THE POWER OF THE MORTGAGEE TO SALE VIS-A-VIS LAND MANAGEMENT IN NIGERIA*

Abstract
Mortgage transaction is an indispensable practice in modern day business activities. In Nigeria however mortgage is regulated by the legal framework provided by the Land Use Act, 1978 as amended. It also appears that the Act is legally inadequate, and its interpretation often generates controversies in some respects. The study critically examined the power of the mortgagee to sale vis-a-vis land management in Nigeria, the restrictive definition of a holder, mandatory, costly and time consuming consent, dreadful revocation of the provision of section 28, discriminatory compensation, resettlement without compensation, non-transferability of non-urban land, the problem of land accessibility for security, problems of access to land in Nigeria under the act for security, problem of land availability under the act for security, problems of land affordability under the act for security, increased scarcity of land and escalating prices, implications of inadequate access to land for security, inefficient use of land resources, inequitable distribution of wealth worsening housing conditions, environmental degradation, poverty accentuation, regional imbalances in economic development. The study finally made recommendations that will accommodate the interest of the mortgagee/lender when the market goes dry. It was further observed that the consent provision in the Land Use Act and clauses on revocation, compensation and settlement were impediments to mortgage transactions in Nigeria as there were no such laws that constitute impediments to mortgage transaction in United Kingdom and India and recommended their removal.

Keywords: Mortgagee, Power of Sale, Land management, Nigeria

1. Introduction

Before the Land Use Act was promulgated in 1978, there was serious agitation, protests and criticisms because the laws relating to land right in Nigeria did not guarantee title to land. There was difficulty in getting access to land for both private and public use. Also, cost of land was prohibitive as a result of the nefarious activities of land speculators.[1] Consequently, the Act came into existence and has continued to be apex statute regulating all transactions relating to land matters in Nigeria. However, section 9 of the Act, creates the first major problem on the issue of title. Section 9(1)(c) provides that 'it shall be lawful for the Governor when any person is entitled, to issue a certificate under his hand in evidence of such Right of Occupancy.' From the language and wordings of this section, it is clear that the Act, merely says that Certificate of Occupancy 'evidences' not 'creates' title in land. Ogundare, JCA (as he then was) in *Chiroma v. Suwa*[2]says that 'a Certificate of Occupancy' 'creates' a term of years absolute for the number of years stated.' The same observation was made in the case of *Daturunbu v. Adene and Others.*[3] With respect, his Lordships' statements in both cases cannot be supported by any statutory provision.

Certificate of Occupancy only evidences title to or interest in land. As a document, the holder has occupationary right; not title. How safe is it for a lender to accept document that does not confer title? Since the Governor, by virtue of *section 28*[4] of the Act can revoke any Certificate of Occupancy, what, worth or value is the document if used as security for advances? Assuming that the Certificate of Occupancy used as collateral for advances has been revoked, the only remedy opens to the lender, being the holder of revoked Certificate of Occupancy is to claim compensation from the Governor by virtue of *section 29* of the Act. Where the compensation is payable, the question is, would the compensation payable be enough to satisfy the principal sum and the accrued interest? All these are the major problems likely to be encountered by a lender that accepts Certificate of Occupancy as collateral or security for advances.

Assuming that there is a defect in the land upon which Certificate of Occupancy is issued, automatically, the holder has a defective Certificate. He cannot use it for any reasonable transaction. If, however, such Certificate is given as collateral to an unsuspecting lender who has not taken time to conduct proper investigation into the genuineness and propriety of the Certificate, such Certificate issued, though, by the Governor, can never cure or validate such defects, as the maxim, *nemo dat quod non habet* will apply.

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[1] Smith I.O. *op. cit* p. 58
[2] (1986) 1 NWLR (Pt. 19) 751, 756
[3] (1986) 4 NWLR (Pt. 65) 314 at 322, 326
[4] *Section 28(1)* provides that it shall be lawful for the Governor to revoke Right of Occupancy for overriding public interests.

The Supreme Court in the case of *Ogunleye v. Oni*[5] has laid to rest, permanently, the occupancy surrounding the issuance of Certificate of Occupancy in respect of land upon which the holder has no title to in the first instance and upon which an adverse claimant has a better title. In this regard, it has been observed that where a Certificate of Occupancy has been granted to one of the claimants who has not proved a better title, then it has been granted against the letters and spirit of the Land Use Act. Thus, the Certificate of Occupancy issued in respect of a parcel of land cannot stop the Court from enquiring into the validity and existence of the title that the person claimed to possess before the issue of the Certificate

