

An Examination of the Legal Framework for Parties' Rights when Mortgaging Land under Nigerian Property Legislation

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Abstract

The conveyancing of rights in Nigeria is complex because of the multiple land tenure systems, which exist under the uniform principles of the Land Use Act 1978. Parties to a conveyancing matter have certain rights and duties to fulfil in creating an enforceable mortgage deed. These include certainty of title, insurance, leasing, custody of title deeds, consolidation of mortgages and possession. These are the preliminary covenants that a mortgage deed must consider. This article looks at the construction of the mortgage deed on land in Nigeria, discusses parties' rights and obligations, and assesses the legal and judicial attitudes to them in determining parties' rights and obligations. The doctrinal approach was adopted, using primary and secondary sources. Statutes and case law were analysed as primary sources, and textbooks, journal articles, and conference proceedings were analysed as secondary sources. Parties' rights and obligations, both at common law and in statutes apply to the mortgaging of land in Nigeria. Also, compliance with these rights and obligations is necessary to enforce mortgages through the various methods recognised in Nigerian law. The seamless enforcement of the mortgage deed is crucial for using land for productive purposes and generating capital. The parties' solicitors should ensure that clauses are included in the mortgage deed to protect the parties and to avoid costly litigation. The consent clause and the definition of a holder in the Land Use Act 1978 should be amended.

Keywords

covenants, deemed grants, mortgage deed, title, right of redemption

1. Introduction

The rights and obligations of mortgage parties are crucial to creating and enforcing mortgages in Nigeria. In *Santley v Wilde*,¹ Lord Lindley defined mortgage as the transfer of legal or equitable titles as security for the discharge of a loan or fulfilling an obligation upon the promise that the title would be redeemed when the debt is repaid, or the obligation is discharged. The transferor of interest is the mortgagor, while the person to

1 (1899) Ch D 474.

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whom the interest is transferred is the mortgagee. The debt over which the property is transferred is the mortgaged sum. 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 head lessor who may give or confirm the transfer of the title as guarantor of the debt security.² Sometimes, the borrower may differ from the mortgagor. In that case, the mortgagor must be a party to the borrowing transaction.

In Nigeria, the mortgage relationship is regulated by a plethora of laws, which often lead to conflict and confusion, particularly at the point of enforcement. A learned commentator has averred that the problem can be attributed to both received English Law and multiple ethnic nations in the country, with diverse customs, values, and orientations impacting the pre-existing customary laws.³

The plural nature of laws in Nigeria makes the administration of laws complex: there are about 250 ethnic groups that have varying customary laws, a Federal Capital Territory, 36 states, and 774 local governments. In *AG Federation v AG Abia and 35 Others*,⁴ the Nigerian Supreme Court affirmed the powers of the three tiers of government to make laws subject to the powers of the Federal Government as stated in the Second Schedule of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Therefore, each tier has regulatory laws and rules governing various matters.⁵ Laws regulating mortgage relationships are scattered among the many statutes of the federation and states, the customary laws (which have been arguably categorised to include Sharia law), in addition to the inherited English statutes, the common law and doctrines of equity in England on 1 January 1900. The multiple land tenures (customary tenure, inherited doctrine of estates and state-controlled tenure under the Land Use Act 1978) operated, which were the incidents of the plural laws continue with modifications when the Land Use Act⁶ (LUA) was enacted. The mortgage system, which is a product of English law, operates under these laws. Therefore, the parties and their solicitors must be aware of the legal labyrinth that may frustrate the parties' achievement of a contractual relationship.

Most studies conducted under the Nigerian legal system focus on creating mortgages and enforcing mortgage contracts. This article looks at the preliminary rights of the parties to a mortgage, which must be settled at the point of concluding the mortgage contract, to relieve practitioners and courts of the burden of litigation when the matters become issues at the point of enforcement. This article examines the preliminary rights of parties to the mortgage of land under the extant legal regime. The objectives are to explore the construction of mortgage deeds on land, discuss the rights of parties to land mortgage under the extant legal regime and make recommendations for sustaining land security in Nigeria.

2 Oniekoro, FJ *Mortgages in Nigeria: Law and Practice* (Chenglo Ltd 2007) 1.

3 Agbede, IO *Themes on Conflict of Laws* (Revised Edition, Princeton and Associates Publishing Co Ltd 2018).9.

4 (2024) LPELR-62576 (SC).

5 Cap C23, LFN 2004, Second Schedule, Part II.

6 1978, Cap L5, LFN 2004.

The study adopted the doctrinal method of research, which relied on primary and secondary sources of information. The primary sources included statutes such as the LUA, the Conveyancing Act,⁷ the Property and Conveyancing Law,⁸ the Land Use Act (Title Documentation) Regulations,⁹ the Mortgage and Property Law of Lagos State (as amended),¹⁰ the Mortgages and Foreclosure Law,¹¹ and the Insurance Act 2003,¹² and case law. The secondary sources included textbooks, journal articles, newspaper articles and internet sources. The information gathered from the sources was subjected to contextual analysis.

