
Volume 54 Issue 8

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ISSUES AND CHALLENGES**

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Recommended Citation: Busari Morufu Salawu (2025); “A Legal Theory of Mortgage and Land Transactions Under the Land Use Act 1978 in Nigeria: Issues and Challenges” Volume 54 Issue 8 Makerere Law Journal pp. 251-281

A LEGAL THEORY OF MORTGAGE AND LAND TRANSACTIONS UNDER THE LAND USE ACT 1978 IN NIGERIA: ISSUES AND CHALLENGES

Busari Morufu Salawu*

Abstract

The use of land as securities for mortgages appears more desirable for lenders because its value increases over a period and it cannot be shipped out of jurisdiction. This paper undertakes an overview of mortgage theories, examines their applications to mortgage transactions under the Nigeria's Land Use Act 1978 and identifies and appraises challenges to their use. Although the Nigerian mortgage industry is still developing, due to a legal complexity in the sector, intermediate theory provides a strong base for its operation because of its adoption of principles of title and lien theories. Contentious provisions in the Land Use Act, such as the consent clause deemed grantee, and the half hectare clause are recommended for amendment for easy mortgage transactions

1.0 INTRODUCTION

Regulating mortgage transactions in an economy characterised by high inflationary trends and low rates of mortgage repayments is a difficult task engaging the Nigerian economy.¹ The uncertainties that pervade the mortgage sector because of the lack of clear directions and policies have had negative impacts on the access to

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¹ Central Bank of Nigeria (CBN), Credit Condition Survey Report for Q4 2020, (December, 2020), 14-16 <<https://cbn.gov.ng>> [Accessed October 12, 2024]; T.B. Oyedokun, A.O. Adewusi and M.O. Be;jo, "Impacts of Borrower's Attributes on Mortgage Default" Evidence from Nigerian Lending Market, (2015)2(3), Pacific Rim Property Research Journal, 259-274, <<http://dx.doi.org/10.1080/1445921.2016.1140713>> [Accessed October 12, 2024].

capital flows and sustainability of the banking sector. Many banks have gone into bankruptcy because of the inability to recover mortgage loans due to problems emanating from the implementation of the Land Use Act 1978 Cap L5.²

Lending institutions in Nigeria are frequently confronted with loan defaulters who, for several reasons, are not able to fulfil their obligations as contained in the loan agreements.³ Oyedokun, *et al* identified factors which may dispose the mortgagors to default from payment of the mortgage to include payment-to-income ratio, type and sex of the borrowers among others.⁴ Due to that, lenders are left with no option than to set in motion actions to recover the capital and the interest in the loan. Actions which a lender could take in the recovery of the sum outstanding depend on loan securities. The loan which is secured by land has the advantage of attaching the security to the loan and thereby seeking a suitable method of recovering the pecuniary interest in any of the following ways: recovery of the mortgage loan through litigation; actual possession; appointment of a receiver; foreclosure; a specific performance and selling security.⁵

In a developing economy like that of Nigeria, recovering a loan may be a challenge for the mortgagees even when their interests are secured. This may be due to complex economic situations and the hyper-inflationary trend which has seen Nigeria enter into economic recession for twice; in 2015-2016 and in 2020-2021,⁶ the effect of which persists to the present day.⁷ Another reason is the macroeconomic effect of COVID-19. These present great dangers for the financial sector where the government itself has found it difficult to repay its loans.⁸

² Law of the Federation of Nigeria (LFN), 2004.

³ Oyedokun, Adewusi & Bello, Impact of Borrower's Attributes on Mortgage Default: Evidence from Nigerian Lending Market.

⁴ Ibid.

⁵ F.J. Oniekoro, *Mortgages in Nigeria* (Chenglo Ltd, Enugu 2007) 142.

⁶ The World Bank, 'Nigeria's Economy Faces Worst Recession in Four Decades, says World Bank Report'. *Press Release*, (June 26, 2020) <www.worldbank.org> [Accessed 2 May, 2021].

⁷ Stephen Onyeiwu, Inflation in Nigeria is still Climbing while it has Slowed Globally: Here's Why The Conversation, (Lagos, March 14, 2024), <<https://theconversation.com/inflation-in-nigeria-is-still-climbing-while-it-has-slowed-globally-heres-why-222226>> [Accessed 13 October, 2024].

⁸ Oladeinde Olawoyin, 'Nigeria spent 97% of its revenue on debt servicing in 2020 – Report' *Premium Times* (Lagos, July 11, 2021).

It was further alleged that in 2020, the nation used 97% of its revenue to service debts.⁹ Banks and other lending firms may therefore, find it difficult to recover even secured loans and may have to use various enforcing strategies, chief among which is the mortgagee's power of sale (MPoS). In recent times, various reports and publications on the mortgage performance in Nigeria have shown an increasing rate of default, with grave implications for the lending industry.¹⁰ The Central Bank of Nigeria (CBN) report showed that the rate of default worsened for small scale businesses in the last quarter of 2020 due to Coronavirus disease (COVID-19) Pandemic.

This study is conducted due to a dearth of legal theoretical frameworks for mortgage transactions in Nigeria. Though many works have been done on mortgage transactions in Nigeria, few of such have concentrated on formulating a legal theoretical framework and, theory building. Findings from these studies revealed the complexity of the legal regime of mortgage and a lack of developed legal theory in Nigeria.¹¹ Conducting this study would contribute to knowledge in the mortgage sector and would contribute to repositioning the fledgling mortgage industry for sustainable development.

The study appraises the relevance of lien theory to mortgage transactions under Land Use Act in Nigeria. The objectives of the study were to;

⁹ BudgetIT, '2020 Budget Implementation Analysis' (Lagos, July, 2020) cited in *Premium Times* (Lagos July, 2021).

¹⁰ See Okafor Endurance, 'Nigerian lenders tighten credit criteria as default rates worsened in Q4 20' *Businessday*; Central Bank of Nigeria (CBN), Credit Condition Survey Report for Q4 2020 Abuja', Statistic Department (December, 2020), 14-16.

¹¹ UG Ihekwoaba, 'A Holistic Analysis of Mortgage Transactions in Nigeria' (2024) (1) (2) *NAU Journal of Private Property Law*, 102
<<https://journals.unizik.edu.ng/nauijpl/article/view/4374>> [Accessed 28 May 2025]; Kehinde Ogundimi, 'Legal and Regulatory Framework for the Mortgage Industry in Nigeria' (2019) (54) (4) *Economic and Financial Review*, 85
<<https://www.cbn.gov.ng/out/2020/rsd/efr%20vol%2057%20no%204%20december%202019%20legal%20and%20regulatory%20framework%20forthe%20mortgage%20industry%20in%20nigeria.pdf>> [Accessed 28 May 2025]; Oluwaseyi Sanni, 'An Appraisal of the Legal Framework Regulating Mortgage of Landed Property as Security for Loans from Banks in Nigeria' (19 September 2017) Available as SSRN
<https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3039309_code2720962.pdf?abstractid=3039309&mirid=1> [Accessed 28 May 2025].

