes further to provide for the mortgagee's right to foreclose the property with the permission of the court; and which order reverses the roles of the parties with the mortgagee becoming the owner of the property in law and in equity.

The rights of the mortgagee stated above however become tenable only with the continued existence of the security. It however become very tenuous where by the instrumentality of the law, the property which is the subject matter of the mortgage and security disappears or its nature becomes altered by the exercise of the Governor's power of revocation; or by some uninsured risks and even by a purchase of a mortgagor's

equity of redemption by a bonafide purchaser for value of a legal interest without notice (especially in cases of equitable mortgages). Specifically, the security of the interest of the mortgagee in a mortgage transaction under the Land Use Act is jeopardized by the possibility of loss of the security through the revocation of right of occupancy by the Governor for lawful reasons<sup>30</sup>. The right of the Governor to compulsorily acquire any land located in the State for “overriding public interests” and the legal requirement of adequate notice and compensation for improvements on the land to be paid to the 'holder' of the land (right of occupancy) that is, the mortgagor and not the mortgagee who is expressly excluded as holder by the Act clearly puts the interest of the mortgagee at risk because he no longer has any security to enforce payment of his loan to the mortgagor. He can neither foreclose on the Governor's revocation order nor exercise his right of sale upon the default of the mortgagor to repay the loan. It is true that upon the revocation of a right of occupancy by the Governor, the mortgagee is left with nothing as security for the loan he has advanced except to take action to enforce the mortgagor's covenant to repay. The court in *Ogundiani v Araba*<sup>31</sup> stated that where such revocation occurs the mortgagee is left with a worthless document in his hands making the mortgage transaction very hazardous for him. The situation for the mortgagee may even be worse where he had taken steps to insure the property if he had assumed possession and paid other outgoings for which the law demands he accounts to the mortgagor only for the latter upon the payment of compensation for revocation abscond with the money.

It is granted that the mortgagee can take out a personal action against the mortgagor in the bid to recover his loan and especially lay a claim to the compensation money paid on the revoked premises. This possibility however depends a great deal on the solvency or otherwise of the mortgagor despite the arguments made in some quarters that by reason of

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<sup>30</sup> S. 28 *ibid*

<sup>31</sup> (1978) 1 Law Rep of Nig 280

the mortgage transaction the position of the mortgagor is subrogated to the mortgagee who becomes entitled to the compensation paid as defacto “holder” and not the mortgagor<sup>32</sup>. This writer however does not subscribe to this view as the Land Use Act expressly excludes the mortgagee as a holder<sup>33</sup> and makes any attempt to vest in the mortgagee any interest or right inconsistent with the clear provisions of the Act of no effect<sup>34</sup>. The Act however respects and protects both the interest of the mortgagor (that is, his equity of redemption or right to redeem his property upon repayment of the loan) and the interest of the mortgagee including his right to the repayment of the mortgage debt; his right of sale or foreclosure upon the default of the mortgagor although these rights are subject to the overriding powers of the Governor<sup>35</sup>.

The second factor which jeopardizes the security of the interest of the mortgagee concerns the consent requirements for alienation of any interest in land under the Act including mortgages. By the tenor of the Act<sup>36</sup> obtaining the prior approval of the governor to deal with the land granted or deemed granted to the holder of such a right (mortgagor) is mandatory to validate any transaction on the land in question especially for a legal mortgage. From the provisions of the Act, it is clear that the responsibility of obtaining the Governor's consent lies on the holder of the right of occupancy who is purporting to alienate his interest and that nothing in the Act demands that transactions concerning the property should not be commenced rather in the opinion of the writer and with the support of judicial authorities<sup>37</sup> that such attempts at alienation remain inchoate under consent is obtained. The bureaucratic delays in obtaining the Governor's consent as required by law while the parties proceed with the mortgage business has left most mortgagees open to higher risks of

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<sup>32</sup> See variously the views of Prof. Uche Jack-Osimiri expressed in an article titled; “ Mortgage Transaction under the Land Use Act 1978 is not a harzadous business,” The Lawyers Journal, vol. 2 No 1 (1991) pp65-79

<sup>33</sup> S.51(1) Land Use Act 1978

<sup>34</sup> S. 26 *ibid*.

<sup>35</sup> See S. 34(4) *ibid*

<sup>36</sup> See SS. 21, 22 & 23 *ibid*

<sup>37</sup> See *Awojugbagbe Light Industries Ltd v Chinukwe* (1993)1 NWLR (Pt 270)485; *Ogunleye v Oni* (1990) 2 NWLR (pt. 745) 751; *Yaro v Arewa Construction Ltd* (2007) 17 NWLR (Pt. 1063)333; *Ogbo v Adoga* (1994) 3 NWLR (Pt 333)p.469;*UBN Plc v Ayodare & Sons (Nig.)* (2007)13 NWLR (Pt. 1052) 567

loss of capital as mortgagors who have benefitted from the mortgagee's loan turn around to deny the legality of the transaction and sometimes even refuse to pay back the facility citing the contract as void for non compliance with legal requirements<sup>38</sup>. A mortgagee who lends his funds to a borrower on agreed terms of repayment and supported by an identifiable security must still contend with the personal factors of willingness or otherwise of the Governor to approve consent applications and possible changes in government policies within the life of the mortgage transaction which can transform his recouping his principal and interests into a nightmare.