2. Construction of the mortgage deed

A mortgage deed is a document evidencing the agreement between the parties to transfer interest in land as security for the discharge of a debt or other purposes. It is subject to redemption after the loan has been paid or when an obligation has been fulfilled.¹³ As an agreement, it must meet the basic conditions for creating a formal contract in Nigeria, which are regulated by principles inherited as part of the law received on 1 January 1900.¹⁴

A contract is defined as a promise or a set of promises the law will enforce.¹⁵ It is an agreement between two or more persons to make promises binding. Its features include an offer, acceptance, consensus ad idem, the capacity of the parties, consideration and privity of contract.¹⁶ Commenting on the need for the parties to benefit from the contract, Lord Haldane in *Dunlop Pneumatic Tyres Ltd v Selfridge*¹⁷ stated that:

My Lords, in the Law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract *in personam* to enforce the contract.¹⁸

The implication is that only a party can act legally to enforce the contract, not a beneficiary of its outcome.¹⁹ Exceptions to this rule, according to Sagay, include the assignment of contractual responsibilities, novation and agency.²⁰ In *Tulk v Moxhay*,²¹ the plaintiff, who has several plots of land, transferred his interest by selling a plot to Elms, who had an agreement with the seller to preserve it in its existing condition. Upon several transfers, the plot was conveyed by sale to the defendant, who, despite being aware of the restriction

7 Cap 41, Law of England Act, 1881.

8 Cap 100, Law of Western Nigeria, 1959.

9 Regulations of Lagos State, 2012.

10 Law 17 of Lagos State, 2012 (as amended).

11 Law 17 of Ekiti State, 2020.

12 Cap 117, LFN 2004.

13 Oniekoro (note 2) 1.

14 Ibid 9.

15 Treitel, GH *Law of Contract* (5th Ed., Sweet & Maxwell Ltd 1979) 1.

16 Sagay, IE *Nigerian Law of Contract* (2nd Ed., Spectrum Books 2007) 8.

17 (1915) AC 847.

18 At 853.

19 Sagay (note 17) 489.

20 Ibid.

21 (1848) Ch 774 LJ 83.

imposed on land use, planned to erect a house on it. An injunction was procured to stop the proposed building. It was granted based on a restrictive covenant on the land. However, developments at common law require that a mere notice of such covenant can no longer prevent the purchaser from using the plot for the restricted purpose. The vendor must retain some other land in the neighbourhood to take care of the interest protected by the restrictive covenant.²²

The position in the preceding paragraph applies in Nigeria by virtue of the received English law. For example, mortgage statutes such as the Conveyancing Act (CA),²³ which is a received law and the Property and Conveyancing Law²⁴ (PCL) contain the provisions. Section 104(1) of the PCL states:

A covenant and a bond and an obligation or contract under seal made ..., binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, or obligation.

The CA and the PCL provisions apply in most parts of Nigeria. The CA regulates conveyancing, including mortgages, in Nigeria, except in Southwestern Nigeria, where the PCL is in use. Recently, Lagos State, which previously used the CA, promulgated the Mortgage and Property Law (MPL) (as amended),²⁵ while Ekiti State, a former PCL state, now uses the Mortgage and Foreclosure Law (MFL).²⁶ These statutes retain the operation of these covenants by the continued use of the provisions of the former statutes for general conveyancing. The MPL and the MFL have created statutes dealing with mortgage law only with innovation and principles compliant with the LUA and do not provide for the comprehensive conveyancing rules and principles contained in the older laws. It is contended that the CA and the PCL operate in other conveyancing practices in Lagos and Ekiti States, except on mortgage. Hence, various covenants at common law, the CA and the PCL, continue to determine land conveyancing practices, including mortgage agreements, unless such rules are excluded by the new mortgage statutes or varied by the deed.

The case law on this aspect of the Nigerian system is still developing, which could result from the low volume of transactions on land use as mortgages compared to developed common-law jurisdictions. Because the extant mortgage statutes derive from the CA, with a few modifications, the case law relied on is to be found in inherited pre-1900 common-law sources.²⁷

3. Legal framework for parties' rights

Parties to mortgages must settle the contract by stating the implied and express rights necessary for implementing and enforcing mortgages at the creation of mortgage deeds.

22 Sagay (note 17) 495.

23 Cap 41 Act of England 1881.

24 Cap 100, Law of the Western Region of Nigeria, 1959.

25 Law 17 of Lagos, 2012.

26 Law of Ekiti State, Nigeria, 2020.

27 Nigeria received English legal system comprising the statutes of general application, common law and doctrines of equity in force in England as at 1 January 1900.

These are statutory rights that are preliminary to the commencement of the mortgage relationship. These rights pertain to security insurance, the creation of leases and sub-letting, the custody of the deeds of mortgage, the right of entry and possession, and the profits from the security.²⁸ These rights are distinguishable from those of enforcement powers because they are rights and obligations required during the life of the mortgage, while enforcement rights are final remedies obtainable by the parties. While a mortgagee has enforcing rights of recovery of the funds, possession, employment of the receiver, specific performance, foreclosure and sale of the security, a mortgagor has other relief, the most important of which is the equity of redemption.

3.1 Mortgage insurance

Mortgage insurance protects the lender when the mortgagor fails to promise to repay the loan or fulfil an obligation. Both parties have rights and obligations regarding the insurance of the mortgaged land. The mortgagee ensures that the mortgaged security is protected from deterioration, which gives the mortgagee assurance that the loan will be repaid.²⁹ Hence, the mortgagee is immensely interested in the safety of the security. Although the mortgagor has the primary duty to insure the security, the mortgagee may do so if the duty is neglected.³⁰ The CA³¹ provides that:

- (1) A mortgagee, where the mortgage is made by deed, shall by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):
 - (ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money ...³²

This statutory provision indicates that the security can be insured if (a) it is a legal mortgage, (b) the insurance is against fire, (c) the insurance is made after the due date of the deed, and (d) premiums paid by the mortgagee can only be charged on the security. The provision is common to the PCL and the MPL with minor variations.

Although both parties have the right to insure the security, the mortgagee often performs the task and later asks the mortgagor for reimbursement.³³ Where the mortgagor has the power to insure the security, the insurance policy should be limited to the amount stipulated in the agreement or two-thirds of the fund required for repairs or restoration in

28 CA, s 19; PCL, s 123; MPL, s 35.

29 Oniekoro (note 2) 122.

30 Cap 41, Act of England; PCL, s 123(1) (ii) CA, s 19(1)(ii); MPL, s 35(1) (ii).

31 Section 19(1)(ii).

32 PCL, s 123(1)(ii).

33 Oniekoro, FJ *Mortgages in Nigeria: Law and Practice* (note 2) 123.

the case of destruction.³⁴ Hence, the mortgagee may not obtain insurance for an exorbitant amount above the agreed amount or the sum reasonably needed to restore the property if it is destroyed. This legal position appears reasonable because the premium for such insurance, where the mortgagee does it, will be charged to the security. Furthermore, an unnecessarily high premium will block the mortgagor's redemptive right.

