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**THE MORTGAGEE'S POWER OF SALE AS THE MOST POTENT REMEDY OF THE MORTGAGEE IN  
SECURED CREDIT TRANSACTIONS IN NIGERIA: AN APPRAISAL**

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**ABSTRACT**

*Human beings are by nature deceitful, coupled with the prevalence of unforeseen circumstances, which becloud the business environments, thus giving rise to every lender of money to make adequate provision for security before lending his money out. A creditor who obtains security for any credit given is assured of a great control over his debtor. However, by the law-regulating mortgage, the lender acquires a right over the mortgaged property and in the event of failure to repay, he may apply any of the remedies available to him in enforcing the payment of what is accruable to him under the mortgage transaction. It should be noted that mortgage of real estate remains an area of law not easy to delineate, understand or comprehend by students of Law of Real Property. In executing this research work, we adopted the doctrinal methodology of research in order to make our recommendations and draw conclusions.*

**KEYWORDS: Mortgagee, Power of sale, Secured credit transactions and Nigeria**

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**Introduction**

Capital is the main stay of any economic activity. Regrettably, the business sector rarely comes by this powerful factor of production, thus, the need for lending. The commonest means of sourcing for funds is through borrowing. No prudent financial institution can lend money without insisting on security for repayment of loans advanced. The reality of insistence on security by the creditor or lender seems to stem from borrower's proclivity to default in the repayment of loan sums and interest when due, the inextricable consequences of insolvency and commercial expediencies to reduce credit risk and liquidity exposure<sup>1</sup>. This security could be in the form of a guarantee or mortgage or both.<sup>2</sup> A foresight lender would always prefer a security of a proprietary character, otherwise known as real property<sup>3</sup>. This therefore qualifies the lender as a secured creditor, which is the concern of this work. A mortgage is a conveyance

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<sup>1</sup> R. A. Onuaha, *Thesis on Land Use Act 1978 and Issues of Reform plus Rules and Regulations on Sectional Rights of Occupancy in Nigeria by the Presidential Technical Committee on Land Reform* (ANON Publishers, Owerri 2013), 179-180.

<sup>2</sup> F.J. Oniekoro, *Mortgages in Nigeria, Law and Practice* (Chenglo Limited, Enugu 2007), 1.

<sup>3</sup> E. Chianu, *Law of Securities for Bank Advances* (3<sup>rd</sup>edn. Ambik Press, Benin 2006), 2.

of a legal or equitable interest in property with a redeemability clause. That is to say, that upon the repayment of the loan or the performance of some other obligation, the conveyance shall become void or the interest shall be re-conveyed. In other words, 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, real or personal, on the condition that the lender's interest in the property will terminate on repayment of the loan. The lender does insist on getting a security as it relates to the money lent to the borrower because of the difficulty experienced in recovering the money advanced. This is to guard against the borrower absconding with the loan. This buttresses the point enunciated by Lord Lindly that, Mortgage under the general law is by no means without complications, "no one... by the light of nature ever understood an English mortgage of real estate."<sup>4</sup>

It is a settled fact that the law has put remedial measures in place in favour of a lender whenever the borrower refuses or neglects to redeem his loan at a redeemable time. Such measures or remedies includes action on the covenant for the repayment of the loan, foreclosure, taking up possession, appointment of a receiver and sale of the mortgaged property. The mortgagee's power of sale is the most potent remedy of the mortgagee in credit transaction. This will attempt to examine this most reliable remedy, its impediments and the court's attitude towards the actualization of this most powerful remedy.

### **Meaning of Mortgage**

A mortgage is a legal or equitable conveyance of title as a security for the payment of debt or the discharge of some other obligation for which it is given, subject to a condition that the title shall be re-conveyed if the mortgage debt is liquidated. It may also be defined as the conveyance of a legal or equitable interest in property as a security for the payment of debt or discharge of some other obligation for which it is given.<sup>5</sup>

Furthermore, a mortgage is a 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 the stipulated terms. It is also a lien against property that is granted to secure an obligation such as a debt and is extinguish upon payment or performance according to stipulation terms.<sup>6</sup> It is a settled fact that whenever parties enters into a contract using a collateral as a security for the advance loan, it is a mortgage and as such redeemable, it is immaterial that such transaction is not termed so by them or the document is not called such. From the foregoing, and in line with the position of a learned writer, it can be gleaned that the most important kind of security is the mortgage<sup>7</sup>. From the above definitions, which are not exhaustible, it is glaring that mortgage possesses the following essential features:

1. A mortgage is a conveyance of a legal or equitable interest in a property.
2. There is always a provision for redemption.
3. The conveyance shall become void upon payment or performance according to stipulated terms.

<sup>4</sup> Per Lord Macnaghten, *Samuel v. Jarrah Timber and Wood Paving Corp.* (1904) A.C 323 at p. 326.

<sup>5</sup> *Pharmatek Ind. Projects Ltd Bank (Nig) Plc* (2009) All FWLR (pt. 495) 16787.

<sup>6</sup> B. Gamer, *Black's Law Dictionary* (9<sup>th</sup>Edn. West Publishing Co. St. Paul, MN 2004), 1101.

<sup>7</sup>Yerokun O, *Casebook on Land Law: Comments and Cases* (Princeton Publishing Co., Ikeja 2014), 467.

4. Consideration must flow from the mortgagee, in terms of sum of money advanced or released, to the mortgagor.
5. Both the mortgagor and the mortgagee have mutual rights of action. The mortgagor can sue for the return of the security so long as the action is not statute-barred, or the property is not sold or his right of redemption is not foreclosed. On the other hand, the mortgagee reserves the right of action to sue for repayment of the outstanding sum and interest<sup>8</sup> or enforce other remedies usually available to a mortgagee.