1. Examine global best practices on mortgage theories regulating land transactions in Nigeria;
2. Apply the legal theory to mortgage transactions under the Nigeria's Land Use Act 1978; and
3. Identify and appraise challenges to the applicability of the theories to land mortgage in Nigeria.

The study adopted the doctrinal research method relying on primary and secondary sources. While the primary source includes statutory analysis and the case law, the secondary sources used are textbooks, journal articles, conference proceedings and the internet to achieve the aim and objectives of the study.

2.0. CONCEPTUAL CLARIFICATIONS

A mortgage is the legal or equitable transfer of title as security for the loan repayment or fulfilment of an obligation, with the promise that the title alienated would be redeemed when the debt is refunded or the obligation is settled.¹² In law, the mortgage relationship is usually between two parties (the mortgagor and the mortgagee). A third party may, however, come into the arrangement as a trustee, head lessor or a guarantor who may give or confirm the transfer of the title as debt security.¹³ In this paper, the words 'mortgagor' is used synonymously with 'borrower' and 'debtor', while 'mortgagee' bears the same meaning as 'lender' and 'creditor'.

The historical development of the mortgage could be traced to French jurisprudence where two types of 'gage existed, namely 'mort gage' which means dead pledge and 'vif gage', live pledge respectively.¹⁴ In "vif gage", the secured lender (pledgee), would be in possession, utilise the rents, profits and products from the security to reduce the payment sum.¹⁵ Under the *mort gage* however, the

¹² *Santley v Wilde* (1899) ChD 474 (Lord Lindley).

¹³ F.J. Oniekoro, *Mortgages in Nigeria: Law and Practice*, (Chenglo Ltd., Enugu, 2007) 1.

¹⁴ *Online Ethymology Dictionary* etymonline.com/word. Mortgage, Retrieved on 8 April 2020.

¹⁵ George Edward Osborne, *Handbook of the Law of Mortgages*, (2nd ed. West Publishing Co. Ltd, Texas 1970) 1.

secured lender was not under such obligation.¹⁶ Rather, the rents, products and profits collected would not be used to defray the debt.¹⁷

The evolution of mortgage law over the centuries has repositioned it for the promotion of commercial and industrial developments and housing facilities to take care of the continued need for funds in the globally competitive world. The institution of mortgage is, perhaps, one of the most important contributions of the English common law and the doctrines of equity to property management. It clearly enunciates roles of borrowers and lenders when security is involved.

3.0 OVERVIEW OF THE MORTGAGE THEORIES

Mortgage is a legal devise of a complex origin. It is a devise in which a legal or equitable title is conveyed by a party, known as mortgagor to another party, known as mortgagee, as security for the payment of a debt or to satisfy some other legal duties, with the understanding that the security would be re-conveyed when the debt is paid.¹⁸ The author identifies and discussed three main theories in this section, namely: the title theory; the lien theory and intermediate theory.

3.1 TITLE THEORY

The title theory of mortgage is otherwise known as the common law doctrine of mortgage. By this theory, a mortgage is conveying the title of the property from the mortgagor to the mortgagee.¹⁹ The title theory holds that the lender has certain rights which include entry and possession of the security immediately and as an incidence of his title, even before foreclosure. Failure to pay on the due date as agreed on the part of the mortgagor would determine his interest and make the interest of the mortgagee absolute.²⁰

¹⁶ *Ibid*, 3.

¹⁷ *Ibid*.

¹⁸ *Santley v Wilde* (1899) Ch. P. 474 (Lord Lindley).

¹⁹ William. H. Lloyd, "The Mortgage Theory of Pennsylvania," (1924) 23 (233) *Yale Law Journal*, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=penn_law_review> [Accessed 13 October, 2024].

²⁰ *Ibid*.

The common law position views mortgage as a conditional conveyancing because it does not set any special rules which could be regarded as law of mortgages. The conditional sale transferred the legal title to the lender, which could be made absolute upon the fulfilment of conditions precedent.²¹ It operates more like an escrow contract where the lender is vested with the estate before default and upon the occurrence of a condition precedent, the right to non-judicial foreclosure is exercised.²² The mortgagee, however, has the post-foreclosure right of re-entry when the condition stipulated in the mortgage deed has been performed, before the final decree of foreclosure.²³ The implication of the common law rule of conditional conveyancing is that the legal right in the property is transferred to the mortgagee upon the perfection of the mortgage deed.

Apart from its common law origin in English law, the title theory has regulated mortgage transactions with considerable success in many states in the United States of America, where 24 states follow the title theory.²⁴ Lessons on its operation in the United States are therefore relevant, and are tapped, for this analysis. When in operation, lenders have both possession and legal rights in the security, a situation which confers adequate protection and safeguards their interest.

Furthermore, access to loans is swift under this theory as the lender takes over security, manages and protects it to ensure that the loan is repaid. While this theory safeguards and protects the rights of the mortgagee, it has been accused of short-changing the interest of the borrowers whose title in the security could be conscripted and foreclosed without any judicial proceeding, subject to the exercise

²¹ Edgar N. Durfee, 'The Lien or Equitable Theory of the Mortgage - Some Generalizations' (1912) (X)(8) *Michigan Law Review*, 587, 592.

²² Ibid.

²³ Wesley A. Sturges and Samuel O. Clark, 'Legal Theory and Real Property Mortgages' (1928) (XXXVI) (6) *Yale Law Journal*, 691- 715.

²⁴ Amanda Bell, 'Understanding the Difference: Lien Theory v Title Theory' *Home Buying and Home selling Tips*, <<https://www.proplogix.com/videos/lien-theory-vs-title-theory/>> [Accessed 13 October, 2024]; World Population Review, 'Lien Theory States 2021' <www.worldpopulationreview.com> [Accessed on 13 October, 2024].

of post-foreclosure right within a certain period specified after the foreclosure sale.²⁵

Through title theory, a trust mortgage deed which allows three parties- the borrower, the lender and the trustee- in a mortgage agreement.²⁶ The deed of trust transfers the title in the property to the lender or third party and sets out duties and conditions of the lender and when and how the property can be foreclosed. For example, a borrower in a title theory state transfers the property title to a trustee to hold for the lender. In case of default, a trustee has powers of non-judicial sale.²⁷

Perhaps a major shortcoming of the title theory which has necessitated several reforms by the court of equity is the absolute transfer of title in the mortgaged security to the mortgagee the moment the mortgagor fails to pay the debt as scheduled.²⁸ The common law relies on contractual terms and obligations to grant the lender, or its trustee, the non-judicial foreclosure and sale.²⁹ The strict adherence to these principles dictates that when the borrower (mortgagor) fails to pay the lender (mortgagee) as promised, the security should be foreclosed.³⁰ The Pennsylvania Supreme Court in *Tyson v Munson*,³¹ affirmed this as follows:

The mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made. He may, therefore, enter at pleasure, and take actual possession-use of the land and reap its fruits. Now this title or lawful right to possess, and actual *pedis possession*, are not ideal or contemplative merely, but are real and tangible.