Under some circumstances, the mortgagee could make the insurance, or if it is done on behalf of the mortgagor in line with the law, it would be valid. These circumstances include where: (a) there exists an agreement that excludes insurance between the parties; (b) the mortgagor takes over the insurance, or it is done on his behalf in line with the contractual deed; and (c) the mortgage agreement does not give any direction as to the insurance.³⁵ Any insurance done by the mortgagee contrary to this provision will be invalid.

Mortgage statutes in Nigeria have similar provisions on the disbursement of insurance money received from the insurer for loss incurred by fire accidents. The laws provide that the disbursed sum shall be applied to the reinstatement of the mortgaged property by the mortgagor with the mortgagee's consent.³⁶ The insurance money received may be applied to restore the loss or damage to the security.³⁷ These statutes permit the mortgagee to disburse the insurance proceeds towards the discharge of the mortgage sum outstanding.³⁸

The consent of either party and the law on maximum benchmarks and the purposes for the insurance must be fully complied with. However, where the policy is taken on behalf of the mortgagee, he is entitled to the benefits, notwithstanding that the mortgagor pays the premiums.³⁹ Suppose the insurance is taken out in the name of the mortgagor. In that case, the latter is entitled to the benefits, except as otherwise provided for under a special contract or the provisions of the statute. In *Lewis v Whitely*,⁴⁰ it was held that where the law indicated that any insurance policy taken out by the mortgagor was for the mortgagee's benefit, any payment made to the mortgagor under the policy had to be held in trust for the mortgagee. In *Halifax Building Society v Keighley*,⁴¹ both parties agreed that the mortgagee could insure the premises against fire accidents while the mortgagor had to pay the premium. The mortgagor, based on the agreement, insured the security, and the mortgagor also insured it with another insurance company in his name. When the premises were damaged by fire, each insurer paid their share of the loss for which they were responsible. The action to recover the insurance proceeds from the mortgagor failed because the court decided it was made for the mortgagee's benefit. This action would have succeeded if the parties in the mortgage deed had not excluded section 23(3) of the CA. The implication of this is that as soon as parties to an agreement seek to exclude a statutory provision by introducing an alternative clause, the provision made by the statute can no

34 Ibid.

35 CA, s 23(2); PCL, s 130(2); MPL, s 42(1).

36 CA, s 23(3); PCL, s 130(3); MPL, s 42(3); MFL, Ekiti State, s 33(d).

37 Ibid.

38 Ibid.

39 Smith, *IO Nigerian Law of Secured Credit* (Ecowatch Publications Ltd 2001) 54.

40 (1866) LR 2 Eq 143 at 149.

41 (1931) 2 KB 248 at 255.

longer avail any of the parties. Section 23(3) of the CA states:

All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

The payment of insurance proceeds to the beneficiary raises the question of whether the proceeds could be spent on reinstating or repairing the mortgaged property or whether they can be used to discharge outstanding mortgage money. Under the extant mortgage statutes, a mortgagee may insist that all the proceeds due, except otherwise provided by the statutes, be used to discharge money due under the contract, except as otherwise provided by statute or any special contract.⁴² However, section 66 of the Insurance Act⁴³ requires that insurance money paid to the beneficiary should be expended solely on reinstating or repairing the property and forbids its being used to liquidate or reduce the mortgage debts. Section 66(2) and (3) state as follows:

- (2) The insurance money payable under subsection (1) of this section shall be paid out and expended towards rebuilding, reinstating or repairing of the house or other building so burnt down, damaged or destroyed by fire, unless—
 - (a) the party or parties claiming such insurance money shall within 60 days after the claim is agreed, give security to the satisfaction of the insurer that the insurance money shall be paid out and expended as stated herein: or
 - (b) the insurance money is, at the time, settled and disposed of and among all the parties entitled as the insurer may determine with the approval of the Court on the application of the insurer or any of the interested parties.
- (3) Notwithstanding the provisions of subsection (1) of this section, the insurer shall have the right to elect whether to reinstate the house or building damaged or destroyed by fire, or to pay the insured for the loss suffered but not exceeding the insured sum.

The import of these subsections is that a beneficiary of insurance money is obligated to expend the money on reinstating or repairing the mortgaged property where it is located, and the money cannot be unilaterally used to liquidate the mortgage debt unless a court order is sought and obtained. This is contrary to the provisions of the CA, the PCL, and the MPL analysed above, which allow the mortgagee to decide whether to repair the burnt building or use the proceeds to discharge the debt.⁴⁴

The power of insurance is central to the operation of an efficient mortgage. Failure to insure the security when the contract does not forbid it may compromise its condition, with dire consequences for the mortgagee.⁴⁵

42 Smith (note 40) 56.

43 Cap 117, LFN 2004.

44 See ss 23(2) and (3); 130(2) and (3); 42(2) and (3) of the CA, the PCL and the MPL, respectively.

45 Essien, *E Law of Credit and Security in Nigeria* (2nd Ed., Toplaw Publishments 2012) 199.

3.2 Leasing and sub-leasing

3.2.1 Parties' rights and obligations

3.2.1.1 Right of the mortgagor

The mortgagor's power to create a lease could be attributed to the possessory right the mortgagee often left with him. This power of the mortgagor is donated by the mortgagee, who does not want to come to possession due to stringent requirements that the law has set for the mortgagee in possession. In *Corbett v Plowden*,⁴⁶ Lord Selborne held that the power of mortgage which the mortgagor has can be withdrawn by the mortgagee as he has the power to evict the lessee from the leased premises or to demand rent from the lessee upon the issuance of notice. Under the mortgage contracts, the security in land is transferred to the legal mortgagee, alongside the right of possession. In *Kasumu v Baba Egbe*,⁴⁷ the court held that the legal estate that resides in the mortgagor could be transferred to the mortgagee immediately after the contract, even when the mortgagor is not in default. An equitable mortgagee does not have this right on the equitable principle of *quod non habet*. The right of possession, which becomes exercisable upon the perfection of the mortgage deed, entitles the mortgagee to exercise leasing powers. However, as shown when the right is not exercised, the mortgagor may continue to exercise it on the mortgaged property.⁴⁸

