

ENFORCEMENT OF MORTGAGE SECURITY IN NIGERIA

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ABSTRACT: *This paper critically examines the five methods of enforcement of mortgage security recognized by law namely: Enforcement of covenant to repay, entering into possession, and sale of mortgaged property, appointment of a receiver and foreclosure of the equity of redemption. Here, where one method does not satisfy the debt owed to the mortgagee, he can adopt another method accordingly. This paper further clarifies to us that once Foreclosure Proceedings are embarked upon by the mortgagee, he cannot afterwards fall back on any of the other remedies earlier mentioned. However, it is suggested that the Mortgagee in exercising the power of sale should take care to obtain a proper price and not sell the mortgaged property at an undervalue. The paper further discussed the protection of a purchaser of the mortgaged property, injunction against the mortgagee's exercise of power of sale on five grounds listed and briefly discussed, and of course, the right of the mortgagor. Suggestions for improvement of the mortgagee and mortgagor relationship were given at the concluding pages of this work.*

KEYWORDS: Mortgagor, Mortgagee, Action for Foreclosure, Equity of Redemption, Mortgagee's power of Sale, sale of mortgaged property

INTRODUCTION

The essence of taking a mortgage security is to give the mortgagee an assurance of having property to fall back on upon failure of the mortgagor to meet his contractual obligation on the date fixed for payment of the mortgage debt. The method of enforcement of mortgage is legal or equitable. Five methods, of enforcement are at least, recognized by law namely:

- 1) Enforcement of covenant to repay
- 2) Entering into possession
- 3) Sale of mortgaged property
- 4) Appointment of a Receiver
- 5) Foreclosure of the equity of redemption

Before elaborating on the methods of enforcement of mortgage security listed, it is appropriate to define the key concepts of *security* and *mortgage*.

Security in the context of the paper refers to the debtor and creditor relationship. The debtor is the *Mortgagor* while the creditor or lender is the *Mortgagee*. According to *Sykes & Walker*¹, security

¹ *The Law of Securities (5th Edition, Law Book Company), 1993 @p. 12*

is defined as *an interest vested in one person called the creditor in certain property owned by another called the debtor, whereby certain rights are made available to the creditor over such property in order to satisfy an obligation personally owed or recognized as being owed to the creditor by the debtor or some other person*. This definition is said to be wide enough to comprehend the case of security by a guarantor, but not wide enough to embrace a personal promise given by him².

A mortgage on the other hand is *an interest in property created as form of security for a loan or payment of debt and is terminated on payment of the loan or debt. The borrower who offers the security is the mortgagor, while lender who provides the money is the mortgagee*³. Land happens to be the most common, and acceptable property that may be mortgaged⁴.

- a) **Enforcement of the covenant to repay** - a covenant to repay is a necessary one in a mortgage agreement, and where it is omitted, it remains implied, since in equity, the receipt of money carries with it the obligation to repay in the absence of a covenant to repay⁵. This covenant may be assigned in accordance with statutory provisions for a valid assignment of choses in action⁶ or by joining the original mortgagee in the assignment. For this remedy to be enforceable, the mortgaged property must be in existence, and the mortgagee must be in position to reconvey same. Thus, where the mortgagee has parted with the property or has encumbered same, he cannot enforce the covenant.⁷ Also, the mortgagee cannot enforce this covenant after foreclosure, except the property remains intact, but he opens the Foreclosure proceedings thereby⁸. A sale after foreclosure extinguishes the mortgagor's liability for the contract debt, but any sale either with the express concurrence of the mortgagor or with express or implied power of sale in the mortgage deed does not extinguish the mortgagee's right to sue on the personal covenant to repay⁹. A judicial sale does not bar the mortgagee from enforcement of the personal covenant to repay, even though he can no longer reconvey the mortgaged property¹⁰. A covenant to repay, cannot be enforced by the mortgagee, and the principal sum secured by the mortgage is irrecoverable after the expiration of twelve years from the date when the right to recover the money accrued¹¹. But the right to recover