²⁵ George E. Osborne, *Handbook of the Law of Mortgage* 2nd Edition, (Minnesota, West Publishing, 1970).

²⁶ Faster Capital, "Title Theory Explained, the Impact on the Trust Deeds and Mortgages," 4 June, 2024, <<https://www.fastercapital.com/content/Title-Theory-State-Title-Theory-Explained-The-Impact-on-Trust-Deeds-and-Mortgages.html>> [Accessed on June 01 2025].

²⁷ Ibid.

²⁸ William H. Lloyd, "The Mortgage Theory of Pennsylvania," *University of Pennsylvania Law Review* (1927) 76,73.

²⁹ Morris G. Shanker, 'Will Mortgage Law Survive? A Commentary and Critique on Mortgage's Birth. Long Life, and Current Proposals for its Demise' (2003) (54) (1). *Case Western Reserve Law Review*, 69- 102.

³⁰ William H. Lloyd, 'The Mortgage Theory of Pennsylvania' 1923-1925 (73) (1) *University of Pennsylvania Law Review* 43-58.

³¹ Per Chief Justice Agnew in *Tyson v Munson*, (77 Pa. 250 (1875)).

Under the title theory, the borrower who ordinarily is in a weak position, appears to be more weakened by the enormous powers it heaps on the lender, who has the title from inception, though subject to the right of redemption upon payment of the loan, but who can lose such right by defaulting to pay the loan as promised, through a non-judicial foreclosure?³²

In its modern form, title theory contends that a mortgagor conveys the title to the mortgagee to hold and utilise until the mortgage is discharged or foreclosed.³³ In such context, the mortgagee has a legal title while the mortgagor possesses an equitable title for the duration of the mortgage. The right of possession by the mortgagee at common law is a feature of the title theory.³⁴ While it entitles the mortgagee to possession of the security, with the right to utilise it for his own benefit, the right is not absolute as the mortgagor has the right of reversion upon the payment of the loan and interest.³⁵ As soon as the debt is paid, the ownership, which earlier resides in the mortgagee reverts to the mortgagor. The reason for this procedure is to ensure that the lender acquires immediate possession should the borrower default in the obligations to defray the debt.³⁶

Nigeria inherits, as part of its common law heritage, the title theory of mortgage as contained in its primary conveyancing statute, the Conveyancing Act 1881 which was received from English law on 1st January 1900. The English legal heritage was formally introduced to Nigeria in 1862, as a result of the British occupation of Lagos.³⁷ The first court to apply the English law was the Supreme Court, which had both civil and criminal jurisdiction.³⁸ The West African Court of Appeal (WACA) was established in 1866, following the amalgamation of British settlements of

³² Administrator, Mortgage >Title Theory, Lien Theory, Intermediate Theory,” *econo*, 10 May, 2022, <<https://ecnoagency.org/Mortgage/2893>> [Accessed 13 October, 2024].

³³ Ibid (n30).

³⁴ Faster Capital, Title Theory States Explained, the Impact on the Trust Deeds.

³⁵ Morris G. Shanker, “Will mortgage Law Survive? A Commentary and Critique on Mortgage’s Birth., Long Life, and Current Proposals for its Demise,” (2003) 54(1), *Case Western Reserve Law Review*, 69-102.

³⁶ U. Kama, J. Yakubu, P. Bewaji, M.A. Adigun, O. Adeigbe, and J.O. Elisha, Mortgage Financing in Nigeria (Abuja, Central Bank of Nigeria, Occasional Papers 50 2013), p.7.

³⁷ Treaty of Cession 1861.

³⁸ Supreme Court Ordinance 1863. No 11 of 1863.

Lagos, Gold Coast, Sierra Leone and the Gambia.³⁹ Appeals from the court lay to the Judicial Committee of the Privy Council. In 1874, a separate Supreme Court was established for the settlements of Lagos and Gold Coast, known as Gold Coast Colony.⁴⁰ It was the first colonial court to apply the full compliments of the received law, namely the English common law, doctrine of equity and the statutes of general application in force in England on July 24, 1874.⁴¹

The promulgation of the Foreign Jurisdiction Acts, 1890–1913, the British Government was empowered to legislate in Nigeria. The amalgamation of the Colony and Protectorate of Southern Nigeria in 1914 led to the establishment of the Supreme Court.⁴² The court received the English law heritage of common law, doctrine of equity and statutes of general application in force in England on January 1, 1900. with necessary modifications to “suit Nigerian needs.”⁴³ This operates in Nigerian courts till present. The Interpretation Act incorporated the extent of the reception of the English law.⁴⁴ These received laws became operational on any matter within the Exclusive Legislature List of the Government of the Federation,⁴⁵ subject to local legislation and local circumstances,⁴⁶ and with necessary modifications to “suit Nigerian needs.”⁴⁷ The purpose of this is to ensure that local peculiarities and circumstances are taken into consideration in the interpretation of the received laws.

Based on this, the English law of real property came to be applied in Nigeria subject to the exceptions earlier identified. Thus, the rules of English Common Law affecting the tenure, disposition of real property estate and inheritance procedure were applicable in Nigeria. In addition, the doctrines of equity and statutes of

³⁹ AO Obilade, *The Nigerian Legal System* (Spectrum Books Limited, Ibadan, 2001) 18.

⁴⁰ The Supreme Court Ordinance 1874.

⁴¹ Ibid.

⁴² No 6 of 1914.

⁴³ IO Agbede, *Themes on Conflicts of Laws* (Revised Edition, Princeton & Associates, 2018) 23.

⁴⁴ Cap. 89 LFN, 2010.

⁴⁵ S. 45(1).

⁴⁶ S. 45 (3); S. 15 of the High Court Law Cap. 161, Law of Eastern Nigeria, 1963.

⁴⁷ Ibid (n43), 23.

general application were operative in Nigeria.⁴⁸ Applicable SOGA subject to the availability of local laws includes Statute of Frauds Act 1677,⁴⁹ Conveyancing Act 1881,⁵⁰ Land Transfer Act,⁵¹ etc.

However, the enactment of the Land Use Act 1978⁵² for land management and control has posed some challenges like the certainty of title, requirement of Governor's consent for alienation of interests and the principle of unexhausted improvement in the determination of compensation to the continued operation of this common law jurisprudence.