### **Difference between Mortgages and Other Transactions**

Other transactions are similar to mortgages in the sense that they grant some security for money, but they are distinguishable from mortgages. These transactions are:

#### **(i) Lien:**

This is a claim or qualified right of a creditor over the property of a debtor which serves as security for the debt or the performance of some other obligation. It is the right to retain possession of a property of another until a debt is paid.<sup>9</sup> A lien does not grant a right to sell or to otherwise deal with property and the right is extinguished if the creditor parts with possession to the creditor or his agent<sup>10</sup>. The major difference between a mortgage and a lien is that a lien is a means of coercing the debtor to pay the money advanced to him, rather than as security against payment not being made. In addition, a lien may be created over other properties and not necessarily on real property as in mortgages.<sup>11</sup>

#### **(ii) Pledge**

This is a deposit of some personal property to a creditor as a security for some debt or engagement or the performance of some act. The pledgor only has the right to possession over the property until the debt is satisfied while in mortgages, the mortgagee acquires ownership (interest is conveyed) and the borrower usually retains possession. It is a possessory security as distinct from a proprietary security in mortgages, thus vesting in the pledgee a right to possession of land and enjoyment of the profits, while the radical title remains in the pledgor.<sup>12</sup>

In *Adetono v. Zenith International Bank Plc*,<sup>13</sup> Ngwuta, J.S.C. aptly summarized the distinction in these words, “the main different between a mortgage and a pledge is that in the former, the general title in the property is transferred to the mortgagee subject to be reversed by performance of the condition, whereas, by the latter, the pledgor retains the general title and parts with the possession. By mortgage, the title is transferred, by a pledge, possession is transferred.”<sup>14</sup> However, Osamolu while agreeing that the general property in the goods remains in the pledgor, also posits that, a pledgee has certain power of sale in the pledged chattels.<sup>15</sup>

<sup>8</sup> *Olowo v. Miller Bros (of Liverpool) Ltd.* (1922) 3 N.L.R 110.

<sup>9</sup> *Afro Tech Services Ltd v. Mia & Sons Ltd.* (2001) FWLR, Part 35, p. 643.

<sup>10</sup> S. A. Osamolu, *Real Property Law Practice in Nigeria* (2<sup>nd</sup> Edn. Panaf Press, Abuja 2016), 367.

<sup>11</sup> Although on fewer occasions, mortgages may also be created on stocks and other equities of a borrower.

<sup>12</sup> F..Fekumo, *Principles of Nigeria Customary Law* (F & F Publishers Nigerian Ltd., Port-Harcourt 2002), 259.

<sup>13</sup> (2012) All FWLR, part 611, p. 1443.

<sup>14</sup> Per Ngwuta JSC at p. 1466.

<sup>15</sup> Osamolu, (n10), 367.

**(iii) Charge:**

A charge is a security transaction by which a borrower (who is the charger) appropriates his right in land to the chargee (lender) as security for a loan. A charge is the mere appropriation of a specified property in discharge of a debt. It does not entail the transfer of possession of the property or interest in the property to the chargee. Thus, the charge does not generally have right to sale of the property except as specifically provided by the statute.

**(iv) Sale:**

This is the transfer or alienation of the total interest of a person in a property. Unlike a mortgage where a right to redeem exists, in the sale of interest in land, the vendor conveys his interest with the intention that the interest is acquired by the purchaser as the absolute owner in the estate for a consideration paid by the purchaser of the estate to the vendor.<sup>16</sup>

**Types of Mortgages**

There are two main types of mortgages, namely:

❖ **Legal Mortgage:** A legal mortgage is a transfer of a legal estate or interest in land or other property for securing the repayment of a debt. Prior to the coming into force of Land Use Act, many mortgages were drawn using fee simple estate to secure the payment of loans. Creation of a legal mortgage involved lengthy documents containing covenant for repayment of the loan at the expiration of the stipulated time; and containing a provision that, upon repayment of the loan, the property is restored to the mortgagor. The mortgagee is, therefore, bound to re-convey the legal estate to the mortgagor unconditionally.<sup>17</sup> A legal mortgage also involves execution under seal and the transfer of the legal title from the mortgagor to the mortgagee, subject however, to the mortgagee's right of redemption, which is a right to a re-conveyance on payment of the mortgaged sum in accordance with the covenants in the mortgage.<sup>18</sup>

❖ **Mode of Creating Mortgage Legal:** Broadly, speaking, legal mortgages are created in one of the following ways:

- (a) By a legal mortgage of a fee simple: The mortgagor by the rule of common law conveys the whole of his beneficial interest to the mortgagee with a covenant by the mortgagee that he will re-convey the mortgaged property upon repayment of the loan on an agreed date.
- (b) By a mortgage of leasehold or right of occupancy: It may be created through:
  - (i) The mortgagor assigning the whole of his unexpired term of the lease or right of occupancy or;
  - (ii) Sublease of the mortgage term<sup>19</sup>

<sup>16</sup>Y. Y. Dadem, *Property Law Practice in Nigeria* (Jos University Press Ltd., Jos 2003), 116.

<sup>17</sup>J. Egwummuo, *Principles and Practice of Land Law* (Okechukwu Communications, Enugu 1999), 233.

<sup>18</sup>O. Oluyede, *Nigerian Law of Conveyance* (Ibadan University Press, Ibadan 1978), 161.

<sup>19</sup>N. Tobi, *Cases and Materials on Nigeria Land Law* (Mabrochi Books, Lagos 1992), 129.