Flowing from the foregoing, where a borrower's Certificate of Occupancy is set aside by the Court as a result of any defect, the lender holding such Certificate is believed to be in possession of a worthless piece of paper. All that the grantee now has in mind is a piece of paper having no value.[6] The Act itself makes adequate provision granting Certificate of Occupancy and cautions the Governor on the need to be very sure that the person to whom the Certified is issued is the person entitled to a Right of Occupancy to the land concerned. Where the Governor, mistakenly or wrongfully granted the Certificate of Occupancy to someone who is not entitled to it, the Supreme Court has iterated that such Certificate of Occupancy will be revoked or set aside by the Court of competent jurisdiction. This was the main verdict of the Supreme Court in *Ogunleye v. Oni.*[7] A word is enough for the wise. Hence, 'to pretend that banks and other financial institutions are unaware of the precariousness of the certificate of occupancy as security, will be foolhardy.'[8] Appreciating the maxim, *nemo dat quod non habet* as being a fundamental principle of Conveyance Law in Nigeria, it has been said that 'this is the maxim on which security of title to land is built and cannot be faulted. It also follows from our discussion so far, that a Certificate of Occupancy is particularly precarious, as security for bank advances.[9]

2. Restrictive Definition of a Holder

The use of a Right of Occupancy as security seems dangerous in view of the provisions contained in the Land Use Act, *Section 50* provides inter alia a '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 a holder but does not include any person to whom a Right of Occupancy has been sold or transferred with a valid assignment, nor a mortgagee, sub lessee or sub-under lessee.' This definition is not only unclear but confusing. If a holder does not mean a person to whom a Right of Occupancy has been sold or mortgaged, it means a Right of Occupancy is of limited value. This is because by *section 29* of the Act, only a holder or occupier is entitled to receive compensation payable on the unexhausted improvement at the date of revocation. The provisions of the Act, seem not to guarantee the essence of a security, which is the insurance taken by any prudent lender against the risk of non-payment to a mortgagee who advances his money to a borrower upon the security of a Right of Occupancy. Indeed, the Act, inhibits mortgage as a form of credit transaction.

3. Mandatory, Costly and Time-Consuming Consent

Section 22 of the Act provides inter alia:[10] 'It shall not be lawful for the holder of statutory Right of Occupancy granted by the Military Governor to alienate his Right of Occupancy or any part thereof by assignment, mortgage, transfer of possession sub-lease or otherwise howsoever without the consent of the Military Governor first had an obtained.[11] Failure to comply with this provision was held to have the effect of denying a mortgagee his most potent remedy in case of default by the mortgagor by rendering the mortgage transaction to be of no effect.[12]

4. Dreadful Revocation Section 28

The precarious position of a mortgagee is further compounded by *section 28* of the Act which gives the Governor power to revoke a Right of Occupancy for overriding public interest. It is also provided that the Right of Occupancy is to be revoked by the Military Governor upon request by the Federal Military Governor for public purposes. By *sub-section 5 of section 28* a statutory Right of Occupancy could also be revoked on the ground of a breach of any of the provision which a certificate of occupancy could also be revoked on the ground of a breach of any of the provision which a certificate of occupancy is by section 10 deemed to contain, or in any special contract made under section 8 or a refusal or neglect to accept and pay for a certificate which was issued in evidence of a Right of occupancy but has been cancelled by the Military Governor under sub-section (3) of section

[5] (1991) 6 NWLR (Pt. 195) 121, 126
[6] Per Belgore, JSC in *Ogundare v. Oni Supra*
[7] Ibid
[8] Ibid
[9] Ibid
[10] See also section 21 which dealt with Customary Right of Occupancy. See Adeoye, P.O., 'The Use of Right of Occupancy as Security for Advances-A Caveat', *ibid* p. 17
[11] Per lord Scott in *Horn v. Sunderland Corporation Ltd* (1941) 2 K.B 26 at 40
[12] That was in the case of *Savannah Bank of Nigeria Ltd. & Anor v. Ajilo & Anor.* (1989*)* 1 NWLR (PT 97) 305

10. It is to be realized that where such revocation takes place, the banker whose interest is at stake will have to depend on the alternate way of compensating the holder or the Right of Occupancy revoked.

5. Discriminatory Compensation

Section 29 provides that compensation will be paid to the holder of the Right of occupancy acquired by the State or Federal Government for public purposes and as well for mining purposes. It further states that the beneficiary of the compensation will be the holder of the Right of Occupancy or occupier. However, no mention was made of the position of a mortgagee whom the holder has transferred his right to for the purpose of securing bank advances. The word compensation almost in itself carried the corollary that the loss to the owner must be made completely to him, on the ground that unless he received a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice. Of great interest and concern to this writer however, is the fact that it is not in all cases of revocation that compensation is to be paid to the holder of the Right of Occupancy revoked by the Governor.[13] For instance, revocation carried out under *section 28 paragraph (a) of sub-section 2* and paragraph (d) of sub-section 3 does not attract compensation from revoking authorities. Also, the Act makes no provision for compensation in cases of revocation under *section 28(4) and (5).* It is to be noted that only the holder of the Right of Occupancy, not a creditor of the holder, is entitled to receive notice of the revocation which extinguished, or receipt by him, his title to the Right of Occupancy. The revocation of the Right of Occupancy destroys the subject matter upon which the security is based. Since no compensation is payable, the mortgagee has nothing to fall back upon, save the mere promise of the mortgagor to repay, once the Right of Occupancy is revoked under these grounds.