3.2 LIEN THEORY OF MORTGAGE

The lien theory means that a mortgage is like a lien on the property. A lien is legal claim or legal right on debtor's property or other assets, especially assets used as collateral to secure a loan.⁵³ Its purpose is to serve as the security of a loan repayment, failing which "the creditor can seize and sell the asset".⁵⁴ It is created through the operation of the law and not by the parties' agreement. It is, unlike the mortgage, which can only be created through the consensus of the parties. A lienee retains custody of a property belonging to another person until certain demands are satisfied, failing which the property can be sold to satisfy the condition.⁵⁵ It may be categorized as possessory, maritime or equitable. It is possessory when a person who has possession of goods retains them until certain financial demands are met.⁵⁶ A real estate lien affords the creditor the opportunity to sell a particular item of property if a contract is not fulfilled.⁵⁷ A lien emanates from the doctrines

⁴⁸ Property and Conveyancing Law 2006, Cap 120, Law of Ondo State 2006.

⁴⁹ Law of England.

⁵⁰ Law of England.

⁵¹ Law of England.

⁵² Cap L5, Law of the Federation (LFN) 2004.

⁵³ W Kenton, N Yashina & HD Jasperson, 'Lien: Definition, Major Types and Examples' (Investopedia, 8 August 2024) <<https://www.investopedia.com/terms/l/lien.asp>> [Accessed 24 April 2025].

⁵⁴ Ibid.

⁵⁵ *Hammonds v Barclay* (1802) 2 East 227 (Grose J.).

⁵⁶ F. Oniekoro, *Mortgages in Nigeria: Law and Practice* (Chenglo Limited, Enugu, 2007) 7.

⁵⁷ Ibid (n52).

of equity. As an equitable remedy, it is “the most convenient and flexible device for enforcing equitable obligations”.⁵⁸

Hence, under the lien theory, a mortgagee merely obtains a lien on the security, while both the legal and equitable titles reside in the mortgagor.⁵⁹ Thus, if a mortgagor defaults by not meeting the contractual terms, an order of foreclosure may be sought to enable the mortgagee to dispose of the property for the repayment of the loan. This theory is premised on the argument in equity that although a mortgage was like “a conveyance on condition precedent,” its purpose is to serve as a security for the debt.⁶⁰ The lien theory arose following the development in equity which watered down the harshness of the common law.

The doctrines of equity influenced the law of mortgages considerably in the seventeenth century because of the rigidity of the rules of the common law mortgage. This demanded that any mortgagee in possession should account for the proceeds from the property. The proceeds should be used to cover the necessary costs of maintenance and preservation of the property while the remainder should be set aside to defray the principal debt and interests.⁶¹

Equity recognised that the content of the mortgage deed notwithstanding, the transaction was a debtor-creditor relationship in which the mortgagee’s entitlement was the loan and interest to be repaid. Hence, the moment this was done, the relationship between the parties had come to an end. Any contention with this position was declared illegal and unenforceable by equity because it hindered the rights of the mortgagor.⁶² Thus, rules were developed to ensure the achievement of mortgagor’s rights. First, a mortgage deed is a contract which regulates the

⁵⁸ “The Equitable Lien as a Remedy for Breach of Contract” 32 Mich. L.Rev.685 (1934) <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=11756&context=mlr>> [Accessed 24 April 2025].

⁵⁹ U. Kama, J. Yakubu, P. Bewaji, M.A. Adigun, O. Adeigbe, and J.O. Elisha, *Mortgage Financing in Nigeria*, 7.

⁶⁰ Edgar. Durfee, ‘The Lien or Equitable Theory of Mortgage’ X (8) (1912) *Michigan Law Review*. 587- 607.

⁶¹ Ibid (n15) 19.

⁶² Garrard Glenn, *Mortgages, Deed of Trust, and Other Security Devices as to Land*, Volume 2 (Michie Co, 1943) cited in Bukhart, p. 266.

relationship between the creditor and the debtor with various duties and obligations.⁶³ Second, it is illegal for the mortgagee to hold on to the security beyond the period of full payment.⁶⁴ It also declares the mortgagor's redemptive right upon full repayment, even beyond the debt due date.⁶⁵ It further limits the strict foreclosure right of the mortgagee to foreclosure by sale.⁶⁶

Equity introduces the creditor relationship,⁶⁷ to beat various attempts of lenders to clog the rights of the mortgagors under various spurious names given to such transactions.⁶⁸ Although it promotes the rights of debtors, it may be disadvantageous to the lenders who may have to embark on tortuous legal battles to secure judicial foreclosure and sale. In a developing economy like Nigeria where the CBN has reported increasing mortgage delinquency, lenders may be reluctant to grant loans, for fears of poor loan recovery.⁶⁹ The lien theory upholds that the right of redemption of the debtor should not be sacrificed on the altar of non-judicial foreclosure.⁷⁰ Hence, it provides for the equitable right to redeem.

As in the case of title theory, a lesson on the implementation of title theory can be drawn from America where not less than 19 states follow it.⁷¹ Mortgagors in a title theory state like Virginia has opportunities to defend their legal rights before the courts and avert the injustice of a non-judicial foreclosure.⁷²

⁶³ Ibid 35.

⁶⁴ William Blackstone, *Commentaries on the Laws of England* 160 n. 38 (W. Lewis ed. 1902) cited in Bukhart, p. 266.

⁶⁵ Ibid 62.

⁶⁶ Strict foreclosure is a right granted the mortgagee by equity to be able to recover his payment on time and after the default date. The mortgagee would institute the foreclosure proceeding For the setting of a date the mortgagor would exercise his right of redemption before payment. This right was limited by foreclosure by sale to make mortgagee accountable for the proceeds of sale.

⁶⁷ "Once a mortgage is always a mortgage"

⁶⁸ Ibid 29.

⁶⁹ CBN, Credit Condition Survey Q4, 2020.

⁷⁰ Ibid 592.

⁷¹ Administrator, "Mortgage > Title Theory, Lien Theory, Intermediate Theory."

⁷² D. Rendleman. 'Foreclosure of a Deed of Trust in Virginia' (2016) (51) *University Richmond Law Review* 147
<<https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1543&context=wlufac>> [Accessed 27 April 2025].