It should however be noted that, the method of creating legal mortgages in Nigeria depends wholly on where the property is located; whether in States covered by the Conveyancing Act, Property and Conveyancing Law or Registration of Titles Law.

### **Equitable Mortgage**

Equitable mortgage is the commonest form of mortgages. It has less cumbersome formalities. For instance, it does not require Governor's consent and registration of title.

#### **❖ Mode of Creating Equitable Mortgage:**

Equitable mortgage can be created in several ways. The Supreme Court has for long held that equitable mortgage can be created by:

- a. Mere deposit of title deeds,
- b. An agreement to create a legal mortgage; and
- c. Mere equitable charge of the mortgagor's property.<sup>20</sup>
- d. An "imperfect legal mortgage" will amount to an equitable mortgage, so long as the tile deeds have been deposited.
- e. A holder of an equitable interest can only create an equitable mortgage on the interest he holds.
- f. Under the registration of titles law, equitable mortgages can be created by the deposit of Certificate of Title and completing and filling Form 15 in the first schedule to the law.<sup>21</sup>

#### **❖ Preference of Equitable Mortgage over Legal Mortgage**

Despite the advantages of legal mortgage, it is advisable to adopt equitable mortgage in the following circumstances;

- a. Where the mortgaged sum is small;
- b. Where the time for repayment is short; and
- c. Where there is urgency in the transaction or the mortgagor is in urgent need of the fund for perfection of title such as securing the Governor's consent.

Any form of agreement involving transfer of equitable interest in land as a security for loan is essentially equitable mortgage. If no legal interest is transferred as security, then it must be equitable mortgage.<sup>22</sup>

### **Remedies or Rights of a Mortgagee**

Once a mortgage is validly created, there are specific rights conferred on the mortgagee by the mortgage transaction. Some of these rights are traceable to common law but they all been assimilated by statute.<sup>23</sup> These include the following,

<sup>20</sup> *Ogundani v. Araba* (1978) 11 NSCC 334.

<sup>21</sup> Section 58.

<sup>22</sup> Section 6 PCL.

<sup>23</sup> Section 19 (1) Conveyancing Act.

**(i) Action to recover Mortgaged sum and interest:**

The mortgagee could institute an action in court against the mortgagor for the recovery of the mortgaged sum and the interest that accrue thereto. This is the common remedy where the mortgage instrument does not confer an express power of sale on the mortgagee.<sup>24</sup> It is worth noting that a legal mortgage does not need to contain an express power of sale before such power of sale is exercised.

**(ii) Taking Possession of the Security:**

The legal mortgagee<sup>25</sup> has the right to take possession of the security. This is mainly because legal estate in the mortgaged property resides in him. Possession is an incident of legal estate.<sup>26</sup> Thus, an equitable mortgagee does not have the right to possession. This right is exercisable by the mortgagee at the conclusion of the perfection<sup>27</sup> of the instrument creating the mortgage, and not dependent upon any breach of covenant on the part of the mortgagor. As was aptly put by Harman J. "the right of the mortgagee to possession in the absence of some Contract has nothing to do with the default on the part of the mortgagor." The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property.<sup>28</sup>

The mortgagee can also exercise this right where the mortgagor is in default in the payment of either the interest or the mortgage sum. This right cannot be forestalled or restrained even where the mortgagor pre-emptively seeks to pay arrears of interest or installment unless he pays all the interests and outstanding sum.<sup>29</sup> The mortgagee does not need the order of court to take possession. He cannot be liable for trespass as the mortgagor, who is usually left in possession is not his tenant but remains in possession at the will (or mercy) of the mortgagee. That is to say, the mortgagor is not entitled to the statutory protection available to tenants under the Recovery of Premises Act<sup>30</sup> and similar legislation.<sup>31</sup> The mortgagee reserves the right to take possession even by force, especially where the mortgagor resists the exercise of that right<sup>32</sup>. Although this particular approach is not civil as it carries the elements of coercion, which is always, frowned at by our laws and the courts.<sup>33</sup>

<sup>24</sup> See for example *Ezomo v. N.N.B Plc* (2007) All FWLR part 368, P. 1032, where the option of court action was utilized.

<sup>25</sup> An equitable mortgagee does not have legal right to take possession. *Ocean Accident & Guarantee Corporation v. Ilford Gas Co.* (1905) 2 K.B 493. He can however approach the court for the appointment of a receiver or personally appoint a receiver where there is an express agreement to that effect in the instrument creating the mortgage.

<sup>26</sup> *Kosumu v. Baba-Egbe* (1956) 3 All E.R 266.

<sup>27</sup> A deed of mortgage is said to be perfected when it is stamped, registered and the requisite consent of the Governor obtained. It is at this point that it is said that a legal interest is transferred to the mortgagee.

<sup>28</sup> *Four-Maids Ltd v. Dudley Marshall (Properties) Ltd.* (1975) Ch. 317 at 320.

<sup>29</sup> *Nigerian Housing Development Society v. Mumuni* (1997) NSCC 65; *Eso Petroleum v. Alstonbridge Properties Ltd.* (1975) 3 All E.R 358.

<sup>30</sup> Section 7 of the Recovery of Premises Act. Under this Act, every tenant is entitled to the service notice to quit (in either form B, C or D), and notice of owner's intention to apply to recover possession (form E), and a writ of possession.

<sup>31</sup> There are different laws made by the various states on the recovery of premises, whether residential or non-residential that prescribe procedure for the recovery of premises. See the cases of *Sule v. Nigerian Cotton Board* (1985) 2 NWLR (pt. 114) 1.

<sup>32</sup> *Awojughbagbe Light Industries Nig, Ltd. V. Chinukwe&Ors.* (1995) 4 NWLR (pt. 390) 379.