² Sykes & Walker op.cit p. 12; I.O Smith – *Nigerian Law of Secured Credit* (Ecowatch Publications Limited, Nigeria), 2001 @ p. 4

³ Oxford Dictionary of Law (6th Edition, Oxford University Press), 2006 @ p. 347

⁴ *In my view, because it hardly depreciates compared to other types of property. However, it could be dangerous and the worst thing to happen to a creditor if the title is not valid or is defective. Therefore, it is the duty of the creditor or mortgagee to investigate any land title before it is accepted as a mortgage.*

⁵ *Sutton v. Sutton* (1882) 22 ch.511@ p.516

⁶ For the requirements of the law on assignment of choses in action, see Judicature Act. 1873, s.25(6); Statute of Frauds 1677, s.9 and Property and Conveyancing Law, Cap 100 LWN 1959, s. 78(1) (c)

⁷ I. O Smith Supra @ 74; *Gordon, Grant & Co v. Boss* (1926) AC 781; *Walker v. Jones* (1866) LR 1 CP @ p.50

⁸ (1806) 32 ER 459

⁹ *Rudge v. Richens* (1873) LR 8 CP@358

¹⁰ *Gordon Grant & Co v. Boss* (1926) AC 781

¹¹ S.28 (1) Limitation Decree No.88 of 1966 (Nigeria)

the money is deemed not to have accrued if the property subject of the mortgage or charge comprises of any future interest which has not matured¹².

b)

- c) **Entering into possession** – a legal mortgagee is entitled in law to enter into possession by virtue of his legal title. The right arises immediately after the execution of a mortgage deed, except such right has been contracted out by himself under the mortgage Agreement.

According to *Harman L.J* in *Four Maids Ltd v. Dudley Marshall (Properties) Ltd*¹³ *the right of the mortgagee to possession in the absence of some contract has nothing to do with the default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the Mortgage unless there is something in the contract, express or by implication whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property.*

As a result of the mortgagor's right to possess the mortgaged property, neither the mortgagee nor his Agent can commit trespass. In *Awojugbagbe Light Industries v. Chinukwe*¹⁴, the mortgagor's claim against the mortgagee for trespass on the on the ground that he appointed a Receiver who took possession of the Mortgaged property with the aid of security men and Alsatian dogs was dismissed by the court. It also follows that the Mortgagee cannot be restrained by the court from taking possession, except such right has been contracted out by himself under the mortgage Agreement¹⁵. Where physical possession is not possible due to the existence of leases binding on him, he can enter into receipt of rents and profits by notifying the lessees in possession to pay rent to him as opposed to the mortgagor¹⁶. Where a Receiver has been appointed by the court, he may apply to court for the removal of the Receiver, and when the exercise of the foregoing powers is impeded by the mortgagor, he may bring an action to eject the latter¹⁷.

A mortgagee in possession in law should have actual power of control and management of the mortgaged property¹⁸. This can be established by showing that the mortgagee is in actual possession of the property as a mortgagee, and not as a lessee, a tenant for life, or a purchaser under a sale which turned out to be invalid. When in possession, the mortgagee can create leases which bind the mortgagor, but not after redemption, unless otherwise agreed under the mortgage deed¹⁹.

Except the mortgaged property is facing the danger of being squandered by the mortgagor or of destruction or depreciation due to trespass or general neglect, or there is need to intercept profits anxiously towards discharging his claims under the mortgage, equity discourages the mortgagee

¹² Ibid, s.28 (2). The same provision applies in the case of a mortgage of a life insurance policy.