Equity of redemption may have been introduced to mortgage transactions to remove forfeiture of land title under the title theory because the value of land often rises beyond the debt to be paid in consideration. Also, equity viewed debt repayment as being central to the mortgage. Hence, the lender could not impose the penalty of forfeiture on the borrower when the debt was paid at a reasonable time after the payment is done.⁷³ The introduction of the equity of redemption gives the borrower the opportunity of repayment after its agreed date and further vested in him an equitable estate to deal with the land beyond that date. This innovation has made it possible for the borrower to transfer, mortgage and divide his estate during the pendency of the loan thus increasing the economic value of land.⁷⁴

The position of equity has been viewed to be hard on the lender, as it could possibly lead to the reduction of the value of a security. However, this argument could be countered by the principle of equitable method of eliminating the mortgagor's interests in the land. Through the decree of foreclosure, an end is effectively put to the mortgagors' interest.⁷⁵ This decree is referred to as "strict foreclosure"⁷⁶ and its purpose was to restore some hope to the lenders that they could hold on to the security upon borrowers' defaults. However, because the operation of strict foreclosure was unfavourable to the borrowers whose equity had perceived to be in a weak position, it developed a redemptive right from a strict foreclosure. Just like the earlier right to redeem, the redemption of security was extended to situations where the land had been sold.⁷⁷

Realising the equitable trend in mortgages, practitioners focus more on the debt rather than security. Therefore, mortgage documents include a right of sale when there is a breach of agreement to pay and the retention of the income realised from

⁷³ G. Osborne, *Handbook of the Law of Mortgage*, (2nd Edition West Publisher Co., 1970). The increasing innovations of equity courts in 16th and 17th centuries gave more powers to the mortgagors who were free from onerous terms of the mortgagees.

⁷⁴ *Ibid*, 16-17.

⁷⁵ *Ibid* 64.

⁷⁶ *Ibid* (n62).

⁷⁷ *Ibid*.

sale to settle the debt, while the borrower would receive the surplus.⁷⁸ This approach has been widely accepted, and it consolidates the position of the lien theory. In other words, the lien theory position is that mortgages do not transfer title and possession. What is transferred is the right of sale of property upon default which can only be done through court orders because foreclosure is judicial.⁷⁹ To allow for non-judicial foreclosure, the mortgage contract(s) must contain power of sale clause which gives the lender the power of non-judicial foreclosure.⁸⁰

The implication of this theory is that the mortgagee does not have a title to the mortgaged land before any default. In lien theory, mortgagees are entitled only to the lien for the payment of the debt and not the security. Hence, when a debtor has paid the creditor, an end has been put to further creditor right.⁸¹

This theory prolongs enforcement of mortgages through court litigations. However, the judicial foreclosure and sale have been identified in Ghana which uses the lien theory to contribute to inefficiencies and undue delays in foreclosure proceedings which affect the mortgage industry negatively.⁸² In order to curb the defects, two Acts were passed in 2008 and 2020 respectively; namely the Borrowers and Lenders Act 2020⁸³ and the Home Mortgage Finance Act 1978⁸⁴ which allow lenders to make use of non-judicial foreclosure and sale.⁸⁵

3.3 INTERMEDIATE THEORY OF MORTGAGE

This theory retains the features of both title and lien theories in the conduct of mortgages. The title of the security remains in the borrower, with the provision that such can be recovered by the lender without judicial proceedings upon default.⁸⁶

⁷⁸ Richard W. Turner, *The Equity of Redemption II* (Wm. W. Gaunt & Sons, 1986), p.121.

⁷⁹ Ibid (n24).

⁸⁰ Oniekoro, *Mortgages in Nigeria: Law and Practice*, op cit.178.

⁸¹ M.G. Shanker, *supra*, p.74

⁸² Frank Gyamfi- Yeboah, "Mortgage Foreclosures in Ghana: The law, Practice and Implications." AFRES, 21st Annual Conference, <<https://architexturez.net/system/files/afres-2022-12pdf>> [Accessed 14 October,2024].

⁸³ S. 67.

⁸⁴ Act 770, S. 12 (b).

⁸⁵ Borrowers and Lenders Act, S. 67.

⁸⁶ Administrator, "Mortgage >Title Theory, Lien Theory and Intermediate Theory."

Borrowers have possession of security and the right of redemption upon full repayment through a deed of reconveyance. Like the previous theories, the intermediate theory is applied by some states in the United States of America⁸⁷ and Ghana.⁸⁸ It is instructive to note that the intermediate theory applies principles of lien theory for the creation and operation of the mortgage until the borrower defaults in loan repayment. After the default, the title theory shall apply. It is a middle of the way approach which accommodates both the theories earlier discussed.

It recognises that mortgage conveys legal or equitable title to the creditor as a promise to repay. It however grants the lender the power of sale which is free from judicial encumbrance when the mortgagor defaults. However, the central theme of the lien theory, adopted by the intermediate theory of mortgage, is the cardinal principle enunciated in *Samuel v Jarrah Timber & Wood Paving Co*,⁸⁹ where the court reiterated that it would never permit any mortgage deed to clog the mortgagor's reversion of the security when contractual obligations have been fulfilled.⁹⁰

In the United States of America, 14 states use the intermediate theory of mortgages.⁹¹

⁸⁷ These states include Montana, Minnesota, Michigan, Oklahoma, Alabama, Maryland, Vermont, New Hampshire, Massachusetts and Rhode Island.

⁸⁸ Frank Gyamfi- Yeboah, Mortgage Foreclosures in Ghana: The law, Practice and Implications. (1904) A.C. 323, 326 (H.L.1904).

⁸⁹ Per Lord Lindley Ibid, 329.

⁹¹ World Population Review, 'Lien Theory States 2021' <www.worldpopulationreview.com> [Accessed on 13 November 2021]. These include Montana, Minnesota, Michigan, Oklahoma, Alabama, Maryland, Vermont, New Hampshire, Massachusetts and Rhode Island.

4.0 APPLICATION OF THE LEGAL THEORY OF MORTGAGE ON LAND IN NIGERIA

In Nigerian legal regime, the title theory inherited through the common law is in use. The lender is entitled to both the transfer of the legal title and the physical possession of the security, while the borrower has only an equitable title.⁹²

Mortgages under the Nigerian law adopt principles of title theory because of its English law heritage.⁹³ The common law right of entry into possession by the mortgagee is therefore part of the Nigerian law of mortgage, although many lenders do not take possession because of the attendant legal responsibilities provided for in the statutes.⁹⁴ Features of mortgages in Nigeria include transfer of title right to the mortgagee, mortgagee's right of possession of the security, leasing powers of both the mortgagor and the mortgagee and non-judicial foreclosure and sale of securities of legal mortgage.⁹⁵ Provisions for the right of redemption and equitable right to redeem operate as equitable principles in Nigerian mortgage law.⁹⁶

However, possession of security is rarely exercised by the mortgagee under Nigerian law to avoid liabilities and loss that may arise by the payment of the occupational rents and the rendition of accounts for the extra period spent on the land. In *Aderoku v UAC*,⁹⁷ the mortgagee in possession in 1921 at the commencement of mortgage was there till 1937, even when the mortgage was discharged in 1935. The court ordered him to render accounts that ought to have accrued for the whole of the period he was in possession. Additionally, while in possession, the lender is responsible for repairs, though this will be set off from profits and rents collected.⁹⁸

⁹² A. O. Okoye, "Creation of Legal Mortgages: A Critique" (2018)73 *Journal of Law, Policy and Globalization*, 56.