Hence, under the statutes, any party in possession can create a valid lease.⁴⁹ The mortgagor has the right to conclude a lease, and collect rent and profits of any land while in possession, provided the mortgagee who possesses the superior right to the mortgaged property has not indicated his intention to take possession.⁵⁰ Section 18(1) of the Conveyancing Law states:

- (1) A mortgagor of land while in possession shall as against every incumbrancer, have power to make from time to time building leases of the mortgaged land or any part thereof for any term not exceeding ninety-nine years.

3.2.1.2 Right of the mortgagee

In terms of section 18(2) of the CA, section 121(2) of the PCL and section 33(2) of the MPL, a legal mortgagee in possession has a right to create leases, which is superior to all previous encumbrances, if any, and the mortgagor. The mortgagee's power to lease emanates from either the statutes or the contractual deed. A legal mortgagee's right to make binding mortgages in this regard stems from his possession of the legal estate. A mortgagee, because of the nature of the mortgage relationship under the common law, the doctrine of equity and statutes, is entitled to the possession of the mortgaged land. Hence, he has the superior right to lease the security over all others.

46 (1884) 25 Ch D 678, 681.

47 (1956) 3 All ER 266.

48 CA, s 18; PCL, s 121; MPL, s 33; MFL, s 34.

49 Ibid.

50 PCL, s 121(1). See also CA, s 19; MPL, s 33(1).

However, the mortgagee may not take possession because of the problems connected to the legal requirement that he account for the profits made, as imposed by equity. In such a situation, the mortgagor remains in possession and, therefore, has the power to grant a lease.⁵¹ Leases granted under the mortgage deed, or the statute, are binding on the mortgagor as if both the mortgagor and the mortgagee were parties to it.⁵² However, in *Iron Trade Employers Ins. Ass. v House Investors*⁵³ the mortgagee had a right to restrict the mortgagor's grant of leases by insisting on the condition of his consent to make such a lease effective. This is the position under the Nigerian mortgage statutes.

3.2.2 Conditions for granting a valid lease

In creating binding leases for mortgaged land in Nigeria, the mortgagee must comply with the conditions set by the mortgage statutes operating in the various states of the Federation.⁵⁴ These are that leases must: (a) commence within 12 months of their execution; (b) be granted at the best rent possible; (c) contain an agreement for the payment of rent and a stipulation of the conditions upon which the lessor may re-enter possession in the case of the failure of the lessee not paying the rent 30 days after it is due; (d) contain a promise that the lessee will improve the buildings, repair the buildings or building purposes; (e) deliver a counterpart lease executed to the mortgagee within one month based on the priority of mortgages. These conditions safeguard the mortgagor's interests, especially where the mortgagee is in possession and grants leases. It may prevent fraudulent dealings on the part of the mortgagee or any connivance between the mortgagee and the lessee, the purpose of which is to have an adverse effect on the financial state of the mortgagor.

3.2.3 Leasing before mortgage

Leases created by the mortgagor as the owner or holder of the mortgaged property prior to the mortgage or after are valid. A lease granted before the mortgage is created, even when it extends to the mortgage period, remains binding on the mortgagee and any other person who purchases the mortgaged property from the mortgagee.⁵⁵ The court held in *Gomez v Williams*⁵⁶ that the mortgagee is also not entitled to rent from a pre-mortgage lease.

However, when a lease is created after the mortgage, unless the mortgagee's consent is sought and obtained, the lease is not binding on the mortgagee. Although either the mortgagor or the mortgagee in possession can create a lease, where the mortgagor creates a lease without the knowledge of the mortgagee, it was held in *Dudley & District Society v Emerson*⁵⁷ that the lease is not binding on the mortgagee, and he can, therefore, proceed to eject the lessee from the property or demand that the rent from the lease be paid to him upon the service of a notice.

51 Essien, *E Law of Credit and Security* (2nd Ed., Toplaw Publishments Ltd 2012) 194.

52 Ibid.

53 (1937) 1 Ch 313.

54 CA, s 18; PCL, s 121; MPL, s 33; MFL, s 90.

55 Oniekoro (note 2) 128.

56 (1972) NMLR 149.

57 (1949) 1 Ch 707.

A learned commentator contended that the mortgagee's entitlement to rent in this scenario is borne out of the common-law provision, which makes the owner of the legal estate the owner of the property subject to equity of redemption because possession follows the law. But this is in opposition to the position of equity as held in *Turner v Walsh*⁵⁸ which sees the mortgagor as the owner of mortgaged property subject to the encumbrance of the mortgagee. While in possession, the mortgagor can create a valid lease and cannot be compelled to give an account of the rents collected. The lease created by the mortgagor, if done without the approval of the mortgagee and a subsequent purchaser who buys from the mortgagor, remains valid and binding between the mortgagor and the lessee based on the doctrine of estoppel.⁵⁹ However, in *Chatsworth Properties Ltd v Effiom*,⁶⁰ a lease without the concurrence of the mortgagee was not binding on the mortgagee; where he served a notice demanding rent from the lessee, he was deemed to have accepted it, which makes the lease binding.