<sup>33</sup> See *Ojukwu v. Governor of Lagos State* (1985) 2 NWLR (pt. 10) 806

### **(iii) Appointing a Receiver:**

A legal mortgagee has the power to appoint a receiver where the mortgagor defaults to pay.<sup>34</sup> Where the mortgage is an equitable mortgage created by deed, the deed should provide for the power to appoint a receiver. In *Adetona & Anor v. Zenith International Bank Limited*<sup>35</sup> the court defines a receiver as a person appointed by the court for the purpose of preserving the property of a debtor pending an action against him or applying the property in satisfaction of a creditor's claim whenever there is danger that in the absence of such appointment, the property will be lost, removed or injured. A receiver usually exercises protective duty over the property he possesses, may collect rent, and profits accruing on the property and discharge rates and other outgoings.

### **(iv) Foreclosure:**

This is a judicial process by which a mortgagee, by the order of court, terminates the mortgagor's equity of redemption and becomes absolutely vested with the title to the mortgaged property. A legal mortgagee can resort to foreclosure where he intends to be vested with absolute ownership of the mortgaged property especially where he rents and profits are either non-existence or not sufficient to defray the outstanding mortgage sum and interests.<sup>36</sup> In foreclosure, equity by equity destroys the equitable right to redeem. The court may also grant an order for judicial sale as an alternative to foreclosure in the course of foreclosure-proceedings. It puts every other remedy to an end.

### **(v) Action for Order of Specific Performance**

This is one of the remedies available to an equitable mortgagee. In the case of *Ogundiana v Araba*,<sup>37</sup> the court held that mere deposit of title deed as security for loan is sufficient for part performance upon which the court can lend its powers to grant an order for specific performance in the enforcement of mortgage security. It is usually resorted to where the mortgagor fails, refuses or neglects to complete the documentation for the mortgage even after receiving the mortgage sum. Where the mortgagor fails to liquidate the mortgage sum and interest on the legal due date, the mortgagee will usually want to sell the security. Yet the equitable mortgagee cannot sell the security or transfer legal interest, as he has no legal estate to transfer to the purchaser except by the order of court, or where the mortgage is by deed and is accompanied with any of the two remedial devices of declaration of trust or power of attorney. Order of specific performance being an equitable remedy is premised on doctrine of part performance. For a party to be entitled to it, he must be able to show a definite act on his part that was done relying on the representation of the other party.<sup>38</sup>

### **(vi) Sale of the Security:**

This is the most potent power of a legal mortgagee. The power of sale may be express or statutory. The power of sale is express where on account of special circumstances or of the

<sup>34</sup> Section 19 (1) iii CA and section 123 PLC.

<sup>35</sup> (2008) All FWLR, Part 440, p. 796.

<sup>36</sup> Oniekoro (n. 2), 270.

<sup>37</sup> (1978) 1 LRN 280

<sup>38</sup> Oniekoro, (n. 2) 280, 282.

importance of the transaction, the intending mortgagee prefers not to rely on the statutory power but to insert the power of sale in the mortgage. The ordinary express power gives to the mortgagee and every person for the time being entitled to give a discharge for the mortgage debt power at any time after the date fixed for payment to sell either by public auction or private contract and subject to special conditions as to title and if there were prior charges, to sell the mortgaged property or any part of it either subject to a free from those charges, and in the latter case to pay them off out of the purchase money and to execute assurances to the purchasers.<sup>39</sup> In any mortgage made after 1881, a power of sale is conferred by statute. The mortgage must be by deed and the power may be varied or extended by the mortgage deed and applies to the mortgage only as far as a contrary intention is not expressed in it.<sup>40</sup> It is the most controversial remedy and thus subject of much litigation between the mortgagor and the mortgagee.

A mortgagee must not sell the mortgage property until his power to do so has arisen and become exercisable. The difference between the power of sale arising and becoming exercisable is that if the power has not arisen, the mortgagee has no statutory power of sale but if it has arisen, the mortgagee can make a good title to a purchaser free from the equity of redemption even if the power has not become exercisable.<sup>41</sup> The implication of the foregoing is to the effect that a purchaser must always satisfy himself that the power has arisen. It is not compulsory for him to verify whether it has become exercisable. But, if he knows of any facts indicating that the power of sale is not exercisable, or that there are some impropriety in the sale, then notwithstanding the statutory provision that the purchaser's title is not to be impeachable, he gets no good title on taking the conveyance.<sup>42</sup>

#### ❖ When Power of Sale Arises:

The following cardinal requirements must be present at the same time for a power of sale to arise. They include (a) the mortgage must be created by Deed, (b) date for repayment must have expired or installment fallen due and (c) there must be no express contrary intention in the deed against sale.

##### (a) The Mortgage must be Created by Deed:

It is a fundamental requirement that before a mortgagee can exercise his power of sale whether in a legal or equitable mortgage, the mortgage agreement must be created by deed. In *Shorunmu v. Dophir*<sup>43</sup> an equitable mortgagee sold a mortgaged property of which mortgage was created by deed. The main issue that came up for determination by the court was whether equitable has power of sale. It was held that under Section 19 of the Conveyancing Act, 1881, a mortgage whether equitable or legal has statutory power of sale so long as it is by deed and the mortgage sum is due. It stands to reason that where the mortgage is not by deed, the mortgagee does not have this statutory power of sale.

<sup>39</sup> D.Umoatan, "Mortgagee's Duty in Exercising the Power of Sale" in U. Udok and I. Essien (eds.) *Essay in Honour of Prof. Enefiok Essien, Vice-Chancellor, University of Uyo* (Umeks Printing Press, Uyo 2016), 67.