⁹³ English law, comprising statutes of general application, common law and doctrines of equity in force in England as at 1st January 1900 were received into Nigeria legal system due to its colonial heritage.

⁹⁴ Mortgages and Property Law 2012 (MPL), Law of Lagos, Section 67.

⁹⁵ Ca, S.19 (1); PCL, S. 123 (1); MPL. S. 35 (1).

⁹⁶ *Bank of the North v Akintoye* (1990)12 NWLR (631) 302.

⁹⁷ (1941) 7 WACA 39.

⁹⁸ *Nigerian Loan & Mortgage Co Ltd v Ajetunmobi* (1944) 17 NLR, 140.

All these requirements of the law often deter lenders from exercising the right of possession.

The feasibility of successfully applying a theory of mortgages in Nigerian property law depends on its compliance with the land control and management rules under the Land Use Act, 1978.⁹⁹ It is apt to have a closer look at the status of the Governor of a state under the Act.

4.1 STATUS OF THE GOVERNOR

The word ‘trust’, just like any other legal term, does not lend itself to an easy definition.¹⁰⁰ Generally, embarking on a definition in law has always been a hazardous and perilous venture as the result has always been unsatisfactory. Despite that, to have an operational roadmap for academic purposes, attempts in defining ‘trust’ would be examined.

Trust is as a relationship where a party (trustee) holds the property for the enjoyment of others, the *cestuis que trust* of which the trustee may be inclusive in a manner that the ultimate benefit of the property accrued to the beneficiaries or other objective of the trust.¹⁰¹ This definition is akin to that of Underhill¹⁰² which sees trust as an equitable obligation, which binds a person, (a trustee) to manage the property (trust property), for the benefit of other persons (beneficiaries or *cestuis que trust*), of which he may be part of.

These definitions show that a trust is an equitable devise, the purpose of which is to make a person, the trustee to hold property for the benefit of other person, the *cestuis que trust*, of which he can be a part in a manner that the actual benefit does not go to the trustee but to the beneficiaries of the trust.¹⁰³ It creates a double system of ownership which is peculiar to English jurisprudence, and unknown to

⁹⁹ Cap.L5, LFN 2004.

¹⁰⁰ Underhill and Hayton, *Law of Trusts and Trustees* (11th ed); 1959, 3.

¹⁰¹ George W. Keeton, *The Law of Trusts* (8th ed) (Pitman & Sons, London, 1963).

¹⁰² Underhill A. & Hayton, *Law of Trust and Trustee* (18th. ed) (Butterworth Law, London, 2010),3.

¹⁰³ *Ibid.*

many legal systems including Nigerian customary law concept of trusteeship.¹⁰⁴ Under English Law, the trustee law holds the nominal but at the same time dominant ownership recognised at law, but in equity, the beneficial interest is vested in the beneficiary.

There have been considerable arguments over the “concept of trust” debate which is juxtaposed in the powers granted to the Governor.¹⁰⁵ The “concept of trust” has generated some issues on the status of the Governor under the Act regarding a trust created in his favor on all lands “in the territory of his State”.¹⁰⁶

Ogundare J.¹⁰⁷ states that “the use of the word “vested”¹⁰⁸ has the effect of transferring to the Governor of a state the ownership of all land in that state...” He observes that the LUA does not envisage the “nature of the trusteeship status” vested in the Governor. Differences exist between a trust under English law and the “trust” given to the Governor. A beneficiary under a trust in English law enjoys equitable right while the right of the Governor under the LUA is legal.¹⁰⁹ A trustee who breaches a trust property by transferring the object of trust to a person without a prior notice of the beneficiary’s interest but with due consideration for the conveyance, the beneficiary’s interest is extinguished as it is merely an equitable interest.¹¹⁰ Alternatively, the grantee’s interest of a right of occupancy under the LUA is always legal. The maxim “first in time, first in law” rule is not applicable. Hence, a second grant, a right of occupancy while a first one subsists in another

¹⁰⁴ Jegede M. I, *Law of Trusts, Bankrupt and Administration of Estate* (Lagos: MIJ Professional Publishers Ltd. 1999) 14.

¹⁰⁵ Land Use Act (LUA) S.1.

¹⁰⁶ See generally section 1 of the LUA.

¹⁰⁷ *Akinloye v Chief Oyejide* (Unreported) High Court of Ondo State, Suit No HC/GA/83. See also Irikefe JSC’s statement in *Nkwocha v Governor of Anambra State* *ibid*, where Irikefe states in reference to the LUA that “by this piece of legislation a legal trust affecting every inch of Nigerian land is created constituting every Governor trustee in respect of the land within the limits of his state.”

¹⁰⁸ Section 1 of the LUA.

¹⁰⁹ L.B. Curzon, *Equity and Trusts Lecture Notes* (Second Edition, Cavendish Publishing Limited, 2001).

¹¹⁰ *Pitcher v Rawlings* (1872) 7 Ch. App. 259.

person, will not confer any right superior to the former holder even if he gave consideration for the grant.¹¹¹

Another factor which opposes the status of the Governor as a trustee in English law is that the LUA does not state any responsibilities obligatory on the Governor because of this trusteeship status and the Governor is not saddled with any of the onerous duties imposed by the English law of equity upon a trustee. In practice, some Governors have denied granting rights of occupancy without giving any reasons or justification for the refusal.¹¹² These are deviations from the characteristics of a trust under English law.

Based on the foregoing analysis, the position of the Governor under the Act is neither the trustee nor the owner of the property which is the subject of mortgage. The position of the Governor is also different from the communal head/ family head as the head lessor in customary tenure. A family head has been labelled as the manager, representative agent and caretaker of the family to whom he owes a fiduciary duty.¹¹³ It is a *sui generis* creation of the statute that gives the charge of all lands to him to appropriate and expropriate.¹¹⁴ This has grave implications for the adoption of any legal theory of mortgage, based on the transfer of legal rights. Rights to land under the LUA is a right of use and occupation only for a definite term.¹¹⁵ The title of the mortgagor which may be legal or equitable cannot be alienated until the consent of the Governor is obtained.¹¹⁶ Thus the conveyance to the mortgagee could not be higher than an equitable right until the consent is obtained pending final perfection of mortgage consent.¹¹⁷

¹¹¹ *Dzungwe v Gbishe* (1985) 2 N.W.L.R. (Pt. 8) 528; *Ogunleye v Oni* (1990) 2 N.W.L.R. (Pt. 135) 745.

¹¹² *Eperokun and Ors v University of Lagos* (1986) 4 NWLR Part 34, 162; *Garba and Ors v Unimaid* (1986) 1 NWLR Part 18, 550.

¹¹³ Adefi M.D. Olong, *Land Law in Nigeria* (Second Edition, Malthouse Press Limited, 2011) 55.

¹¹⁴ LUA, Section 1.