It may be argued that the mortgage transaction is secured on the improvement on the land, and not the land itself, since by section 1 of the Act, all land within the territory of a state has been vested in the Governor of that state. It is obvious however that the legal signification of the land connotes not just the surface of the soil but also the sub-adjacent and the super adjacent.[14] This is confirmed by the legal maxim *quic quid plantatur solo solo cedit*. Thus, for purpose of any meaningful mortgage, the land cannot be severed from the improvement.[15] It is equally interesting, to note, that *section 15* of the Act which guarantees the holder's right in the improvement may only suggest the contrary. It is clear, however, that to mortgage a mere Right of Occupancy *simpliciter* without any development on the land is perilous when the Right of Occupancy is revoked. This is because no compensation is payable upon a revocation of a bare right to occupy. Compensation is payable for unexhausted improvement on the land at the date of revocation.[16]

The mortgagee seems not to be in a stronger position even where compensation as is payable is only for the unexhausted improvements on the land. This may not be adequate compared to the value of the land, which was the subject of the transaction. Secondly, it appears that the mortgagee has no automatic right to claim the compensation money payable to the holder or occupier of the Right of Occupancy. This is because *section 50* specifically excludes a mortgagee or creditor from the definition of a holder. The question then is, whether the mortgage attaches to the compensation receivable in respect of the unexhausted improvement. There is no known Nigerian case on this yet. But the East African case of *Manyara Estates Limited v. National Development Credit Agency*[17] is instructive. In an action brought by four unsecured creditors of the mortgagor for a declaration to determine the application of the compensation payment, it was held that the charge created by the mortgage did not attach to the compensation into which the Right of Occupancy had been converted. That the mortgagee was not in the position of the occupier or the holder[18] and therefore was not entitled to receive the compensation. The court further held that the equitable doctrine of tracing is not applicable to the ordinary relationship of mortgagor and mortgagee. Consequently, the mortgagee became an unsecured creditor who has to join the queue in order to mitigate his loss. The reasoning upon which the decision of the court is based in this case is suspect for a number of reasons. Firstly, the court rejected the applicability of the equitable doctrine of conversion on the lame excuse that if any conversion took place at all, it was a conversion of the unexhausted improvements and not the Right of Occupancy. As Law J.A. said 'the security in each case was the Right of Occupancy and when the Right of occupancy was revoked, the security was destroyed.'[19] By this, an artificial distinction was drawn between the Right of Occupancy and the improvement on it. In my own view, a Right of Occupancy is of little or no use

[13] See section 29(1) & (2)
[14] See C.O Olawoye, title to Land in Nigeria (1974) p.9; section 3 of the *Interpretation Act, Laws of the Federation 1964.*
[15] See *Baillie & Ors v. Offiong & Ors* 5 NIR 29; *Francis v. Ibitoye, Ezeani v. Ejidike* (1964) 1 All NLR 402*; Oso v. Olayioye* (1966) NMLR 329; *Otagbolu v. Okeluwa* (1981) 6-7 SC 99
[16] *Section 29 of the Act.*
[17] *Section 29(1) and (2)* of the Land Use Act. Compensation is payable to the holder and occupier. The mortgagee is neither the holder of the Right of Occupancy nor the occupier of the land, section 50 of the Act.
[18] (1970) E.A 177 at 2183
[19] (1970) E.A. 177 at 2183

without improvement on it, hence no compensation is payable upon revocation of a bare Right of Occupancy.[20] The improvement also does not exist without the right of occupy. One concept is valueless without the other. It is submitted that the approach of the court in this case will not help, rather the Right of occupancy should be seen as clearly inseparable from the improvement, so that the compensation payable for the unexhausted improvement could be attached. It is a principle of law that a right of the owner of a property generally, and therefore of one who has a pledge or other security thereon, is not destroyed by a mere transmutation of its subject matter into a different form without his assent.[21] This approach, it is submitted, is not without statutory support. Section 63(1) of the Conveyancing Act,[22] provides: 'Every conveyance shall by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.'