<sup>40</sup> Section 101 (3) Law of Property Act, 1925.

<sup>41</sup> Umoatan (n. 39)

<sup>42</sup> *Ibid.*

<sup>43</sup> (1965) NLR 87.

**(b) Date for Repayment must have Expired or Installment Due:**

The legal due date<sup>44</sup> must have expired or where payment was agreed to be made by installment,<sup>45</sup> an installment must have fallen due without it being paid by the mortgagor. Usually when parties to a mortgage agree to an installment payment of the mortgage sum and interest, the mortgagee agrees not to call in the whole mortgage sum unless the mortgagor defaults in the payment of an installment. In *Payne v. Cardiff Rural District Council*<sup>46</sup> it was held that where the mortgagor agreed to repay the mortgage sum by installment, the power of sale of the mortgagee will arise where the mortgagor default in any installment and the whole mortgage sum becomes payable. This power of sale will not be restrained even where the mortgagor pays all outstanding arrears after an initial default unless he repays all the outstanding sum and interest into court.<sup>47</sup>

**(c) The Must not be no Express Contrary Intention in the Deed Against Sale**

If there is any express provision in the mortgage deed prohibiting sale, then the security cannot be sold by the mortgagee. It is important to state here that such a covenant or provision cannot be implied. Thus, a mortgagor will not be permitted to give oral evidence of an oral agreement allegedly made between him and the mortgagee to the effect of the mortgagee agreeing not to exercise his statutory of sale especially where the right of sale is expressly contained in the deed of mortgage. Thus, this statutory power of sale can only be exercised where the parties have not expressed any contrary intention in the mortgage deed.<sup>48</sup>

**❖ When Power of Sale Becomes Exercisable:**

For a mortgagee to validly sell the mortgaged property within the contemplation of the law, he must wait for the power of sale to become exercisable. The power of sale becomes exercisable only if any of these three conditions are met.<sup>49</sup>

- (i) Notice in writing requiring of the mortgage money has been served on the mortgagor or on several mortgagors and there is default of payment for three months after such service; or
- (ii) Some interest under the mortgage is in arrears and unpaid for two months after becoming due; or
- (iii) There has been a breach of some provisions contained in the mortgage deed or under the provisions of the Conveyancing Act or the Property and Conveyancing Law.

The right or power of sale though may have arisen by the occurrence of the conditions earlier discussed; it can only become exercisable at the happening of any of the under-mentioned incidents. The occurrence of any of the incidence will suffice. Not all of them need have occurred. It is pertinent now to analyse these conditions.

<sup>44</sup> This is the date agreed between the parties for the redemption of the mortgage sum.

<sup>45</sup> The phrase "when the mortgage money has become due" in Section 123(1), PCL does not refer only to the whole mortgage sum. It must be taken to include instalment payment where it is so agreed between the parties.

<sup>46</sup> (1932) 1 KB 241.

<sup>47</sup> *Birmingham Citizens Permanent Building Society v. County* (1962) Ch. 883.

<sup>48</sup> Section 19(3) of the Conveyancing Act, 1881; Section 123 (4) of the Property and Conveyancing Law, 1959.

<sup>49</sup> Section 20 Conveyancing Act & 125 Property and Conveyancing Law.

### (i) Demand Notice Served

Where the mortgagee serves a demand notice and the mortgagor remains in default for at least 3 months (unless it is expressly excluded), the right of sale becomes exercisable. The parties may have agreed in the mortgage deed to exclude the service of notice.<sup>50</sup> In most modern deed of mortgages, the mortgagor usually waives the right to be served demand notice before the mortgagee can sell the mortgaged property so long as the mortgagor is in default.<sup>51</sup> This was the position in the case of *Okonkwo v. CCB (Nig.) Ltd*<sup>52</sup> and the dictum of Idris Kutigi, J.S.C. is of fundamental importance in this respect. It goes thus:

By clause 8 of the exhibit B, the plaintiff also waived his rights to be given any notice under any statute or customary law. The court of Appeal was thus plainly giving effect to the agreement entered into by the plaintiff himself and nothing else when it said the plaintiff had waived his right to any notice of sale under section 19 of the Auctioneer's Law of Eastern Nigeria.

Though the mortgagor can waive his right to be served with a demand notice, this must be distinguished from the notice required under the Auctioneer's law. The notice under the Auctioneer's law is a public notice to be given for the interest of the members of the public and not necessarily that of the mortgagor. The mortgagor cannot therefore waive the notice under the Auctioneer's Law. This was the court's decision in the case of *Ihekwoaba and Ors v. ACB Ltd*<sup>53</sup> where the Court of Appeal distinguished the two notices and rules that the Auctioneer's notice is not within the rights of the mortgagor to waive as such right is for the benefit of the public.

Regrettably, the Supreme Court in *ACB Ltd & 2 Ors v. Ihekwoaba & 4 Ors* later set this decision aside.<sup>54</sup> This was done on the grounds that the mortgagor did not prove fraud or gross under value, and that the non-service of notice of sale by the auctioneer is merely an irregularity. The point must be made here that the demand notice can only take effect 3 months of service demanding payment and there is a persistent default from the mortgagor or where more than one mortgagor, any one of them is sufficient as a proper demand notice.<sup>55</sup>

It is further stated that, after a mortgagee has given the demand notice to the mortgagor, he need not give him a further notice to him that he is set or ready to sell the security on a particular date. This must however be distinguished from the auctioneer's notice which is an information to the public, mostly advertised in national dailies that a public auction of the said

<sup>50</sup> O. Elujekor, "Avoiding the Pitfalls inherent in the Mortgagee's Power of Sale" (1997) *Nigerian Law and Practice Journal*, 66.