The form of creating a mortgage of a leasehold interest under the Conveyancing States through a sub-demise of the mortgagor's interest for a term at least one day shorter than the term of the original lease with a proviso for re-conveyance on the redemption of the mortgage also leaves the mortgagee with an incomplete interest because of the reversionary interest of the mortgagor encapsulated in his equity of redemption. Although this method of creation of the mortgage frees the mortgagee from both privity of contract and estate, it has a disadvantage of preserving the mortgagor's right to reversion and since possession of the mortgaged property may reside in the mortgagor, the mortgagee cannot give a perfect title to the purchaser in the event of mortgagor's default. This puts the interest of the mortgagee in a precarious position although by improved conveyancing techniques this problem can be cured by inserting a power of attorney clause or a trust declaration clause or both to vest the mortgagor's reversionary title in the mortgagee.

The mortgagee runs the risk of not being sure (although this is not peculiar to him alone but to all land users in Nigeria) of the quantum of interest passed to him as security for the loan advanced because the mortgagor himself is not sure of the totality of interests he has under the Land Use Act since the meaning of a right of occupancy is not given under the Act only a description of the statutory and customary rights of occupancies.

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<sup>38</sup> See *Savannah Bank Ltd v Ajilo* (1989) 1 NWLR (Pt. 97)305; *Adedeji v National Bank of Nigeria Ltd & Anor* (1989)1 NWLR (Pt. 96)212

Is he the owner of the property listed in the certificate of occupancy? What type of ownership that alienation of interest is highly censored by another. The argument of the purport of the right of occupancy which is the interest available to Nigerians under the Land Use act confirms the insecurity of tenor of interest especially as the lands comprised in each State becomes vested in the Governor<sup>39</sup>. The plight of the mortgagee in this regard was highlighted by Essein<sup>40</sup> who stated that “it is of interest to the creditor who accepts the right as security to know what exactly the right he has is or the interest he acquires by accepting the right of occupancy.” Going further, he stated that if the right of occupancy is to be equated to a lease “it would mean that a mortgage cannot be created to last longer than the mortgagor's lease. If on the other hand the right is a licence it is merely a personal permission to be present on land: it is revocable at will and is not alienable, being that a licence properly passeth no interest nor alters or transfers property in anything...”

A further risk under the LUA which the mortgagee is exposed to concerns the mortgage of vacant land, that is land without improvements because in the event of the government's exercise of the powers of revocation no compensation will be paid to the holder of a vacant land as the Act only provides for compensation to be paid on improvements on the land and not on the value of the land itself<sup>41</sup>.

## **7. Concluding Remarks**

This work concludes that despite the efforts of some States to enact laws governing mortgage transactions in the States which are a clear improvement on colonial and earlier State laws, the business of mortgages for the mortgagee (creditor) remains hazardous with the extant provisions of the Land Use Act 1978. The way forward is the immediate amendment of the Land Use Act to reflect modern and current realities in the investment sector of the Nigerian economy.

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<sup>39</sup> S1. (1) Land Use Act 1978

<sup>40</sup> E. Essien, *Law of Credit and Security in Nigeria* (2nd edition, Uyo: Toplaw Publishments Limited;2012)p.125

<sup>41</sup> See generally SS. 29(1) (4)a-c, Land Use Act 1978.

Particularly, this work recommends that S.51(1) of the Land Use Act 1978 which by its express provisions excludes the mortgagee from qualifying as a holder under the law and so not entitled to be paid compensation for un-exhausted improvements in the case of any compulsory acquisition of mortgaged property by the government be amended to include the mortgagee whose power of sale has arisen and become exercisable by the time the revocation notice is issued by the government. This suggested limited protection of the mortgagee is an acknowledgement that until the power of sale arises and becomes exercisable; the mortgagor's right to redeem his property subjected to a loan is protected in law and equity and so cannot be waived or removed. The courts have reiterated that this right “cannot be taken away even by an express agreement of the parties. This right continues unless and until the mortgagor's title is extinguished or his interest is destroyed by sale either under the process of the court or of a power in the Mortgage Deed<sup>42</sup>”.

Furthermore, the importance of mortgages as a viable vehicle for economic development propels the writer to state that all provisions of the Land Use Act which have pigeon holed and sequestered the effective deployment of land assets for creation of further wealth should be given immediate attention by the executive, the legislative and judicial arms of government. There should be a collective will to make constitutional amendments especially to extricate the Land Use Act from being a part of the Constitution so as to make subsequent amendments of the law possible.

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<sup>42</sup> *Rafuka v Kurfi* (1996) 6 NWLR, (Pt 453)p.235