¹³ (1957) Ch.317 @ 320

¹⁴ (1995) 4 NWLR PT 390 p.379

¹⁵ See *Harman, L.J* in *Four Maids Ltd v. Dudley Marshall (Properties) Ltd* supra

¹⁶ *Harlock v. Smith* (1895) 1 ch.d 516

¹⁷ *Doe D. Rody v. Maisey* 108 ER 1228

¹⁸ *Noyes v. Pollock* (1886) 32 Ch. 53

¹⁹ *I. O Smith* supra @ 76

from going into possession by imposing on him strict liability to account. The mortgagee has the obligation to be diligent in collecting rents and profits and be liable to the sums not recovered due to his negligence or wilful default. Where he is in physical occupation, he is liable for occupation rent. He is obliged to keep the mortgaged property in a state of repairs which cost may be met from the rents and profits collected; and he is liable for deterioration of the property where it is left to degenerate into a state of disrepair²⁰.

The mortgagee may charge only to the extent of reasonable improvements which enhances the value of the property, but not extra ordinary one made without the consent of the mortgagor²¹.

Where a mortgagee has been in possession of the mortgaged land for a period of 16 years from the date the right of the action first arose, the mortgagor's right to redeem is lost²², and the property becomes vested in the mortgagee. There is definitely no injustice in this. But where the mortgagee acknowledges the title of the Mortgagor or his equity of redemption, or receives any payment in respect of the mortgage debt, the time prescribed will start to run afresh.

An equitable mortgagee has no legal title which entitles him to possession and cannot ask lessees in possession to pay rent to him to possession and cannot ask lessees in possession to pay rent to him. He can however, appoint a Receiver where such right is reserved under the mortgage agreement or apply to Court for the appointment of a Receiver to collect rents and profits on his behalf. Where a legal mortgagee is in possession, the equitable mortgagee may intercept the *surplus* rents and profits to which the mortgagor is entitled by asking the legal mortgagee to pay him²³.

- d) **Sale of Mortgaged Property** – a mortgage instrument may provide for the Mortgagee's power of sale and stipulate conditions for the exercise of that power, so that except the mortgagee complies strictly, the sale shall be ineffectual.

According to I.O Smith²⁴, the power of a legal mortgagee to sell the mortgaged property upon the mortgagor's default is statutory and need not be express. The power of sale is conferred by the Conveyancing Act 1881 and the Property and Conveyancing Law 1959²⁵ on any person for the time being, entitled to give and receive a discharge of the mortgage money. The statutory power of sale is limited to legal mortgages only. An equitable mortgagee can only apply to the court for judicial sale. The mortgagee's power of sale is distinct and separate from the exercise of power by a judgment creditor. The power of sale under the deed of mortgage may be exercised by the

²⁰ Sandon v. Hooper 49 ER 820

²¹ *I.O Smith @ 77; Shephard v. Jones (1882) 21 Ch*

²² The prescribed period under the adopted Statute in the old Western Nigeria is twelve years. See Limitation Law of Western Nigeria, Cap 64 of 1959, s.13; *Federal Administrator – General v. Cardoso (1973) NSCC p.577*

²³ *I. O Smith @ 78*

²⁴ *Nigerian Law of Secured Credit @ p.78*

²⁵ Cap 100, Laws of Western Nigeria

mortgagee notwithstanding a debt recovery judgment in his favour, and even where an appeal and a motion for stay of execution are pending²⁶.

The right to sell a mortgaged property depends on two conditions namely:

- a) the power of sale must have arisen in the sense that the mortgage debt must have become due. This can be ascertained from the mortgage deed. If the money secured by the mortgage is payable by instalments, the power of sale arises as soon as the instalment is due and unpaid.
- b) the power of sale must have become exercisable – for this to happen, one of the under listed instances must have taken place:
 - i) notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of the money for three months after such service; or
 - ii) some interest is in arrear, and remains unpaid for two months after becoming due, notwithstanding that the principal sum to be advanced instalmentally under the mortgage deed has not been advanced in full²⁷; or
 - iii) there has been a breach of some provision contained in the mortgage deed or in the statute, and which imposes an obligation upon the mortgagor.