<sup>51</sup> *Okonkwo v. CCB (Nig)* (2003) 8 NWLR (pt. 822) 347.

<sup>52</sup> *Ibid.*

<sup>53</sup> (1998) 10 NWLR (Pt. 571) 590.

<sup>54</sup> (2003) 16 NWLR (Pt. 846) 249

<sup>55</sup> *Da Rocha v. Hussain* (1958) 3 FSC 89 at 92. The notice states the amount due. But a mistake as to the amount stated has been held not to affect the power of sale in the case of *Denverge v. Sandeman, Clark & Co.* (1902) 1 (1962) LLR 174. A notice is not also bad for overstating the principal sum. This is because the purpose of the notice is to identify the debt, rather than the quantum.

property is to be done at a certain place and at a particular time.<sup>56</sup> In the case of *Bruce v. African Easter Trade Corporation Ltd.*<sup>57</sup> Webber, J. stated the principle thus: "There is no authority for the proposition that notice of intention to sell is a condition precedent to the exercise of the power of sale by the mortgagee... Mortgagee have power of sale provided that a reasonable time has elapsed after notice requiring payment. There is no particular form of notice or need the notice state that the mortgagee will sell. It is sufficient that the notice requires payment of the mortgage money."<sup>58</sup>

Demand notice does not lapse once serve.<sup>59</sup> In *Pinnock v. G.B Ollivaant & Co. Ltd.*, after the service of a demand notice, the mortgagee did nothing to realize the security until after six years. The sale was upheld even if the notice had been served for such a length of time before the mortgagee exercised the power of sale.

### **(ii) Interest Must have been in Arrears**

Where the mortgagor is in default of the payment of interest for a period of two months, the statutory power of sale will become exercisable. These two months begin to run from the expiration of the legal due date and not before. Thus, where the mortgagor is in arrears of interest even prior to the expiration of the agreed date for repayment of the mortgage sum, the mortgagee's power of sale does not become exercisable.<sup>60</sup>

However, where the payment of the mortgage sum is agreed to be made by installment, and the mortgagor defaults in any installment, the two months will begin to be counted from the date of the default if the mortgagor also fails to pay interest.<sup>61</sup> It must be added that even where the mortgagor is in arrears of interest, as long as the legal due date has not expired; the mortgagee's power of sale will not become exercisable.<sup>62</sup>

It should be noted however that, where the mortgagor is not in arrears of interest, that is, the mortgagor has been paying the interest promptly, even if he is in default of the mortgage sum, the mortgagee power of sale will not become exercisable on this ground unless the mortgagee either serves a demand notice on the mortgagor and notwithstanding the service of the demand notice, the mortgagor remains in default for a period of, at least, three months or the mortgagor is in breach of any other covenant.

### **(iii) There has been a Breach of Some Provisions contained in the Mortgage Deed or under the Provisions of the Conveyancing Act or the Property and Conveyancing Law**

A mortgage transaction usually involves several covenants, in addition to the usual covenant for the repayment of the mortgage sum and regular payment of interest. These other covenants may be covenant to insure; to repair the mortgaged property or keep it in a good state of repair; not to sub-let the mortgage property without the consent of the mortgagee. Where the

<sup>56</sup>Umoatan (n. 39).

<sup>57</sup> (1928) 9 NLR 119.

<sup>58</sup> In the case of *Bank of the North Ltd v. AlhajiMamman Muri* (1998) 2 NWLR (Pt. 536) 153, the court had held that what constitutes notice of demand of repayment depended on the fact of each case.

<sup>59</sup> *Ojikutu v. Agbaonmagbe Bank Ltd.* (1966) 2 All NLR 277.

<sup>60</sup> *Twentieth Century Banking Corporation v. Wilkinson* (1977) 1 Ch. 99.

<sup>61</sup> *Walsh v. Derrick* (1903) 19 TLR 209

<sup>62</sup> *Ibid.*

mortgagor or any other person who concurs to the mortgage is in breach of any of these covenants or such covenant (that is not connected to payment of the mortgage sum or interest) agreed between parties, the power of sale becomes exercisable.<sup>63</sup> In addition, where the mortgagor is in breach of any of the provisions of the law (CA or PCL), the power of sale becomes exercisable.<sup>64</sup>

#### ❖ **Mode of Sale in Exercise of the Mortgagee's Power of Sale**

The mortgagee has the option to sell the mortgaged property either by private treaty or through a licensed auctioneer.<sup>65</sup> According to a learned author,<sup>66</sup> "the mortgagee may upon fulfilling the foregoing conditions, sell the mortgaged property at any time thereafter and at any price obtainable. The sale may be by auction or private treaty and may be in one lot or several lots." Experience has shown that the mortgagee usually prefers the use of licensed auctioneer who sells by public auction instead of selling by private treaty. This is to prevent much suspicion or inference of collusion between the mortgagee and the purchaser. In a situation where the mortgagee chooses to sell by public auction, the sale must comply with the relevant Auctioneer's Law;<sup>67</sup> otherwise, the sale is invalid as was held in the case of *Fajule v. FMB*.<sup>68</sup> The mortgagee must act in good faith while exercising the power of sale.

