Negotiations and Legal Documentation Relating to Mortgage Creation in Nigeria

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INTRODUCTION

One of the major problems militating against the provision of comfortable houses and housing delivery in Nigeria over the years is lack of adequate finance. We live in a country where certain things are taken for granted. Many Nigerians have struggled for many years to own houses of their own but could not because of low per capita income and the inability to save the desired amount required to set up a building and place a roof over their head. The Government over the years has also come up with various housing programmes some of which to a very large extent has not impacted on the people.

This work is intended to proffer solution to the lingering housing problem in Nigeria by putting across the importance of mortgage and make a call for a review of the law. The documentations involved in mortgage creation are fully explained. Mortgage creation is a new trend and this is responsible for the attitude of majority of Nigerians towards mortgage. This writer, an expert in mortgage creation has, by this essay, allayed the fears of Nigerians to enter into mortgage agreement and has explained in full the importance and the advantages of mortgage.

WHAT IS A MORTGAGE

Simply and succinctly, a mortgage refers to the Pledge, Assignment or Conveyance of landed property as a security for the payment of a debt or discharge of some financial obligations.[1] Property usually used as security by means of mortgage include land and buildings, stocks and shares, life policies, fixed deposit accounts and other immovable assets. Under a mortgage arrangement, the borrower debtor is known as the Mortgagor, while the lender or creditor e.g. a bank or a primary mortgage institution[2] is called the Mortgagee.

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[1] Okonkwo Onuigbo, Mortgage Finance in Nigeria, Esquire Press and Books Co. Ltd Aba, 1999 at 3

[2] S. 17(2) Mortgage institutions means a mortgage institution licensed under the mortgage institution Act.

In a mortgage arrangement or agreement the possession of the mortgaged asset or property remains with the mortgagor unless he defaults on the repayment and that is when the mortgagee is empowered by law to take the property by receivership or foreclosure[3]. The mortgagee can in law sell the property through an auction or through a private treaty to recoup from the proceeds whatever amount that is an outstanding balance of the loan that has accrued throughout the defaulting period. Mortgages are either legal or equitable.

(i) **LEGAL MORTGAGE-** Under a legal mortgage, the mortgagor enters into a form of contract under seal. It is legal in the sense that the bank (lender or mortgagee) acquires the ability and right to enforce the security without recourse to the court of law by a foreclosure and by appointing a receivership and through an auction sale4. Legal mortgage therefore involve the formal execution of a mortgage deed under seal by which the mortgagor transfers his legal title in the property to the mortgagee, retaining only the equitable right of redemption.

(ii) **EQUITABLE MORTGAGE**:- Equitable mortgage comprises of agreements entered into with any form of security that cannot be perfected legally. It is this perfection of security that gives rise to legal mortgage. This may however mean a mere deposit with the mortgagee of title documents for the preparation of and execution of mortgage deed without the statutory consent[5] or without the basic requirement for stamping and registering the deeds for perfection.

DIFFERENCE BETWEEN THE TWO ABOVE.

The main difference between the two lies in the legal implications. Whereas in legal mortgage, valid legal title vests in the mortgagee throughout the life of the mortgage, even though the mortgagor may retain possession of the mortgage property, the reverse is the case in equitable mortgage where the legal title remains in the mortgagor.

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[3] Nwabueze: Nigerian Land Law (1972) p.290.

[4] S.58(2) Sale of Goods Act 1893 applicable to all the Northern and Eastern States of Nigeria as a Pre 1900 English Statute of General Application.

[5] The right of redemption implies that after repayment of the principal sum of the loan and interest, the mortgagee will execute a deed of release conveying the legal title to the mortgagor to discharge the property from encumbrance

[6] See SS-22-26 Land Use Act 1978.

Banks or Financial Institutions prefer legal mortgage for obvious reasons that they are convenient and less troublesome. The Equitable mortgage creates problems for the Banks or Mortgage Lending institutions[7] in the event of default by the mortgagor in his repayment obligations, for the mortgagee cannot exercise the power of sale to realize his securities without a court order, whereas the right to sell without court order is readily available to the mortgagor in the case of a legal mortgage[8]. Because of this clear business advantage, lending institutions invariably opt to create legal mortgages in preference to equitable mortgages.

This preference is justified by the general delinquent attitude of the average Nigerian borrower who observes his obligations more in breach than in performance and this has accounted immensely to the death or the distressed condition which most lending institutions have found themselves today.

EVOLUTION OF HOUSING FINANCE SYSTEM IN NIGERIA

Housing finance refers to the activities of both private and public sectors in providing financial resources with or without agents and intermediaries for the purchase, construction, improvement or renovation of a housing unit including the immediate infrastructure[9]. This includes the purchase and development of land and the provision of finance for the construction inputs. House finance system is a system whereby, laws, institutions and structures have been put in place to assist and provide loans for the purchase or building of affordable houses by the people. In Nigeria, institutional and non- institutional units have been set up years back for this purpose.

In Nigeria, the Institutional Framework consists of the federal and state owned institutions. The Federal Mortgage Bank of Nigeria

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[7] See, Mortgage Lending means the system of lending money to contributors by mortgage institutions under the Decree or under any regulations made thereunder.