However, it should be noted that these statutory requirements may be varied or excluded by the mortgage instrument where notice is required to be served as in (i) above, the three months begin to run from the date of service of the Notice, and not from the expiration of the time fixed by the notice for payment²⁸. The notice need not inform the mortgagor that the property would be sold; it suffices that it requires him to pay the mortgage money. A notice served on the mortgagor subsists, notwithstanding a plea of extension of time by the mortgagor to which the mortgagee never reacted, nor can the mortgagee be said to have waived the notice merely by giving some interim concession to the mortgagor²⁹.

The mortgagee may upon fulfilling the foregoing conditions, sell the mortgaged property at any time thereafter, and at any price obtainable. The sale may be by auction or private treaty, and may be in one lot or several lots. Upon sale, the mortgagee is empowered to execute a deed vesting the title in the purchaser.

Mortgagee's obligation in exercising the power of the sale

In exercising the power of sale, the law requires the mortgagee to act in good faith, and in the absence of fraud, any unfair dealing with the mortgaged property or collusion with the purchaser, resulting in gross undervalue. Unfortunately, the sale cannot be impeached by the court even where the sale is disadvantageous to the mortgagor. The Nigeria Court of Appeal held in *Okonkwo v Co-operative and Commerce Bank of Nigeria Plc*³⁰ that *if a mortgagee exercises his power of sale*

²⁶ *Union Bank of Nigeria Plc v. Olori Motors Co.Ltd* (1998) 5 NWLR PT 554 P.652

²⁷ *Okafor & Sons Ltd v. Nigerian Housing Development Society & Anor* (1972) NSCC Vol 7 @ p.271

²⁸ *Barker v. Illingworth* (1908) 2 Ch. 20

²⁹ *Bank of the North v. Muri* (1998) 2 NWLR PT 536 p.153

³⁰ (1997) 6 NWLR PT 507 p.48

*bonafide for the purpose of realizing the debt, and without collusion with the purchaser, the court will not interfere, even though the sale is disadvantageous unless the price is so low as in itself to be evidence of fraud*³¹.

In *Eka-Etet v. Nigeria Development Society Ltd & Anor*³², the finding of the lower Court that the sale of the mortgagor's property by the second defendant (the purchaser) was at an undervalue, was held by the Supreme Court not to be sufficient reason to set aside the sale in the absence of bad faith or collusion on the part of the defendants. I disagree with this judgment of the Supreme Court saying that it is immaterial that the mortgagee exercised a sale of the mortgaged property in good faith and without collusion, when in fact, it is proved that he sold the property at an undervalue.

The sale should have been aside by the Supreme Court, while the mortgagee should exercise some patience and get a buyer who is willing to offer something more reasonable that will amount to the normal value of the mortgage. To do otherwise would be unfair to the mortgagor. Or, because the mortgagee would on his own part, not accept any lesser amount of money being repaid for the loan by the mortgagor. So why should the Supreme Court rule otherwise? The fact that the mortgagor look a loan and defaulted mean that we should justify the mortgagee selling the mortgaged property at an undervalue, even though it was in good faith or in error. The mortgagee has to return the amount lost in course of such a transaction to the mortgagor³³.

It has also been decided³⁴ that the mortgagee cannot sell to himself or to an Agent on his behalf. However, the fact that the mortgagee sold to a relation, a business partner or a Company (whether or not he is a majority shareholder) is not sufficient to vitiate the sale.³⁵ Rather, it merely puts the onus on the mortgagee to show that everything was done fairly and that he took reasonable precautions to obtain the best price reasonably obtainable at the time of sale. I would still add that if that best price reasonably obtainable at the time of sale is an undervalue rate of the mortgage property, more time can still be given, while very serious efforts should be made by possibly advertising the property in the newspapers (or other accredited public places for adverts), provided that such efforts will not be too expensive. What is important is that the advert of the property should attract purchasers who are willing to pay higher price for the property to the extent that it will not be sold at an undervalue, even after the cost of advertising it has been removed from the amount the property was sold. It has been held that the timing of exercise of a right of sale by the mortgagee is entirely at his discretion³⁶.