The effect of this section is that every conveyance shall pass all the estates and interest of the vendor to the purchaser, and this includes receiving the compensation money. In the same vein, the mortgagee of a Right of Occupancy should be entitled to claim the compensation payable on the unexhausted improvement when the subject matter is resolved since a mortgage is also a conveyance of interest in property.[23] The cases on compulsory acquisition of land by government provide a useful analogy. In *Chairman, L.E.D.B v. Adeshina*,[24] the Supreme Court accepted this argument as a record proposition of law though it was held inapplicable to the case before it. In that case, counsel for one of the applicants for compensation sought to argue that anybody who could trace his title to the owner of the land stood for purposes of entitlement in the shoes of the owner and that the court should treat the conveyance of such title as if it was an assignment of the interest of the party conveying at the vesting date. Lewis, JSC in reply to this said: 'As a general proposition of law that submission may be correct, but its application must depend upon the evidence available for consideration and we do not think that such a proposition can apply in this case.'[25]

In the light of the above, the minority view of *Duffs V.P.* in Manyara Estates case commends itself to this study and should be accepted as a correct proposition of law. He said:

> Compensation is always attached to the Right of Occupancy and is one of the conditions under which the tenure of right of occupancy is created. It is part of the title of the owner of Right of Occupancy; it passes with the title if he sells his Right of occupancy and in my view, it must also pass with the title which he gives his mortgagee when he borrows money.[26]

This is certainty the most equitable and logical view, otherwise the mortgagee's security over a Right of Occupancy would be of little value, as a dishonest mortgagor could cause the Governor to forfeit his Right of Occupancy and then collect his compensation for the value of the 'unexhausted improvement' and then as in Manyara Estate's case, abandon the scene to the detriment of the mortgagee, even though the mortgagor might have used the entire loan covered by the mortgage to carry out the very 'unexhausted improvements' on the land for which the mortgagor has collected the compensation.

6. Resettlement without Compensation

Another problematic provision of the Act which undermines the security efficacy of a Right of Occupancy is *section 33*. Subsection 1 of the section provides that 'where a Right of occupancy in respect of any developed land on which a residential building has been erected is revoked under this Act, the Governor or the local Government, as the case may be, may in his or its discretion offer in lieu of compensation payable in accordance with the provisions of this Act resettlement in any other place or area by way of a reasonable alternative accommodation if appropriate in the circumstance.' In *sub-section 3*, it was provided that 'where the person accepts a resettlement, his right to compensation shall be deemed to have been duly satisfied and no compensation shall be payable to such person.' The effect of these provisions, in my view, diminishes the value of a Right of occupancy as security, where it is revoked and the holder/mortgagor accepts the option of resettlement. This is because it renders the effort of the creditor to retrieve the advance improbable without the co-operation of the mortgagor to substitute the property for the revoked one. However, the principle of transmutation[27] may permit

[20] Section 29 of the Act
[21] See Fisher and Lightwood: Law of Mortgages, *op cit* 3
[22] See Conveyancing Act 1881
[23] Linley M.R. in *Santley v. Wilde* supra, see also Cheshire's Modern law of Property (12th Edn) 637
[24] (1969) All NLR page 118
[25] (1969) 1 All NLR 118, 123.
[26] (1970) E.A. 117 at 190
[27] Omotola J.A. 'The Mortgagee's Power of Sale: hammer or Illusion' (1980) vol. 18, *Nigeria Bar Journal, p. 104*; I.A. Umezulike

the mortgagee to lay claim to property offered in place of the one which is the actual subject of the transaction. The provision of the Act contained in *subsection 2 of the section 33* is also to be noted. The subsection says that where the value of the alternative accommodation provided for the person whose Right of occupancy had been revoked is higher than the one revoked, the balance will be converted into a loan which the person affected shall refund or repay to the government. The clear meaning of this provision is that where such a revoked Right of occupancy is the subject of a mortgage transaction, the creditor may have to pay off the loan to the government before realizing the security, especially where the mortgagor decides not to settle the difference in the value of the two properties.

7. Non-Transferability of Non-Urban Land

The most sever constraint on the use of a Right of Occupancy as security is that imposed by the provision of *section 36(5).* The section provides: 'No land to which this section applies shall be subdivided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested as aforesaid.' This section prohibits any form of alienation with respect to this Right of occupancy. It is to be noted however, that it is only the deemed customary Right of Occupancy that is caught by this prohibition. The customary Right of Occupancy granted by the local government under section 6 of the Act which makes the consent of the local government a requirement for a valid alienation. Section 36(5) stands in the way of meaningful development of the non-urban sector of the economy, since capital formation by the mortgage of customary Right of occupancy is impossible. The research makes a case for the recognition of traditional rulers as guarantors for such transfer and mandatory notice given to them if the transfer of customary Right of occupancy is for mortgage. Apparently, in view of the effect of the section, some state governments have taken steps to circumvent the difficulty posed by this section. In Lagos State for example, an Edict[28] establishing the Lagos State Agricultural Land Holdings Authority was passed. The object[29] of this Edict, as stated, is to accelerate development of agriculture in the state through the grant or allocation for agricultural land to successful applicant for agricultural purposes and to encourage any person granted or allocated agricultural land to improve same. Of great import, however, to this writer is the provision contained in *section 22(1) (c).* It provides: '…that the allottee shall not mortgage, sublease, assign or alienate in any way his interest in the agricultural land holdings without first obtaining the previous written consent of the Military Governor but in the case of a foreclosure, the mortgagor shall be entitled to the excess of the amount borrowed on realization of the value of the foreclosed interest.' The Edict not only makes land accessible for farming purposes, it also permits the allottee to mortgage same in order to obtain the necessary finance for agricultural development, subject to a qualified covenant which makes the consent of the Governor a requirement of a valid alienation.