Despite the ample provisions that both parties are free to lease the mortgaged property in accordance with statutes, it appears that the Landlord and Tenant Law⁶¹ of various states forbids the mortgagee from creating a lease. The law, however, applies mostly⁶² to residential premises, while mortgagees are free to grant agricultural and building leases while in possession.

Understanding the lease rules in mortgages will reduce friction in the operation, enforcement and discharge of the contract. It also sheds light on the fate of the third parties to the agreement, such as the lessee of the mortgagor, without the concurrence of the mortgagee and the purchasers of the mortgaged security from the mortgagee. Apart from the rights of the mortgagor and the mortgagee to determine clauses in the deed, mortgage statutes in Nigeria make detailed provisions for the mortgage lease, thus repositioning land as the engine of commercial transactions in Nigeria.

3.2.4 Leasing under the Land Use Act 1978

The LUA, which is Nigeria's main land statute, does not indicate if a mortgagee in possession needs the governor's consent to grant leases. Sections 21 and 22 of the LUA require the governor's consent when the holder alienates his right of occupancy through mortgage, transfer of possession, assignment or sublease. The LUA defines a 'holder' as:

a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly passed or has validly passes on the death of a 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-underlessee.⁶³

Therefore, the mortgagee is excluded from the definition of a 'holder'. This suggests that the mortgagee is not a holder of an occupancy right and does not require the governor's

58 (1909) 2 KB 484.

59 Evidence Act 2011, s 170; *Alabi v Adeniji* (1962) All NLR (Pt 2) 754.

60 (1971) 1 WLR 144.

61 Cap 75, Rivers State, 1999, s 16(3)(f), etc.

62 *Ibid*, s 1(4).

63 Section 51.

consent to grant leases. According to Essien,⁶⁴ this exclusion raises further legal issues. First, the definition of 'holder' is clearly 'in relation to a right of occupancy' and the mortgagee does not fall within the conception of a 'holder' of a right: he is, according to the statute, an incumbrancer of the right. However, while the definition of the 'holder' excludes a 'sub-lessee or sub-underlessee', the sub-lessee is under an obligation to seek the consent of the governor (and also the approval of the holder of the statutory right of occupancy) to create a sub-underlease.⁶⁵ The exclusion of the mortgagee means that he is not a person entitled to a right of occupancy under the LUA and, therefore, does not need any governor's approval to grant a lease. As the grant of a lease requires the approval of the governor, it may be argued that any lease granted by a person not entitled to the right is null and void since it seeks to confer or vest in the lessee an interest in or right over land.⁶⁶ Section 26 of the LUA adds that: 'Any transaction or any instrument which purports to confer or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void.' The section forbids the transfer of land to anyone or the vesting of land in anyone without the approval of the governor. A strict construction of the section means that any lease created by the mortgagee is not competent in law.

However, in view of the express provisions of mortgage statutes allowing mortgagees in possession to grant leases, the above argument may not be acceptable. It has been argued, on the contrary, that based on the rule of interpretation of *expressio unius est exclusio alterius*, the express mention of leasing by sub-lessees and the deliberate omission of leasing by mortgagees can only presuppose that mortgagees do not need the governor's consent to create leases.⁶⁷ This submission by the learned commentator appears plausible; more importantly, the governor's consent obtained for the mortgage itself, which gives him possession, should be enough to clothe him with the power to exercise the right to lease, which, after all, is not a final enforcement remedy terminating a mortgagor's right to the land or transferring it from him.⁶⁸

In some situations, the mortgagee may not take possession because of the strict duties to account imposed by equity, and so the mortgagor remains in possession and, therefore, can grant leases. In *Chatsworth Properties Ltd v Effiom*,⁶⁹ the court held that the mortgagor's action can be controlled by the mortgagee by insisting on its consent for the lease to be valid. This ensures that the property is well-preserved and enables the mortgagee to control the security.

3.3 Custody of title deeds

Much of Nigeria's land has no title deeds because land rights are held under customary law. However, with the creation of mortgages on land, title documents must be generated

64 Essien (note 46) 196.

65 LUA, s 23(1).

66 Ibid, s 26.

67 Essien (note 46) 196.

68 Ibid.

69 (1971) 1 WLR 144.

during the transaction, evidencing the right being mortgaged. The absence of adequate land documents makes the use of land as the subject of a mortgage difficult. The reason for this land management gap is that most rural and urban lands are still held in terms of customary land tenure, while a few others are held under the received English Law on Doctrine of Estates. Thus, dual tenures that operated before the LUA continued unabated through sections 34 and 36, which allowed the sustenance of their incidents of the customary tenure and doctrine of estates.⁷⁰

3.3.1 Keeping custody of titles deed at common law

Under the common law, the first legal mortgagee of freehold land has a right to the custody of title deeds. Also, the first legal mortgagee by an assignment of lease is also entitled to title documents, because the entire interest of the mortgagor has been transferred.⁷¹ In a mortgage by sub-demise, the custody of the title document should be with the mortgagor, who still holds reversionary interests, unless the mortgage deed contains a special device to that effect.⁷²

3.3.2 Keeping custody under the statutes

In states where the PCL applies, title custody can be given to a mortgagee by sub-demise, unlike the situation at common law. Legal chargees of a charge by deed expressed to be by way of a legal mortgage are also entitled to title documents even though no interest is transferred.⁷³ In applicable states, a first legal chargee is entitled to title deeds.⁷⁴ It, therefore, makes no difference under the PCL whether the mortgage is by freehold, lease or sub-demise instead of by assignment, because the mortgagee is still entitled under the statute to the custody of the title deed.⁷⁵

The situation under the MPL of Lagos State is very similar; the only exception is that it does not provide for the transfer of the freehold, as is the case in the PCL. Instead, it includes the mortgage of a statutory right in land by demise of legal charge or statutory charge, by which a first mortgagee shall be entitled to title documents.⁷⁶ In the mortgage of leasehold, a mortgagee of a whole interest is also entitled to title documents, like the first mortgagee.⁷⁷ Under the MPL, the mortgagee of the statutory right is by demise or by a charge, while the leasehold is by sub-demise and a charge.⁷⁸ Even if the mortgage is of a statutory right of occupancy or lease, the mortgagee still has a right to keep title deeds.