³¹ *Okonkwo v. CCB (Nigeria) Plc* Supra @ 60

³² (1973) NSCC Vol 8 @ p.373

³³ *In my view*. This decision of the Supreme Court of Nigeria calls for a Reform, the mortgagor willing to repay the loan by having his property mortgaged.

³⁴ *Ihekwa v. ACB* (1998) 10 NWLR PT 571 p.590

³⁵ *I. O Smith* Supra @ 81; *Viatonu V.Odutayo* (1950) NLR P. 119

³⁶ *Tenco Engineering & Co. Ltd v. Savannah Bank of Nigeria Ltd* (1995) 5 NWLR PT 397 P.607. This discretion vested in the mortgagee must not be exercised unfairly & unjustly. The courts should equally add that clause in their Judgments while allowing the mortgagee exercise his discretion as to the timing of the sale of the mortgaged property once that power of his/theirs becomes exercisable. I am glad that the English Courts supported this in

Where the mortgagor can prove that there is presumption of fraud, or impropriety in the sale by the mortgagee of the mortgaged property at an undervalue, that sale will be rendered invalid.³⁷

PROTECTION OF THE PURCHASER

A purchaser acquires an unimpeachable title basically on the condition that the power of sale has arisen, for the Statute protects him and frees him from the problems of constructive notice that the power of sale has not become exercisable. The law provides that *where a conveyance is made in the professed exercise of the powers of sale conferred by this Act, the title of the purchaser shall not be impeached on the ground that no case has arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person injured by an unauthorized or improper exercise of the power shall have his remedy in damages against the person exercising the power.*³⁸

However, provisions of a Statute protect only purchasers for whom the mortgagee has executed a conveyance, so that if an aggrieved mortgagor commences an action to impeach the purchaser's title after sale, but before the conveyance, the purchaser cannot take advantage of statutory provision³⁹. A mortgagee who takes a mortgage in an unregistered land in a Registration Area, and who failed to register as first owner under the Registration of Titles Act⁴⁰ cannot in exercise of his statutory power of sale convey a valid title to the purchaser. This applies to lands in cities.

According to the Land Use Act, a sale pursuant to the mortgagee's exercise of the statutory power of sale cannot vest an interest or right over the land in the purchaser without the requisite consent of the Governor first sought and obtained⁴¹. Otherwise, such transfer of land shall be null and void⁴².

Injunction against Mortgagee's exercise of power of sale⁴³

A mortgagor may bring an application for an Order of Interim or Interlocutory injunction restraining the mortgagee from exercising his power of sale on the following grounds:

- a) Where the power of sale has not arisen or become exercisable;
- b) Where the mode of sale contemplated by the mortgagee deviates from the mode prescribed by the mortgaged instrument;
- c) Where the amount claimed by the mortgagee is excessive

Farrar v. Farrars Ltd (1888) 40 Ch.d 395 by adding that the mortgagee should take precaution & obtain a proper price.

³⁷ *Taiwo v. Adegboro* (1997) 11 NWLR PT 528 @ p.224; *Idowu v. Jaiyeola* (1970) 1 ALR (comm.) 289

³⁸ Conveyancing Act 1881, s.21 (2); PCL Cap 100 Laws of Western Nigeria 1959, s.126 (2)

³⁹ *Oguchi v. Federal Mortgage Bank of Nigeria Ltd* (1990) 6 NWLR PT 156 @ p.330

⁴⁰ Cap 166, Laws Lagos State of Nigeria, 1994

⁴¹ S.22 Land Use Act, Cap 202, Laws of the Federation of Nigeria 1990 or Cap L.5 Laws of the Federal Republic of Nigeria 2004.

⁴² S.26 Land Use Act, Cap 202, Laws of the Federation of Nigeria 1990 or Cap L.5 Laws of the Federal Republic of Nigeria 2004.