8. The Problem of Land Accessibility for Security

The fact that land is not freely accessible to many makes it difficult for those wishing to borrow money with land as security in business transactions. Access to land is a function of physical, economic, social, institutional and contextual factors. Physical factors determine the quantity and quality of land available.[30] Economic factors dictate market conditions for acquisition which includes demand and supply interface, the price mechanism, extent of competition and availability of finance. Institutional factors regulate the mechanism for exchange, use and development while the socio-cultural factors are instrumental in shaping the land tenure system under which rights in land may be held and secured. Accessibility essentially comprises four elements namely, availability,[31] affordability,[32] security of tenure[33] and ease of transaction.[34] Existing tenure patterns and private interests rarely harmonize with social priorities.[35] As a result, land may be physically available and yet not accessible due to exclusivity of ownership rights. What matters then is not how much land is physically available at any given time but how much of it is not available because of obstacles to development.[36] Also available and affordable land may

[28] Edict No. 18, 1986. Similar Provisions exist in Agricultural Credit Guarantee Scheme Fund Decree No. 20 which has been properly discussed by I.O Smith, 'The Efficiency of Agricultural Charge as a form of Security', *Business and property Law Journal* (1996) vol. 2 No. 10 p. 69

[29] See *section 3* of the Edict

[30] See M.M. Omirin, 'Land Accessibility and low Income House Building Activity in Lagos Metropolitan Area,*' The Lagos Journal of Environmental Studies (1998) pp. 76-91.*

[31] This connotes the ready supply of suitable and usable land.

[32] This means the convenience with which the cost of the available land can be paid without undue financial strain.

[33] This connotes the certainty of the right to land, i.e. assurance that the possession, occupation, development and use of land will be free from intrusion, conflicting claims, disturbance and sudden loss.

[34] This is the process of acquisition which must be without such difficulty as may arise from lack of information, unwidely and costly procedures, protracted negotiations or delayed certification.

[35] *Mathew K,* 'The Sadinista Approach to Housing,' *Habitat International* (1987) vol. 13(3) pp. 139-155.

[36] Nicholls et al, 'Private Housing Development Process- A Case Study' Consultancy Report prepared for the Department of Environment, U.K (1980) p. 1-10

be legally insecure due to indeterminate titling arising from disputes over ownership or as a result of the threat of compulsory acquisition. This constitutes a great obstacle to the use of land as security.

Further, available land with good titles may be difficult to obtain due to transactional obstacles leading to undue delays or additional expenses. In the past, efforts to address land accessibility problems have tended to concentrate on one element to the exclusion of all the others. As a result, problems have persisted and intervention measures have had little impact. All four elements are interrelated and interdependent and should therefore not be treated in isolation. Market constraints to land accessibility normally arise from the nature of land as an economic good. Land is compulsory not only for housing but also for a variety of other productive activities. Yet its supply is physically fixed and there is no substitute except in so far as it is possible to expand the use of land vertically. As a result, competition for land is intense in urban areas. Secondly, its scarcity gives it high value so that demand for land transcends its use value to include its placement value. Especially in developing countries where other forms of profitable investment are few, land is sought not only as a status symbol but also as a repository of capital accumulated from other economic activities.[37] This is one of the reasons why land speculation is usually rife in peri-urban areas where urban expansion is dynamic. Furthermore, the housing industry is emotionally and financially sensitive to land prices since the decision to buy land is the most crucial in the housing development process.[38] In fact, land determines the form in which housing is offered as a commodity for consumption. Its location, size and planning status dictate directly or indirectly the form, size and market orientation of the final product. This affects its use as security.

Another major source or difficulty is the regulatory environment determining tenure and exchange of patters. The UN-Habitat Conference of 1976 in Vancouver, Canada, recommended public land management and control as the surest way of ensuring efficient and equitable distribution of land resources.
Public land management is expected to, among other things:

a. Guarantee equitable distribution of land rights on basis of non-commercial criteria;
b. Empower government to ensure a more judicious, orderly and healthy development of urban areas;
c. Guarantee cheaper and easier access to land for both public and private land development;
d. Curb speculation which was believed to be the main cause for escalating land prices in the periphery.

These expectations are based on unrealistic assumptions of neutrality, altruism and freedom from political manipulation, clientelism and corruption among officials in charge. However, it is these ignored factors that constitute the bane of land accessibility under systems of public land ownership and control such as operates in Nigeria.