¹¹⁵ LUA, Section 8.

¹¹⁶ *Ibid*, Section 22.

¹¹⁷ *Awojugbagbe Light Industries v Chinukwe* (1993) 1 NWLR (Pt 270) 485.

4.2 MORTGAGE THEORY AND THE LAND USE ACT 1978

In the Nigerian legal system, title theory of mortgage is applicable because the mortgage contract vests the title of the property in the mortgagor, who, as the holder under the LUA, is saddled with the responsibility of seeking consent for the transaction.¹¹⁸ Until the approval for the transfer is sought and obtained, the lender has no better title than an equitable one. However, with the consent obtained for the transaction, the legal title to the security is vested in the lender.

Despite the transfer of legal title to the mortgagee, the LUA still recognises the mortgagor as the ‘holder’¹¹⁹ to whom the right of occupation has been conveyed and who has the right to be compensated on the ‘unexhausted improvements.’¹²⁰ LUA states this of the holder:

“Holder” in relation to a right of occupancy means a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of the holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-under lessee.¹²¹

In addition, the Conveyancing Act (CA)¹²² which clearly states that a conveyancing shall pass all estates and interests of the vendor to the purchaser, does not avail the lender of the right of the holder of legal title under the LUA.¹²³ This may be attributed to some factors. First, the section does not appear to contemplate mortgage transactions. Second, the LUA has lucidly stated that the application of any statute after its passage is subjected to necessary modifications to make it conform to its provision.¹²⁴ Third, the LUA’s provision on who is to be compensated upon acquisition is also very clear. Hence, S. 63 of CA has lost its force in the face of the superior legislation which has a constitutional flavour.

¹¹⁸ See 22 Land Use Act 1978.

¹¹⁹ Ibid, s. 51. ‘Holder’ is defined to include a mortgagor but clearly excludes a mortgagee.

¹²⁰ Ibid, s, 51 (1).

¹²¹ Section 51 (1) of the LUA.

¹²² See also S. 5(1) PCL Cap 100 and S. 19(1)(a) MPL, 2012

¹²³ Section 63(1).

¹²⁴ Section 48 of the LUA.

LUA has very wide implications for mortgage practice under the Nigerian law.¹²⁵ First, until the consent has been secured, the mortgagor has a legal estate, while the mortgagee's equitable interest is in the property as contained in the mortgage agreement. Upon the consent of the transaction, the mortgagee has the title which he is free to make absolute without recourse to the court in case of default. While before the consent is obtained for the transaction, the only remedy the lender has is judicial foreclosure, but upon the Governor's consent, the mortgagee has the power to embark on non-judicial foreclosure and may exercise his power of sale as provided for under Conveyancing Act 1882.¹²⁶

Then LUA excludes the mortgagee from the holder appears to introduce confusion into the whole mortgage transaction.¹²⁷ The mortgage agreements confer only the equitable title on the mortgagee until the approval of the Governor. The mortgagor is in control as a 'holder,' until the document has been perfected by the Governor's approval.¹²⁸ The exclusion of a lender from the definition of a 'holder' is an indication that LUA does not recognize the interest of the lender as a right holder.¹²⁹ The Act specifically exempts mortgagee from having a right to the statutory right of occupancy or somebody it can be validly assigned. Therefore, a mortgagee's interest as a legal title holder appears to have been constrained by the Act.

The implication of this for the mortgage practice is that the mortgagor still has the legal title. The conveyance to the mortgagee can only operate as a conferment of the statutory right of occupancy (SRO) even when the assignment of the land to the mortgagee is processed by the holder by obtaining a Governor's consent for the mortgagee (the lender).

Another major implication is that it is only the holder who can access compensation on the mortgaged land.¹³⁰ The mortgagee is not included in the definition of the

¹²⁵ Section 22 LUA.

¹²⁶ See S. 19(1). See also PCL 123 and MPL 35(1) MPL.

¹²⁷ S. 51 LUA.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ S. 29 LUA.

holder under Section 51 LUA. Hence, when the security (land) is revoked, only the mortgagor can access compensation. Perhaps the rationale for this is that despite the encumbrances(s) on the land, the holder (mortgagor), rather than the (lender) mortgagee, is still regarded as the grantee, until he has defaulted on the payment of the debt and actions are taken for the enforcement of mortgagee's right. It may, therefore, be argued that until the period of default, the lien theory of mortgage could be said to be operating on mortgage transactions in Nigeria. However, upon default, the legal title transferred and acceded to by the Governor becomes fully operative to allow the mortgagee to embark on non-judicial foreclosure and exercise the power of sale (PoS) as stipulated CA¹³¹ and PCL.¹³²

5.0 CHALLENGES TO THE APPLICATION OF A LEGAL THEORY OF MORTGAGES

This section highlights practical difficulties that practitioners face in applying legal theories in the Nigerian mortgage industry.

5.1 UNCERTAINTY OF TITLE

Under the Act, ownership title formerly held under the pre-LUA tenures is no longer possible. Hence, a new type of title, namely a right of occupancy, previously limited to the Land Tenure Law 1962 (LTL)¹³³ of Northern Nigeria, was extended to cover all parts of the Nigerian federation. Although the right of occupancy is not defined under the LUA, the LTL gives its definition as "a title to the use and occupation of land."¹³⁴ This right, which is for a definite term replaces pre-existing allodial titles in land.¹³⁵ As such, freehold estates known to common law and pre-LUA legislations, especially in southern Nigeria were replaced with the right of occupancy system.

¹³¹ 1882, s. 19(1).

¹³² Cap 100, Law of Western Region, 19 s. 9, s.123, (1) – (4).

¹³³ Cap 59 Laws of Northern Nigeria 1962.

¹³⁴ Ibid S.1.

¹³⁵ This refers to an outright ownership of property.

Furthermore, a statutory right of occupancy is different from a freehold because it has a definite duration, and a rent is paid by the grantee. This is unlike a freehold which has exclusive possession and has indefinite duration. Hence, the decision in *Prenchard Nathu & Co Ltd v The Land Officer*¹³⁶ that the right of occupancy under the Tanzania Law is *sui generis* and that the legislative intention was to introduce a totally new interest is revealing and captures the essence of the concept. This position is the same under the LUA, where a right of occupancy is neither a personal nor a proprietary right.¹³⁷ Rather, it is a right to the use and occupation of land.¹³⁸

The right of occupancy under the LUA converts all titles to land to temporary rights which allow the grantee to use and enjoy the land for a finite term of years. At the commencement of the LUA, the Governors were vested with the power to allocate lands¹³⁹ as trustees for the people of state.