⁴³ *I. O Smith – Nigerian Law of Secured Credit* @ p.90

- d) Where prevailing circumstances give rise to estoppel - for instance, where the mortgagee has caused the mortgagor to believe in a set of facts upon which he has acted, equity will restrain the mortgagee from enforcing the power of sale under the mortgage.
- e) Where mortgage is a fraud or the mortgage deed is not executed by the mortgagor. Another point that I will add is *where the mortgagee sells at an undervalue*.⁴⁴
- d). **Appointment of Receiver** – this remedy is open to both the legal and equitable mortgagee. The legal mortgagee may appoint a Receiver where he cannot go into physical possession (e.g due to the existence of binding leases) for the same reason as he goes into possession himself, such as where the security is in danger of being squandered by the mortgagor, or that being in urgent need of his capital, he is anxious to intercept the profits and apply them to the discharge of the mortgage debt.

Appointment of a Receiver is also a special right of an equitable mortgagee, since the latter has no legal estate, and cannot ipso facto go into physical possession for receipt of rents and profits directly. The power to appoint a Receiver becomes exercisable where –

- i) the mortgage money has become due for payment and the mortgagee has served a written notice on the mortgagor, informing the latter that the principal has become due, but the mortgagor defaults in repaying the whole or part of the money for a period of three months;
- ii) some interest is in arrears and remains unpaid for two months;
- iii) the mortgagor has committed a breach of some other covenant in the mortgage deed.

When a mortgage is created by a deed, a Mortgagee has a statutory power to appoint a Receiver. If the appointment of a Receiver is made under a mortgage deed by the mortgagee in pursuance to the management or realization of the mortgaged property, the Receiver is presumed to be an Agent of the mortgagor⁴⁵.

Responsibility of a Receiver ⁴⁶

Section 24(8) of the Conveyancing Act 1881 and section 131(8) of the Property and Conveyancing Law prescribe that moneys accruing from the mortgaged property shall be applied as follows:

- i) in discharge of all rents, taxes and outgoings whatever affecting the mortgaged property;
- ii) in keeping down all annual sums or other payments and the interest on all principal sums, having priority to the mortgage in right where of he is the Receiver;
- iii) in payment of his commission, and of the premiums of fire, life or other insurances, if any, properly payable under the mortgage deed, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
- iv) in payment of the interest accruing or due in respect of any principal money due under the mortgage, and

⁴⁴ In my own view, the Courts should begin to acknowledge this point to ensure that in practice, the mortgagee does not treat the mortgagor unfairly, even though he can choose any time to sell the property once the power of sale has arisen and become exercisable.

⁴⁵ *Waldock, Law of Mortgages* (2nd Edition & Maxwell, London), 1950 @ p.6

⁴⁶ *I O Smith* @ 94

- v) in or towards discharge of the principal money if so directed in writing, by the mortgagee.

In addition, the Receiver, if directed by the mortgagor in writing, shall insure or keep insured against loss or damage by fire, the mortgaged property out of the money received by him⁴⁷.

e). **Action for Foreclosure** – an action for Foreclosure is a judicial procedure by which the mortgagee acquires the mortgaged property for himself free from the mortgagor's equity of redemption⁴⁸. It is a more effective remedy available to the mortgagee in urgent need of his capital which he cannot realize from the rents and profits accruing from the mortgaged property, or which in fact, is non – existent. As a result of the foregoing constraints, the courts which jealously protect the equity of redemption, allow a mortgagee to destroy the equitable right to redeem with its own assistance⁴⁹. A Foreclosure Order will not be made until the contractual date has passed with the principal and / or interest remaining unpaid after a demand and a reasonable time allowed to lapse without compliance⁵⁰.

However, I would suggest that an action for Foreclosure should not be granted by the Courts where the interest of the mortgagee is the only outstanding money that has remained unpaid. If the principal money has already been paid, the mortgagor should be allowed to redeem his property provided he devises no other means to pay the mortgagee his interest. But the only problem here is that at times, the accrued interest ends up being higher than even the principal sum itself, in which case, the mortgagee many indeed have to end up succeeding in a Foreclosure action against the mortgagor.