9. Problems of Access to Land in Nigeria under the Act for Security

Access to land in Nigeria is affected by the operation of the *Land Use Act of 1978*. The principal aim of the Act was to make land more accessible for both public and private use. However, its operation so far seems to have created more of a bottleneck. Details of the provisions of the Land Use Act and their implications have been critically examined in the literature[39] and need not be repeated here. Under section 1 of the Act, all land in each state is vested in the State Governor to be held in trust and administered for the common benefit of all Nigerians. This divested not only private land owners of their freehold rights but also stripped traditional land management institutions and community leaders of their benefit of control over family and communal land.[40] The vesting of land in State Governors was meant to minimize the tradition of vesting communal land in local rulers to be held in trust for the members of the community. The extensive powers of control granted to the State Governors could, if appropriately applied, guarantee land availability to all citizens on the basis of non-market criteria using the bureaucratic land allocation machinery. Unfortunately, these powers are ineffective and for the most part inappropriately applied, hence an obstacle to its use even for security purposes.

10. Problem of Land Availability under the Act for Security

Section 34(5) of the Act empowers state governments to extinguish all private rights in individuals underdeveloped land holdings in excess of 0.5 hectares and take them over without compensation for public

[37] McAuslan, P. 'Law and Urban Development: Impediments to Reform Cities, Vol. 11(6) pp. 402-408
[38] Drewett R., 'Land Values and Sub-Urban Markets' in Hall, p et al (eds), The Curtailment of urban England, London: George Allen and Unwin, (1973) p. 65
[39] Omot*ola,* J.A, op cit, pp 8-16; Fekumo J.F. 'The Land Market under the Land Use Act' *The Gravitas Review of Business and Property Law* (1989) vol. 2(8) pp. 22-29; Odunlami, Land Use Policy Effectiveness: the case for Nigeria, Unpublished Ph.D Dissertation submitted to the Department of Land Economy, University of Cambridge (1987); Umezurike, the Land Use Decree 1978.
[40] Udo R.K, The Land Nationalization Policy of Nigeria- Research Report, Development Policy centre, Ibadan, Nigeria (1999)

purposes including redistribution. *Section 28 and 29* also provide for revocation of previously granted statutory rights of occupancy with minimal compensation. These provisions gave the government cheap control of much land but the allocation criteria are so exclusionary as to provide access to only a very small proportion of upper income carners particularly the educated elite, the politically influential and military personnel.[41] It is recorded that over 92% of the best residential land in the government residential estate of Apapa, Lagos were held by just 22% of the upper income earners in the area. Ultimately, the direct implication of the situation is that land is taken with little or no compensation from the poor and allocated to the relatively rich, a serious misplacement of subsidies. Hence majority of people wishing to borrow money using land as security cannot find any. Even for prospective land users who meet the allocation criteria obtaining an allocation is difficult due to the fact that land is released in trickles compared to the number of applications. For example, in Lagos State a performance rate less than 35% of actual allocation was the average between 1980 and 1991, part of this situation is explained by the difficulty the Lands Department has had in taking possession of all the vacant land due to the lack of a cadastral record of land holdings. The procedure for land allocation is inequitable, fraught with delays and provides opportunity for officials in charge to seek graft. As a result, most prospective land users resort to the informal and illegal land market. Under section 22, the Act outlaws all private transactions including sales, assignments and even mortgages carried out without the written consent of the State Governor. Because of the process of obtaining consent is so long, several transactions remain unapproved and are therefore irregular. The ensuring interests in land remain undocumented thus preventing their holders from being able to use them as collaterals for loans from banks for investment purposes.

11. Problems of Land Affordability under the Act for Security

As aforementioned, although official allocations are relatively cheaper, they are inaccessible to most urban dwellers. Private transactions to which the majority is confined are rendered more expensive by certain factors which indirectly affect their ability to use land as collateral.

12. Increased Scarcity of Land and Escalating Prices

Since 1996, the market prices of land closest to the urban periphery in Lagos have risen astronomically-up to 2000% due to increasing scarcity in the face of growing demand[42] much of the increase is due to the intensifying competition between churches seeking land for expansion, industrial establishments and formal sector staff unions seeking land to establish home ownership schemes for their members. The proliferation of such participants in the informal private land market reveals the extent to which there is decreased confidence in State allocation mechanisms.

13. The requirements for consent for the transfer of rights of occupancy[43]

Presently, consent fees are charged at 10% of the value of the transferred property. The fact that assessment is done by the bureaucrats potentially adds to the costs as unscrupulous ones among them have been known to seize the opportunity to take bribes. Although, the onus is on the vendor to seek consent, it is the purchaser or assignee that bears the cost.

The activities of unscrupulous land owning families and land touts that engage either in multiple sales of land or insist on double payments. The lack of proper land records and failure to regularize illegal transactions contributes greatly to this. Small and medium scale industries policy of the present government may be hampered if the banks cannot be given adequate security for the loans.