The first legal mortgagees have priority over others in keeping title deeds under the received law (by assignment), the PCL, and the MPL. Subsequent legal mortgagees do not

70 Otu, *MT Customary Land Tenure in Nigeria: Law and Practice* (Princeton & Associates 2022) 134.

71 Essien (note 46) 188.

72 Waldock, CHM *The Law of Mortgages* (2nd Ed., Sweet & Maxwell 1950) 23.

73 PCL, ss 17 and 108(1).

74 PCL, s 108(1) proviso.

75 *Ibid*, s 109(1) proviso.

76 MPL, s 15(1) proviso.

77 *Ibid*, s 16(1) proviso.

78 *Ibid*, s 16(2).

have this right. However, the second and subsequent legal mortgagees and charges under the PCL and the MPL may obtain title deeds if the first legal mortgagee has not exercised this right.⁷⁹ The essence of the custody of title deeds residing in the first legal mortgagee is to notify subsequent mortgagees of the encumbrance on the property as the mortgagor no longer has any title to give. This may prevent the mortgagor from raising further funds based on the security of the same property.

An equitable mortgagee has no right to title deeds since he has only an equitable right in the security. The mortgage agreement may stipulate the right for the mortgagor.⁸⁰ In *Four-Maids Ltd v Dulley Marshal Properties Ltd*,⁸¹ it was held that since an equitable mortgage arising by title deposit gives the equitable lender possession of the deeds until the loan is repaid, he is entitled to the custody of the deeds. The rationale for this decision may be the fact that an equitable mortgagee by deposit of title deeds has a contractual lien on the deeds.

The LUA does not provide custody of deeds for legal and equitable mortgages. An examination of the Act, however, reveals that it is not a mortgage statute as it merely sets principles for land use and control under the governor's power.⁸² Also, the LUA does not repeal the pre-existing mortgage statutes which operate subject to its provisions. Where the LUA does not provide direction, the pre-existing practices under the mortgage statutes operate, hence the custody of the deeds as provided for under the CA and the PCL, which are pre-existing statutes that operate in their respective jurisdictions. In the same vein, the MPL and the MFL, which postdate the LUA, uphold the custody of the deed rules under the CA and the PCL respectively. The LUA does not exhibit any intent to displace these provisions. The right to custody of the deeds belongs only to the mortgagee.

The first legal mortgagee has priority over and above subsequent legal mortgagees on the same security. However, the priority of latter legal mortgagees who have custody of the deed must be determined by the court.⁸³ Also, the possession of titles by the mortgagee prevents a fraudulent mortgagor from using the same mortgaged property to obtain funds from third parties by sale or by the creation of subsequent mortgages without the mortgagee's knowledge. The capacity to use the power of sale, to appoint a receiver or to request a foreclosure depends on the priority of the mortgagee and the custody of title deeds.

3.4 Consolidation of mortgages

Consolidation is a right of the mortgagee who has two or more mortgages vested in the same mortgagor. The mortgagee may consolidate these to ensure that none of the mortgages is redeemed unless the others are also redeemed.⁸⁴ It is an equitable remedy to safeguard

79 Ibid.

80 Essien (note 46) 190.

81 (1957) Ch 317 at 320.

82 Section 1.

83 Chianu, *E Law of Securities and Bank Advances (Mortgage of Land)* (3rd Ed., Ambik Press 2017) 263.

84 Megarry, R & Wade, *HWR The Law of Real Property* (5th Ed., Stevens 1984) 92.

the financial position of the mortgagee. It is a clear example of situations where equity may restrict rather than extend the mortgagor's right. The purpose appears to be to protect the mortgagee from financial loss if the security of a mortgage is insufficient to defray the debt. Even if each property has enough value to defray the debt, the mortgagee is still allowed to consolidate.⁸⁵ The conditions under which mortgages can be consolidated are discussed in the following paragraphs.

The first condition is that the right be reserved in the mortgage contract. Section 17 of the CA mandates that, after its passage, the mortgagee's power of consolidation should be reserved expressly in the various deeds or, at least, in one of them.⁸⁶ Hence, the power of consolidation subsists in all other mortgage laws used in Nigeria unless such is reserved as indicated in their various provisos.

The second condition is that the mortgages' redemption date must have passed. Since consolidation is an equitable remedy, it cannot override the redemptive right on the due date.⁸⁷ This condition appears to prevent a situation where a mortgagee insists that the other mortgage that is due cannot be redeemed until the one that is not yet due is redeemed.

Thirdly, the mortgages must be concluded by the same mortgagor. Equity will not allow any consolidation if the mortgagors are not the same. No right of consolidation will arise if the mortgages were originally concluded by different mortgagors, even though they were later united in one mortgagor.⁸⁸

Finally, simultaneous unions of mortgages and equities in a mortgagee must exist. This means that at least two or more mortgages should be vested in a mortgagee, and both redemption equities reside in different mortgagors.⁸⁹ The mortgages must have been created by the same mortgagee, or the interests in the mortgages to be consolidated must have been vested in the same mortgagee,⁹⁰ Once this situation subsists, it does not matter that equities of redemption have subsequently been vested in different persons.⁹¹ An exception to this rule is where consolidation is based on an express contractual right to consolidate and not merely on the equitable doctrine. In such a case, a purchaser's interest is inferior to that of the mortgagor, except where the subsequent loans were known to the mortgagee.