A notice of Foreclosure once given and received, remains valid and in force until the exercise of the mortgagee's power of sale; and the mortgagee is not bound to make any concession or to suspend the exercise of his power of sale. An action for Foreclosure being an action to recover land, must be brought within twelve years from the date upon which the right of recovery accrued, i.e the date fixed for payment of the principal. Otherwise, it becomes statute barred⁵¹.

A legal mortgage created in the Eastern, Northern or in Lagos State (as examples) already conveys a legal estate to the Mortgagee subject to cessar on redemption by the mortgagor. As such, an Order of Foreclosure upon default by the mortgagor makes absolute the title initially vested in the mortgagee subject to cessar on redemption. There is no transfer in any form and Governor's consent is not required since the mortgagee by the initial conveyance has the property vested in him, and what happens is that upon the destruction of the mortgagor's right in the property consequent upon the Order of Foreclosure Absolute, the mortgagee takes free of it.

⁴⁷ S. 24 (7) Conveyancing Act, 1881

⁴⁸ *Cheshire & Burns Modern Law of Real Property* (17th Edition, Oxford University Press), 2006 @ pp 775-782. *Halsbury's Laws of England, Mortgage* (4th edition, 2005 Reissue) ss 767-816; *Maudsley & Burn's Land Law: Case & Materials* (8th Edition, London) 2004 pp 852; 895-925 ; *I.O Smith – Nigerian Law of Secured Credit* (Ecowatch Publications Ltd, Nigeria) 2001 @ p.97

⁴⁹ *I.O Smith* @ p.97

⁵⁰ *Fitzgerald's Trustee v. Mellersh* (1892) 1 Ch. 385

⁵¹ *I. O Smith* @ p.100; Limitation Law Cap 118 Laws of Lagos State of Nigeria, 1994

RIGHTS OF THE MORTGAGOR

This paper will not be complete without the rights of the mortgagor being discussed. The mortgagor has the following rights: Right of ownership, right of sale; and the equitable right of redemption.

- a) **Right of Ownership** - where the mortgagor is in possession, he remains the true beneficial owner of the property in the eyes of equity, and can therefore grant a lease of the property,⁵² take rents and profits. The mortgagor is not liable to account for the rents and profits derived to the mortgagee, and he can accept surrender of leases⁵³. These rights notwithstanding, the mortgagor's possession is precarious for, he is the mortgagee's tenant and therefore, not entitled to any notice of termination. The mortgagee may evict the mortgagor by taking out a summons to recover possession.
- b) **Sale by Mortgagor** – one fundamental principle in the law of mortgages is that the real owner of the mortgaged property in equity is the mortgagor and the interest of the mortgagee in the property is the security for credit given to the mortgagor. Therefore, a sale of the mortgaged property by the mortgagor is far from being fraudulent and cannot be void, even though the purchaser takes the legal estate subject to the mortgage. The mortgagee remains protected. The most effective way of giving good title to a purchaser is by him paying off the mortgagee, and paying the mortgagor the difference between the value of the property and the amount of the loan repaid, while the property is then conveyed to such purchaser jointly by the mortgagor and mortgagee⁵⁴.
- c) **The Equity Right of Redemption** – this has been defined as *the right of the mortgagor to recover the security by discharging his obligations under the mortgage, although the time fixed by the contract for the performance of those obligations has passed, and even though under the express terms of the agreement, the security may be stated to be the absolute property of the mortgagee*⁵⁵. This right is inherent in any mortgage contract and cannot be waived or contracted out by agreement.⁵⁶ Failure to repay the mortgage debt on the contract date extinguishes the mortgagor's right to redeem at law, but equity implies a condition giving the mortgagor a continuing right to redeem which may exercise before it is destroyed by Foreclosure, sale, release or lapse of time. The equitable right to redeem is basically a right premised on the equitable consideration that the mortgagor is the real owner of the property and that the mortgagee merely holds the mortgaged property as a security since his interest lies in repayment of the mortgage debt by the mortgagor. Hence, the maxim *once a mortgage, always a mortgage* will always operate to guard the initial understanding between the parties and ensure that the mortgage contract contains no provision(s) which may render the right to redeem illusory or which is a clog on the equitable right to redeem.