14. Implications of Inadequate Access to land for Security

The negative effect of inadequate and inequitable access to land in Nigeria which constitutes a clog to secured credit transactions are:

Inefficient Use of Land Resources

Government land in prime areas is allocated on generous terms (1000 sq.m. 2000 sq.m. per plot) to relatively few usually for low density development. The low-density development standards engender much wastage as cost of servicing land per capita is relatively higher. Moreover, such standards encourage lateral expansion and inefficient land usage as fewer persons are accommodated per unit area while the rest of the public is confined to overcrowded and unplanned sections of the cities,[44] and this greatly hampers their usage for security.

[41] Agboola, 'The Housing in Nigeria: A Review of Policy Development and Implementation' –Research Report No. 14, Development Policy Centre, Ibadan, Nigeria (1998) p. 1

[42] Abiodun, J.O, 'Challenge of Growth of Metropolitan Lagos' in Rakodi: The urban Challenge in Africa, growth and Management of Large cites, Tokyo, New York and paris-The United Nations University Press (1997) 1-20

[43] Section 22 of the Land Use Act 1978. *Savannah Bank of Nigeria limited v. Ajilo Supra.*

[44] Adenji Adele, 'The problem with Lekki-Ajah Lagos,' Homes and property Guide Magazine published by B. Gold Communications, 44B Ajanaku Street, off Salvation Road, Opebi Ikeja Lagos, april 2004, p. 8.

Inequitable Distribution of Wealth
Land in government layouts are in prime locations and are relatively well laid out and serviced. They command a higher value per unit area, which tends to escalate with demand even though ground rents paid are relatively low and remain static. As such, they offer high profit margins upon disposal. This accentuates their attractiveness and it is not unknown for bureaucrats to speculate on them for personal gain. Their allottees are also enriched at the expenses of the tax paying majority to whom such privileges are unavailable and sometimes against the interest of the original owners of the property that were compulsorily acquired.[45]

Worsening Housing Conditions
The shortage of decent housing is worsening especially in the low income sector due to difficulties of securing cheap land legally in good areas for construction purposes. Lack of legal titles prevents improvement in construction and all over there is excessive overcrowding and high rental charges. Although some State government including Lagos are now providing land to speculative house building companies, costs of such land still limits the extent to which they can provide homes affordable to the vast majority of urban dwellers.

Environmental Degradation
Because a vast majority is confined to marginal areas without services or infrastructure, cites in Nigeria possess a predominant squalid outlook, sums have proliferated and city dwellers are forced to provide inefficient solutions to their refuse disposal, water supply and other needs.

Poverty Accentuation
Access to land provides a sure means of poverty alleviation. The present situation forces majority of urban dwellers to remain in abject poverty due to lack of legal titles for securing loans for investment either in construction of durable shelters or purchase of equipment of equipment for economic pursuits.

Regional Imbalances in Economic Development
The Land Use Act permits overgenerous limits to individual land holdings in rural areas.[46] Whereas urban dwellers cannot hold more than 0.5 hectares of land, an individual in rural areas can be allocated 500 hectares for farming purposes and up to 5000 hectares for grazing. This divests several traditional farmers of their means of livelihood forcing them to migrate to the cities to seek other means of employment.

From the foregoing, the ultimate solution lies in a deregulation of land in Nigeria. The process of deregulation demands a removal of present regulations and unnecessary intervention that constitute constraints to free operation of the land market. This is imperative in a country like Nigeria, where socialist oriented land market intervention has been used in an otherwise capitalistic environment.

15. Conclusion and Recommendations
In the light of the foregoing, this research comes to the conclusion that lending and secured financing in Nigeria can only thrive when there are good laws that will protect both the lenders and the borrowers. But that the present state of less than one percent of three hundred Nigerian firms having access to credit according to a survey cites in this work, under 'summary of related literature, 'is a logical outcome of the unsatisfactory legal framework of secured lending in Nigeria-typified by the mortgage laws of Rivers State and in some respects of Lagos State. And until the legal framework as it stands in Nigeria is overhauled and streamed-lined to drive economic activities and allow MSME's the benefit of borrowing with their movable assets, including after-acquired or future assets in line with global trends (without the normal pressure of producing real property) Nigeria will remain in the muck and mire of unsatisfactory and deficient secured lending system. In the light of the foregoing, the following recommendations are offered as solutions to the festering challenges confronting the advancement of mortgage transactions in Nigeria.

a. The study recommends that the Act which has caused more pains to mortgages following its suffocating provisions and a hydra of court judgments pointing in many directions requires fundamental amendments. But first, there is the need to extricate the Act from the stronghold of the Constitution of the Federal Republic of Nigeria, 1999 which by virtue of *sections 315(5) and 9(2)* fastens the amendment or alteration of the Act to a rigid constitutional amendment procedure. When this is achieved, it is expected that the National Assembly will be positioned to consider and alter with less effort provisions such as the 'consent,' 'revocation and compensation provisions which has brought hardship, complexities and cost implications upon parties to mortgage lending transactions. It is proposed that any amendment