3.5 Entry into possession

In *Ocean Accident & Guarantee v Ilford Gas Co*,⁹² it was held that a legal mortgagee has the right of entry into possession of the mortgaged security. This right can be exercised after the mortgage deed has come into operation. The right can only be waived by the parties. In *Birch v Wright*,⁹³ it was held that a legal mortgagee can assume possession of the security at the commencement of the contract. However, this right entails that the mortgagee should

85 Ibid.

86 Law of Property Act 1925, s 93; PCL, s 115; MPL, s 28; MFL, s 92.

87 Taiwo, A *The Nigerian Land Law* (Princeton & Associates 2016) 147–148.

88 *Sharp v Richards* [1909] 1 Ch 909.

89 *Pledge v White* (1896) AC 187, 198.

90 Oniekoro (note 2).

91 Megarry & Wade (note 85) 922.

92 (1905) 2 KB 493.

93 (1786) 1 TR 378, 383.

account for the funds collected while in possession.⁹⁴ The rationale for this is the rule that prevents the mortgagee from acting unfairly.

The question that may arise is what happens when certain encumbrances on the property forbid the mortgagee from entry into possession. In this situation, as held in *Harlock v Smith*,⁹⁵ where physical possession is impossible due to encumbrances such as existing leases binding on the mortgagee, the mortgagee can take over the receipts of rents and profits by notifying the lessees in possession to pay rent to him henceforth.

Through this arrangement, the lessees become responsible for the mortgagee. The possession of security may be taken for several reasons. These are captured in *Four-Maids Ltd v Dudley Marshal (Properties) Ltd*⁹⁶ to include when the mortgagee (a) exercises the right as a legal mortgagee; (b) ensures proper management of the property and uses the resources accruing from it to reduce the loan and the interest; (c) protects the security from waste and vandalism or makes repairs; and (d) ensures that the mortgagor pays the outstanding indebtedness. The right of entry into possession is, therefore, both a pre-enforcement and an enforcement right because it can be exercised at the commencement of the mortgage contract and when the mortgagor has broken the covenant to repay in order to realise the mortgage.

The possession may also be assumed if the mortgagee's primary focus is the payment of interest and not the mortgage sum and where the property is of immediate commercial value.⁹⁷ However, in *Young v Abiina*,⁹⁸ the mortgagee was very careful in taking possession because of the many pitfalls involved in doing so. Rather, as in *Chapman v Smith*,⁹⁹ the mortgagee may prefer the situation where the mortgagor retains possession, or constructively reserves the right of possession as a trustee or donee of a power of attorney to collect rents from the tenant put in possession by the mortgagor.

In some situations, however, the mortgagee has no option other than to take possession which is his inalienable right under the mortgage. When in possession, the mortgagee can take any of the following actions.¹⁰⁰ First, as decided in *Chapman v Smith*,¹⁰¹ the mortgagee can create a lease that is binding on the mortgagor, and can collect rents and profits from tenants in possession upon the service of the appropriate notice on those tenants. Second, as in *Roby v Maisey*,¹⁰² the mortgagee can eject anybody in the property who constitutes or is constituting a clog on his right. Finally, the mortgagee may extinguish the redemption right of the mortgagor where he remains in possession after the legal due date of 12 or more years.¹⁰³

94 Megarry & Wade (note 85) 913.

95 (1895) 1 Ch D 516. See also the Landlord and Tenant Law of various states eg Cap L4, Kwara State, s 3(4).

96 (1957) Ch 317, 320. See also *Western Bank v Schindler* (1976) 3 WLR 341, 347.

97 Oniekoro (note 2) 146.

98 (1940) 6 WACA 180; *Olumo v Adewale* (1964) NMLR 17.

99 (1907) 2 Ch 97.

100 Oniekoro (note 2) 148.

101 (1907) 2 Ch 97.

102 ER vol. 108, 1228.

103 Limitation Law of Western Region, Nigeria, s 13, or 16 years in other states. See the Limitation Law, ss 23 and 27.

However, a mortgagee who takes a possessory right under the legal mortgage must be ready to live with the consequences of his actions, which are quite unpalatable. Hence, the mortgagee is often cautious about assuming possession. One issue is the legal implications of the mortgagee's possession of the security. First, the mortgagee must strictly and prudently account for rents and other profits received from the mortgaged security or that ought to have been received. The liability to strictly account applies to any benefit received as a result of being in possession. The rationale for the courts' intervention on behalf of the mortgagor is to ensure that equity prevails in protecting the mortgagor, who obviously is a weaker party, from being unfairly and unjustly treated.

The court in *Aderoku v UAC*¹⁰⁴ saw the act of taking over the 'res' and still compelling the payment of the outstanding funds as unconscionable. Allowing this will make the courts unresponsive and unconcerned as to the plight of the mortgagor and will promote the power of the mighty over the weak. Hence, in *Hughes v Williams*,¹⁰⁵ the court mandated the mortgagee in possession to exercise due diligence in collecting rents and profits because an account would be given of what was collected and what would have been collected, but could not be achieved due to the mortgagee's negligence or wilful default. Second, the mortgagee in possession must pay occupational rent and give a proper account for the extra period spent on the property after defraying the loan with interest. In *Aderoku*¹⁰⁶ the mortgagee was in possession when the mortgage was made in 1921 and remained in possession until 1937, even when the mortgage sum was paid in 1935. The mortgagee was mandated to render an account that ought to have accrued for the whole period in possession.

Finally, the court held in *Saunder v Hooper*¹⁰⁷ that while in possession the mortgagee is responsible for repairs. Although the costs of such repairs to the property will normally be set off from the rents and profits collected, the mortgagee is answerable for the maintenance if the property falls into disuse. However, for repairs which are not excessive or could be attributed to permissive waste, the mortgagee is entitled to reimbursement. In *Nigerian Loan & Mortgage Ltd v Ajetunmobi*,¹⁰⁸ the mortgagor accessed a loan to complete a building. He later abandoned the building. This compelled the mortgagee to take over and complete the building. The mortgagee later claimed both the mortgaged sum and the cost of completing the building. It was held that the equity of redemption of the mortgagor could not be extinguished by the improvement made by the mortgagee to the building.