The uncertain title of the holder or occupier of the right of occupancy contributes in no small way to problems of the LUA in mortgage transactions. For example, the SRO used as security has uncertain nature. Is it to be treated as a lease, or a license or a freehold? What are the interests that can be transferred to the mortgagee? Also, the holder/mortgagor does not hold free of the encumbrance of the Governor; he enjoys no quiet possession, and his right is subject to the pre-LUA superior rights of deemed grantee which may arise during alienation. The problem is further compounded by the Act itself: it does not define what a right of occupancy is. All these constitute hindrances to the mortgagee who may find it difficult to realize the mortgage by sale because of the uncertainty which surrounds the nature of the right. Additionally, the uncertain title makes it difficult to clearly pigeonhole Nigerian mortgage law either as title or lien theory since the theories deal with certainty of title conveys or charges by the mortgage.

¹³⁶ (1960) EA 731 at 941.

¹³⁷ J.A. Omotola, *Essays on Land Use Act* (1980), 14.

¹³⁸ LUA, S. 51.

¹³⁹ R.N. Nwabueze, "Alienations under the Land Use Act and Express Declarations of Trust in Nigeria", *Journal of African Law*, 53(1) 59-89.

5.2 CONTROVERSIAL NATURE OF DEEMED RIGHTS

Deemed grants raise questions which are pertinent to the enforcement of power of sale. These are: by the language and tenor of the Act, is deemed grant a freehold, with rights absolute and tenure indeterminable? Has the LUA automatically converted all deemed rights, customary and statutory, to a right of year determinable? In alienating the deemed grants, has the Act set the same condition for transfer or conveyance of interest of deemed grants and express grants? Answers to these questions are provided in *Savannah Bank v Ajilo*.¹⁴⁰ In the matter, the 1st defendant sought to sell the mortgaged property upon the default of the plaintiffs. The plaintiffs approached the court to declare Deed of Mortgage and other transactions on it illegal. Grounds upon which the request was based among others were:

- (1) the urban location of the property;
- (2) the property had been conveyed to the 2nd plaintiff prior to the LUA;
- (3) the approval for the transfer and public auction ought to be first sought;
- (4) since there was no approval, both the Mortgage Deed and the Auction Notice were illegal.

The apex court decided that both deemed grants and express grants under the LUA have determinable years. But this appears controversial and creates further confusion when viewed against the clear provision of section 8, which limits governor's appropriating power only to grants under section 5(1)(a). It was also held that although deemed and actual grants were markedly different, a deemed right is by the operation of law while an actual grant is by the activities of the governor, but both are subject to his legal controls. Equally, held was that the words "as if" in section 34(2), LUA, unambiguously equated deemed grant with actual grant. A deemed grant is thus treated by the court as a grant which has all attendant consequences and subject to the control of the Governor. Despite this

¹⁴⁰ (1989) 1 NWLR (Pt. 97).

judgment, the conflict created using deemed grant as subject of mortgage did not abate.

In realising the mortgage by sale, to what extent has the mortgagor complied with the LUA? First, the nature of the interest the mortgagor holds determines what can be transferred. If the mortgagor is an occupier at the commencement of the Act, he/she is entitled to a deemed grant, but such could only be conveyed by transfer, mortgage or sale by the holder.¹⁴¹ Second is the right to the statutory grant upon the approval of the Certificate of Occupancy (C of O).¹⁴² The holder, or the occupier, is entitled to the certificate in respect of rural land. While for the deemed statutory grant, only the holder is entitled to the C of O. However, ownership of the land could not be proved only by the possession of the certificate. In exercising the power of sale, the mortgagee must be sure of the nature of right it possesses, otherwise, the power cannot be exercised.

Based on the above analysis and the dual tenure conception, an equitable distribution and administration of land may not be achieved under the Act if deemed grant persists. Interests which are held under the deemed grants appear superior to express grants. Deemed grant lands are not vested in the Governor until the holder or occupier intends to alienate the land or apply for a certificate of occupancy. Hence, a deemed grant (customary and statutory) may not be suitable as security of a mortgage until it is converted to express grant given under Governor's hand. Its use appears limited to devices such as equitable charge which does not require Governor's consent. However, the gravest hindrance that sustenance of deemed grant under the Act poses to economic value of land and its use to access capital for development is that the right is indeterminable and absolute at least until the holder/occupier applies for a C of O.

¹⁴¹ See *Abioye v Yakubu* supra.

¹⁴² A C of O does not confer any title or interest in land, it is mere evidence of a statutory right of occupancy.

6.0 CONCLUSION

6.1 SUMMARY

This paper considers the applicability of a legal theory of mortgage to mortgages of land in Nigeria. The theories explored are the title theory, the lien theory and the intermediate theory.

6.2 FINDINGS

Due to the legal complexity in Nigeria's property sector, neither the title theory nor the lien theory could completely explain land mortgage in Nigeria.

Section 5(1) of the Act empowers the Governor to grant statutory right of occupancy to any person in respect of land in both urban and rural areas. Section 5(2) provides further that "upon grant of a statutory right of occupancy. All existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished". On the other hand, all existing land titles and ownerships are preserved and recognised by sections 34 and 36 of the Act. This is a contradiction so fundamental as to deprive the Act of any force. Hence, the contradiction needs to be resolved through statutory reform. It is noteworthy to observe that pre-existing rights on land are converted to deemed rights of occupancy which cannot be defeated simply by a grant of statutory right of occupancy over the same land to another person.

The Supreme Court confirmed this in *Adole v Gwar*,¹⁴³ when it was decided that a statutory right of occupancy cannot defeat a deemed right which exists and has not yet been revoked as at the time it is issued. A deemed right of occupancy can only be revoked under section 28 of the Act. Hence, section 5(2) appears to be an empty provision which is contrary to the deemed rights vested in sections 34 and 36 of the Act.

6.3 RECOMMENDATION

Based on the above, the following recommendations are hereby made.

¹⁴³ (2008) 5 NWLR (pt. 1099) 563.

The intermediate theory combining the theories of title and lien is recommended.

Furthermore, controversial provisions of the LUA which make it difficult and confusing to regulate Nigeria's vast land resources should be amended. Hence the following recommendations are made.

Rights and obligations under the actual statutory grants and deemed grants be merged to make them transferable for commercial transactions such as mortgages.

The confusion the Act introduces in the meanings of the "holder" and "occupier" in section 51 (1) should be streamlined to legally affirm that a mortgagee is a "holder" with all rights appurtenant to.

The incidents of the half-hectare rule and other limitations to conveyancing in the Act are recommended for amendment to make for easy transactions.

Since a deemed grant cannot be defeated by an express grant until it is revoked for public purposes, its continued existence under the LUA has become a threat to mortgagees who may not be aware of the pre-LUA encumbrances on the land. It is recommended for excision.

The procedure for obtaining approval for the transfer of a right of occupancy should be streamlined and unified throughout the federation in the interest of development. This will reduce waste of time and resources critical to investment decisions. It will also reduce corruption of land officers who may gloat on the cumbersome and non-transparent process.

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