[45] Tunde Otubu: Land Use Act and Housing in Nigeria- Problems and Prospects,' The Land Use Act Twenty Five Years After. A publication of the Department of private and property Law, University of Lagos, by I.O. Smith (ed) 2003 p. 363.
[46] *Kasali v. Lawal* (1986) 3 NWLR (Pt. 28) p. 308

done on Land Use Act must be premised on the clear consideration of mortgage lending being an economic tool that should not be unreasonably gagged by government interference and control through laws that increase the legal risks in such transactions.

b. The study recommends secured lending laws in Nigeria such as the Conveyancing Act 1881 and the Bills of Sale laws should remain streamlined as they are presently according to real and personal property. However, it is proposed that States like Rivers State must repeal the secured-lending laws on real and personal property, specifically the *Conveyancing Act 1881 and the Bill of Sales Law of Rivers State* 1999 to meet emerging complex property rights and interest, by replacing them with modern and well-developed body of commercially-minded law which provisions will be harmonized with a federal law on the subject where one already exist. What is being proposed here should be similar with the operations of the Article 9-UCC in the US; contrary to the misconception that the existence of the Article 9-UCC is a federal US law that meant the absence of local state laws on moveable property in the US. It is misconceived to consider the Article 9-UCC as a federal law and product of the US Congress mandatorily applicable in all the States of the US. In reality, the Article 9-UCC is a product of the National Conference of Commissioners on Uniform State Laws, American Bar Association and the American Law Institute. The code becomes law only in States that first adopted its provision and then formally enacts it as State laws. Instructively, whereas generally all fifty states in the US have adopted and enacted Article 9-UCC as State laws, some state enacted only parts or sections of it as law.

c. The establishment of the National Collateral Registry for moveable properties under the STMAA is indeed a wonderful idea good for secured lending transactions in Nigeria. This is particularly because the NCR is expected to operate an automated system capable of interfacing with other registries established by the National Assembly for the purpose of ensuring and guaranteeing that those registries is made accessible through, by, and from the NCR. Hence, it is proposed that in enacting a modern personal property law as suggested in recommendation No. 2 above, states should equally establish a state-based automated personal property registry that can leverage from the interface platform of the NCR. If the establishment and link-up is done by every State, Nigeria would achieve a near-comprehensive personal properties public recording system that will enable real-time electronic search of the register of one State from another. In respect of real property, it is suggested that since it may be difficult for now to achieve a single registry for all lands in Nigeria, mainly due to the complex land tenure systems and the equivocal provisions of Land Use Act in respect of deemed rights for instance, states governments are advised to establish reliable electronic database of landed properties within its territory that can be accessed from anywhere in the world at a minimum cost. Undoubtedly, the longtime economic benefits of such registries for States will surpass any investment to establish such registries; and the net effect of this would, logically, be a reliable and more secured business environment capable of supporting the sought-after economic diversification of Nigeria.

d. This study establishes that the cost of perfecting a mortgage from obtaining consent to registration, from paying consent fees, land taxes to personal income tax, from official payments to kickbacks are enormous, and have rather than make mortgage a useful tool for driving economic development, arrested its development. Therefore, it is recommended that the application of stringent measures with all manners of transactional costs which focuses more on raising revenue for State government than facilitating commercial deals that encourages and grows economy should be discarded. It is envisioned that such state of affairs will reduce the risks associated with mortgages, reduce the cost of credit pricing and potentially increase access to debt capital for businesses; both small and large.

e. A legal system which, besides a number of other statutory enforcement components, does not allow for the judicial enforcement of security interests and resolution of disputes in a timely manner is likely to produce an arrested economy of apprehensive or unwilling lenders and stranded potential borrowers. Drawing from the innovative provisions of the MPL 2010, it is suggested that similar to the current Electoral (Amendment) act, 2010 the legal process for the adjudication of a mortgage matter should be statutorily time bound. In other words, the judiciary should be further mandated through mortgage laws to adjudicate on mortgage issues within a set time. This definitely will invoke a legal process that is expedient; cost effective; less likely to be tainted with corruption; bound to drastically reduce enforcement risks usually associated with credit transactions in Nigeria and bound to increase lenders confidence in issuing credits. In the same vein, settlement of mortgage disputes by means other than court adjudications in commercial relationship deserves full legislative approval in Nigeria. Thus, this research commends the MPL 2010 provision for mediation and arbitration (predicated upon court referral) to all the secured transaction laws in Nigeria already identified as deserving reviews and amendments. However, it is suggested that these laws should move further to expressly provide for alternative means of dispute settlement, particularly arbitration, which can be activated without a court referral system. This should be geared towards meeting the sociological essence of mortgage laws that will sustain mortgagor-commercial relationship even after a dispute. It is believed that arbitration enjoy the advantage of not only circumventing the time-wasting processes and high cost of prosecution associated with adjudications in law courts, but importantly also circumvents the bitter legal duel or disputations that ensue between parties in court suits and the consequent disaster of destroying commercial relationship built over-time.