An equitable mortgagee has no right to take possession. However, it has been contended that as equity comes to the aid of the lessee of a lease of term ordinarily void for not being made by deed. Where part-performance could be pleaded, the rule in *Walsh v Lonsdale*¹⁰⁹ could prevail to allow an equitable mortgagee to take possession, just like a legal mortgagee, in appropriate circumstances.¹¹⁰

104 (1941) 7 WACA 39.

105 (1918) 118 NE 914 (Mass).

106 (1941) 7 WACA 39.

107 (1843) 6 Beav 246.

108 (1944) 17 NLR 136.

109 (1882) 21 Ch D 9.

110 Oniekoro (note 2) 153.

Entry into possession is both a pre-enforcement and an enforcement remedy because the mortgage of a legal interest may enter the property at any time. The right may also be exercised by the mortgagee when the mortgagor has failed to pay the mortgage sum and it is in the mortgagee's interest to ensure the payment of the loan and interest.¹¹¹ Therefore, it is a useful remedy, especially for a mortgagee whose concerns are safeguarding the security from damage and deterioration and securing the payment of the debt with interest.

4. Conclusion

This article discussed the preliminary rights of parties to mortgages. These were identified as leasing and subletting the mortgage security, insurance, consolidation, taking custody of title deeds, and entry into possession. The mortgagor has the power of lease,¹¹² but in exercising it, the concurrence of the mortgagee must be sought for the lease to be binding. While a mortgagee is not regarded as a holder under the LUA, the mortgagee's lease is still binding due to the nature of the rights of the mortgagee as an incumbrancer.¹¹³

The power of insurance is available to both parties, subject to the important control that insurance should be created only against fire accidents. Also, the premium paid should be charged to the mortgaged property.¹¹⁴ The insurance should, therefore, strictly be against fire damage. This has serious implications for the mortgagee: other risks such as floods, physical damage etc are exempted.

The right to the custody of the deeds is central when many legal mortgages are imposed on the same property. This is a very useful aid in establishing the priority of the mortgages. It also prevents fraud on the part of the mortgagor who, knowing that his legal interest is already conveyed in mortgage(s), could proceed to the outright sale of the property or the creation of further incumbrances on the demised property to defraud a third party without notice.

The right of entry to possession is peculiar to the mortgagee, who has the power under the mortgage statutes to do so unless the parties in the mortgage deed waive it. However, due to the stringent rules that equity has placed on the mortgagee, the right is rarely exercised unless it is necessary to protect the property.

The consolidation of mortgages helps mortgagees recoup their funds from a mortgagor with whom they have multiple mortgages on different securities. It also prevents the mortgagor from discharging one mortgage without attending to others.

5. Recommendations

Based on the discussion in this article, recommendations are made to protect the rights of the parties to mortgages under Nigerian property legislation.

The provisions of mortgage statutes and the Insurance Act regarding the application of insurance proceeds must be harmonised. While extant mortgage statutes are unanimous in allowing proceeds to be used to repair the damaged security or discharge the mortgagor's

111 Essien (note 46) 191.

112 See CA, s 18(1); PCL, s 122(1) and MPL, s 33.

113 Essien (note XX) 196.

114 PCL, s 123(1).

debt, section 66 of the Insurance Act provides that the proceeds should be expended only on repairing the damaged security. It is recommended that the mortgage laws that emanate from State Houses of Assembly should be amended in line with the Insurance Act, which is an Act of the National Assembly. This will allow for the easy practice of mortgages throughout the federation as most lending institutions operate nationwide.

Furthermore, both parties (mortgagor and mortgagee) have rights to create leases under the mortgage statutes. However, the LUA, Nigeria's foremost land statute, appears to oppose the mortgagee's right to create leases. It does not recognise the mortgagee as a holder who has the capacity to transfer legal interest. This contradiction comes to the fore when others whose interests are derived from the governor's consent, including a sub-lessee, can access the governor's assent for a lease. In the interim, the position of Essien should apply:¹¹⁵ since the mortgagee is a creation of the governor's assent, though his right is a mere incumbrance, his action as a lessor should be valid in law. This is necessary for the protection of the *res*. Although this research is unaware of any litigation in this area in the Nigerian courts, it is suggested that section 51 of the LUA should be amended to enlarge the definition of the 'holder' to include the mortgagee.

The title deed is a very important document in mortgage transactions. It must be in proper custody of the mortgagee, while a copy of the title deed must be accessible and verifiable in the land registry. The documentation of land in Nigeria leaves much to be desired. Despite the enactments of land registration laws in each state of the federation and the Federal Capital Territory, Abuja, most urban and rural lands lack adequate documentation.¹¹⁶ This can be traced to the principle of deemed grants under sections 34 and 36 of the LUA, allowing continued incidents of customary tenure. It is suggested that the LUA be amended so as to compel deemed grantees to register the land they occupy either as holders or occupiers immediately to create records of such holdings. In addition, land registries across the nation should be equipped with infrastructure and personnel to transform into digital registries which stakeholders can access. This will promote the integrity of the title deeds kept by mortgagees.

Both parties have possessory rights to the mortgaged land. However, barring the need to protect the *res*, the mortgagee seldom exercises this right. Continuing this practice is recommended.

Finally, mortgages are consolidated for the benefit of the mortgagee who has multiple mortgages with a mortgagor. This statutory creation is salutary and assists in realising the mortgage. This provision should not be disturbed.

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115 Essien (note 46) 196.

116 Imhanobe, *SO Legal Drafting & Conveyancing* (3rd Ed., Temple Legal Consult 2010) 283.