#### ❖ **Impediments to the Actualization of the Mortgagee's Power of Sale**

The power of sale must be exercised within the ambit of the laid down roles to avoid same being set aside by the court. The written at this juncture will look at various circumstances in which the mortgagee's exercise of the power of sale may be nullified which by so doing constitute impediments to the actualization of his power in law in which case the purchaser does not obtain good title. This includes the following,

##### **(a) Where the Mortgagor has no Good Title:**

It is trite law that one cannot give what he does not have (*Nemo dat quod non habet*). It speaks to reason that where it is established that the mortgaged property does not belong to the mortgagor or that it is jointly owned and that the mortgagor did not obtained consent from those involved at the time of the creation of the mortgage, the mortgagor cannot transfer a good title to the mortgagee. By implication, the mortgagee cannot transfer good title to the purchaser.

<sup>63</sup> Section 20(iii) C.A, Section 125 (iii) PCL; *Barker v. Illingworth* (1908) 2 Ch. 20.

<sup>64</sup> *Public Trustee v. Lawrence* (1912) 1 Ch. 789.

<sup>65</sup> *Oyebanji Building Materials Store Ltd v. UBA Plc* (2001) NWLR (pt. 708) 80.

<sup>66</sup> I. Smith, *Practical Approach to Law of Real Property in Nigeria* (Ecowatch Publications (Nig) Ltd., Lagos, 1999), 268.

<sup>67</sup> Section 19 of the Auctioneer's Law of Eastern Nigerian provides thus: "No sale by auction of any land shall take place until after at least seven days' notice thereof made at the principal town of the district in which the land is situated and also at the price of the intended sale. The notice shall be made not only by printed or written documents, but also by drum or such other method intelligible to uneducated persons as may be prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller.

<sup>68</sup> (2001) 2 NWLR (Pt. 697) 384; *Sanusi v. Daniel* (1956) 1 NSCC 85.

**(b) Failure to Obtain Requisite Consent**

By the provision of the Land Use Act, there can be no valid transfer of interest in land by way of mortgage without the approval of the Local Government<sup>69</sup> or consent of the Governor.<sup>70</sup> The mortgage is void.<sup>71</sup> This applies to both express and deemed grants of right of occupancy. In *Savannah Bank (Nig.) Ltd v. Ajilo*<sup>72</sup> a loan taken by the 2<sup>nd</sup> plaintiff from the defendant bank was secured by the first plaintiff by a mortgage deed over the property acquired in 1965. The consent of the Governor, as required under Section 22 of the Land Use Act was not obtained. As the second plaintiff defaulted, the defendant bank took step to realize the security under the mortgage, putting up notice of auction sale of the property.

The plaintiffs took out summons in the High Court to void the sale contending that the mortgage was null and void and the power of sale could therefore not be exercised. The bank argued that the property falls within section 34 of the Land Use Act as demand grant, section 22 of the Land Use Act was inapplicable. This contention was rejected and the deed of mortgage was declared null and void. The Supreme Court considered the effect of not obtaining the consent of the Governor before the transaction or transfers of interest of an expressed or deemed grant of right of occupancy. It that every holder of a right of occupancy, whether statutory or customary, is required, as having been granted the right by the Governor or Local Government, as the case may be, to obtain the approval of the Local Government or consent of the Governor before any transfer of interest in land can be valid.

It does not stand to reason that failure to obtain the consent of the Governor at the inception of the transaction will automatically render it void even if the consent is subsequently obtained. Such a transaction is inchoate until the consent of the Governor is obtained. This was the court's decision in the case of *Awojugbaegbe Light Industries Ltd. v. Chinukwue&Ors.*<sup>73</sup> This decision was a positive improvement in this area of the law and a radically departure from the court's decision in *Solanke v. Abed*<sup>74</sup> and *Savannah Bank Nig. Ltd. v. Ajilo*.

**(c) Non Registration of the Mortgage**

The transaction is void if the instrument is unregistered within the prescribed period as stipulated in the law of a given state. In addition, a charge of Company's property as security must be registered with the Corporate Affairs Commission within 90 days of the execution of the instrument.<sup>75</sup> The charge is void against the liquidator of the company and any other creditors of the company if it is not registered within the prescribed period. Such a charge can thereafter be registered with the order of the Federal High Court<sup>76</sup> which order will only be made where the court is satisfied that the omission to register the charge was accidental. On the other hand, that it was due to inadvertence or to some just cause or is not of a nature to prejudice creditors or shareholders of the company and that it is just and equitable to make the order.

<sup>69</sup> Where the subject of interest is a customary right of occupancy. Section 21 of the Land Use Act.

<sup>70</sup> Where the subject of interest is a statutory right of occupancy. Section 22 of the Land Use Act.

<sup>71</sup> *Savannah Bank (Nig) Ltd v. Ajilo* (1989) NWLR (Pt. 97) 305.

<sup>72</sup> (1989) NWLR (Pt. 97) 305.

<sup>73</sup> (1995) 4 SCNJ 162

<sup>74</sup> (1962) NRNL 92.

<sup>75</sup> Section 222 Company and Allied Matters Act, 2020 (CAMA).

<sup>76</sup> Section 230, CAMA 2020.

**(d) Where the Mortgagee's Right of Sale is Caught up with the Statute of Limitation:**

A mortgage, like every other contract, is subject to Statute of Limitation. It is the law that a mortgagee has twelve years within which to enforce mortgagor's covenant to repay the mortgage loan.<sup>77</sup> Where a mortgagee fails or neglects to take action within the twelve years, the right becomes statute-barred and the loan becomes irrecoverable.<sup>78</sup> No judicial process can be activated for recovering the mortgage sum. This is because the mortgagee's title to the security and the right to the mortgage sum and interest has become extinguished.

**(e) Where the Mortgage is a Fraud on the Mortgagor:**

Where it is established that the mortgage is a fraud by the mortgagee on the mortgagor, it has no legal or binding effect, it cannot give right to an enforceable right on the part of the mortgagee to sell the mortgaged property. The Mortgagor can have the mortgage vitiated and any sale carried out by the mortgagee pursuant to the mortgage is impeachable.