⁵² This lease is binding upon him and the lessee upon the principle of estoppel, but not on the mortgagee if the latter asserts his paramount title to possession. See *Rogers v Humphreys* 111 ER 799

⁵³ *Trent v. Hunt* (1853) 9 Exch 14

⁵⁴ *I. O Smith @ 103*

⁵⁵ *Waldock op. cit 171*

⁵⁶ *Per Lord Eldon in Seton v. Slade* 32 ER 108

The equitable right of redemption is a proprietary right which may be conveyed, devised or entailed, it may devolve on intestacy or pass as *bona vacantia* to the State.⁵⁷

CONCLUSION

The Mortgage is a good Security in Law and in Fact, but at times, the mortgagor objects by going to the Law Court to restrain the Mortgagee from enforcing his power of sale, even after it had become exercisable, after he (the Mortgagor) discovers that he cannot repay the debt owed to the mortgagee. Even when some mortgagors are allowed by the mortgagee to get buyers of the property, they deliberately refuse, despite the availability of buyers. This is a problem.

Another problem lies with the Mortgagee who abuses his power of sale by exercising his discretion to sell the mortgaged property unfairly when he decides to sell it at an undervalue. I have rightly suggested in this paper that in addition to other factors that may warrant the mortgagor to bring an application to the Court to restrain the mortgagee's power of sale, the fact that *a mortgagee sells the mortgage property at an undervalue* should be an additional factor, even though the Courts protect the Mortgagee as we can see from a few cases cited in this paper. The Courts should really caution the mortgagee against selling at an undervalue, and this should be part of the Rules for the formation of a Mortgagor and Mortgagee Relationship. It enables the Mortgagor feel safer, because the mortgagee has got nothing to lose once the mortgage property is already in his possession.

Where a Mortgagee has interest in a Company buying the mortgage property, even if he gets the best price obtainable, the inference from the mortgagor will normally be that the price is not the best, as he will be suspicious that the mortgagee has some special interest in the property, and would not want to pay so much to acquire it. In this regard, it is recommended that a Mortgagee should not sell to a Company he has any interest in, or to Relations or close Associates, except the mortgagor accepts the price any such persons or Company offer for the mortgage property.

There is no doubt that Banks suffer largely for mortgagor's breach of contract, and should therefore ensure that all their Workers comply with the laid down Rules, Regulations and Procedures for lending before any loan is given out. If the loan conditions are a bit too stringent, that may deter some insincere borrowers from going to obtain loans. Therefore, in Nigeria, the Rules and Procedures laid down for lending as stipulated by the Central Bank of Nigeria should be strictly followed to reduce the incidence of losses of funds by the banks as a result of the default of mortgagors. When banks collect mortgage property that are of lesser value than the sum loaned out to the mortgagor, they are definitely to blame for failure in business of the banks, and this has been the case with most banks all over the World that have collapsed, including some Nigerian Banks that failed in the last few years.

The Central Bank of Nigeria should be serious with its supervisory role over all Banks in Nigeria, and ensure that it does not cover up any bank malpractice discovered by any Bank or its Management. The truth remains that the Management of most Banks are largely responsible for

⁵⁷ I. O Smith Supra @104

collapse of such banks when they grant loans running into millions and billions of naira (or their equivalent in other currencies) to different customers and mortgagors who offer no collateral or collaterals of far lesser value than the amount they obtained as loan from the banks.

It is finally suggested that stiffer measures should be put in place, such as arresting, prosecuting and sentencing any Bank Staff who goes against the CBN's Policy on lending to twelve years imprisonment with compulsion of returning the amount lost by the Bank. Escapee debtors should equally be caught, arrested, prosecuted and jailed to twenty one years imprisonment, while all their available properties should be taken over by the mortgagee/lender. This will make people go for loans only when there is truly any need for such.

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