**(f) Where the sale occurred after payment of mortgage sum and interest**

**(g) Where the parties agreed on the different mode of sale**

**Power of Sale and the Court's Attitude towards Failure to comply with the laid down Procedure**

It is a settled position of the law that the mortgagee needs not go to court to obtain an order before exercising his power of sale so long as the mortgage is created by deed and the legal due date has expired without the mortgagor making full payment. Once the right of sale has arisen, the mortgagee can pass good title to a purchaser, even when the right has not become exercisable. Upon sale, the mortgagee ought to execute a Deed of transfer in favour of the purchaser. The statutory power of sale is given for the benefit of the mortgagee to enable him realize his security. To that extent, he should act in good faith. The Court in *Abe v. Skye Bank Plc*,<sup>79</sup> states the principles governing exercise of mortgagee's power of sale as follows, "Though the complaint of undervalue is not enough to vitiate the exercise of a mortgagee's power of sale, but the court will always be on the lookout that the mortgagee acts bona fide and observes reasonable precautions to obtain not the best price but a proper price."

In *Viatomu v. Odutayo*,<sup>80</sup> a moneylender granted the loan. When the mortgagor defaulted, he was given another two months to redeem, but within two weeks, the mortgagor tendered the money to redeem. Before this, the mortgagor tendered the money to redeem. Before this, the mortgagee had instructed her husband and partner in an auctioneering firm. The sale was set aside. The court held that the sale was collusive, not made bona fide and therefore void.

In *Pinnock v. G.B. Ollivant and Co. Ltd.*,<sup>81</sup> the plaintiff as surety, additionally mortgaged his landed property to the defendant. The debtor defaulted and the defendant gave notice to sell the mortgaged property to realize the debt, which then sold at about €76. On receipt of the notice the debtor made further repayments to the defendant, which reduced the outstanding

<sup>77</sup> Section 29, Limitation Law, CAP, L67, Laws of Lagos State.

<sup>78</sup> Section 26 and 31 (1), Limitation Law, Lagos State, 2003.

<sup>79</sup> (2015) 4 NWLR (Pt. 1450) 512; *Babatunde v. Bank of the North* (2011) 18 NWLR (pt. 1279) 738; *West African Brewing Ltd v. Savannah Ventures* (2002) 10 NWLR (Pt. 775) 401.

<sup>80</sup> (1950) 19 NLR 119.

<sup>81</sup> (1934) 2 WACA 164

debt to below €40. The defendant then sold the property for €40, admittedly €100 below its estimated market value. The court held that the price at which the property was sold made the sale “an utterly discreditable transaction.” The court’s attitude toward the mortgagee’s failure to comply with the laid down procedure is to set aside such a sale. This can be seen in the above cases.

### **Conclusion**

From the exposition above, it is deducible that the mortgagee’s power of sale is the most potent remedy that avails a mortgagee in secured credit transaction. This power is seen to be both contractual and statutory<sup>82</sup>. It should however be noted that, before this right is exercised, the power of sale must have arisen and become exercisable<sup>83</sup>. That is to say, the following three conditions must be fulfilled to wit:

- i. That the mortgage was created by deed
- ii. That the legal due for redemption date has passed
- iii. That there is no contrary intention in the deed of conveyance

Where the above-mentioned conditions are met, and in the absence of any form of fraud, underhand dealings or connivance with the purchaser, the sale cannot be impugned by the court even where such sale is at the detriment of the mortgagor. Moreover, unlike other forms of remedies accruable to a mortgagee, the mortgagee, notwithstanding a debt recovery judgment in his favour, and even where an appeal and a motion for stay of execution are pending, may exercise the power of sale under the deed of mortgage.<sup>84</sup> A sale or a contract to sell mortgaged property destroys the mortgagor’s equity of redemption and absolutely divest the mortgagor of any form of title to the mortgaged property.

In addition, where the mortgagee embarks on the exercise of his statutory power of sale consequent upon mortgage installment falling into arrears, the mortgagor merely paying off the arrears cannot restrain him from selling the mortgaged property; only payment in full of the principal sum and interest can restrain the mortgagee from selling the mortgaged property.

### **Recommendations**

From the foregoing, it can be gleaned that this mortgagee’s power of sale tends to be unfettered especially when such power has risen and becomes exercisable. It is the writer’s suggestion that there should be a codified instrument to regulate mortgage transactions in Nigeria wherein the powers of sale by mortgagees would be put on check. Where a mortgagee, in the exercise of his right, sells far below the value of the mortgaged property, he would be made to account for the loss or finds a way of compensating the mortgagor. With such legislation in place, the mortgagee whose power of sale has risen would always act in good faith in the discharge of his right. Nigerian law relating to mortgage transaction should have a resemblance of other

<sup>82</sup> See section 19 CA 1881; section 121 PCL 1959

<sup>83</sup> Osamolu, (n 10), 382.

<sup>84</sup> *Union Bank of Nigeria Plc v. Olori Motors Co. Ltd.* (1998) 5 NWLR (Pt. 554).

common law countries, which seek to protect both the mortgagee and the mortgagor in the event of this power of sale becoming exercisable<sup>85</sup>.

Furthermore, the powers of the court to hear and determine issues arising from the sale of mortgaged property by the mortgagee should not be ousted. This in effect would balance the scale of liability suffered by the mortgagor whose equitable right to redeem his security can no more avail him.

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<sup>85</sup> See the case of *Medforth v. Blake* (1993) 3 All ER 104.