[8] Ibid (8) above.

[9] Okonkwo Onuigbo- Mortgage Finance in Nigeria: Esquire Press and Books Co Ltd Aba 1999 at 3.

(FMBN)[10], The primary mortgage institutions[11]; the National Housing Fund[12]. Above all, there are myriad of other private lending organizations, ranging from Banks, Community Banks and Credit - Finance houses which provide long terms loans for housing delivery in Nigeria.

NEGOTIATION PRIOR TO MORTGAGE CREATION

Where a Lawyer is involved to stand for a client to the Pre-Mortgage negotiations or an individual prospective mortgagor is invited for deliberations or negotiation, the negotiations which look like an interview usually revolve round these areas:

(i) The purpose of the Loan

(ii) The Amount required

(iii) The Affordability

(iv) Interest Rate.

(v) Instalment Rate.

(vi) Source of Income/Repayment.

(vii) The documentation.

Where the prospective mortgagor is an individual seeking for a loan, the issue is different. He has the right to walk to a mortgage or financial institution of his choice or a Bank as the case may be and make inquiries as to the requirements for a mortgage loan. He would be required to approach the mortgage section of the company for discussions or negotiations.

PURPOSE OF THE LOAN

The Mortgage Institution will like to know whether the facility is within the discretionary power of the bank to grant or not. It also enables him to know in the light of the customers business, whether the borrower or the debtor is trying to over reach himself, and whether the object of the loan is in line or not with the national, economic and social objectives as provided by the central monetary authorities and which is communicated to the banks for observance and application. This is because a prospective mortgagor may be asking for a long term loan of five or more years duration which is available not from mortgage institutions but from commercial banks. Mortgage Institutions are specialists in long term lending. The purpose of the loan must be one that is satisfactory from the view

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[10] See S:1 (1) (2); Mortgage Institutions Decree N0. 53 1989

[11] Section 2, mortgage Institutions Decree N0.53, 1989

[12] S. (1) (2) of the National Housing Fund Decree N0. 3, 1992

point of the Mortgage Institution. It must be within the regulatory lending frame work provided by the monetary authorities i.e. the Central Bank or Nigeria.

A Mortgage bank is to be approached for a loan to finance a housing project repayable over 20 years and not to finance a big export or import business which is meat for commercial banks. It is only the Mortgage banks and other specialized Institutions who make such long term financing.

AMOUNT OF LOAN

It is important that careful and realistic cash flow projection be established before loan requests are made and should be presented during negotiations for mortgage. It is important to assess if the Amount being sought is adequate to satisfactorily carry the project or venture. Customers often underestimate their requirements and then find half-way through the project that additional finance is required. It is part of good financial management to budget for cash requirements on a definite basis, that will suffice in completing the project than to eventually request for additional loan.

On the other hand, the would be mortgagor would be assessed with his gross income to find out if he can stand to repay the loan conveniently from his salary after deducting about one third of his salary as repayment rate on monthly basis for a period between 15-20 years or there about. If he can stand the test, due to the level of his income, he can obtain the loan – if he cannot the loan is discouraged unless it is proven that he has other sources of income or he is prepared to reduce the loan amount to a level he can conveniently repay. This is called affordability.

DURATION OF THE LOAN

The aim of the mortgage institution is to retain the energy to lend long term and still remain in operation. To this effect, in their negotiation, they ensure that the loan they offer is long term in nature. This is because of the limitations imposed on the banks ability to mobilize deposit as quickly and massively as the commercial banks. Mortgage lending Institutions a times suffer disadvantages when they tend to borrow short in the money market but traditionally lend long. They must therefore devise a way of mobilizing funds under sustainable arrangements or schemes.

SOURCE OF MONEY FOR REPAYMENT OF THE LOAN

In the negotiation, the mortgage institution will want to ascertain whether the customer has a viable or steady source of income for the repayment of the loan. The main test of the customer's loan request is the ability to repay from sources which must be reasonable, steady, certain and adequate.

No bank or lending institution wants to create a loan that crystallizes into bad debt or that will end up in litigation[13]. The other relevant issue to be discussed is the repayment period or the validity period of the loan. This spreads between 15-25 years, depending on the type of loan. Then the issue of the repayment sum called the instalment payment has to be negotiated because the mortgagor may be required to pay off the interest on such loan before the repayment of the principal loan. Some organizations or lending houses may like to spread the interest on the loan i.e. add the interest on the loan and then calculate the instalment amount on the total of loan plus interest.

The mortgagor may be allowed to choose the option he likes and this should be built into his mortgage agreement. It should be noted that the interest rate is calculated according to the prevailing interest rate in the banks as released by the Central Bank or Nigeria, quarterly, annually or periodically as the case may be.

The repayment of the loan on instalment basis is normally resumed after the moratorium period[14], a grace period when the mortgagor should be warming up and preparing for the repayment of the loan by instalments.

PROFITABILITY OF THE LOAN

At this stage, it is necessary to ask what the lending or mortgage institution gets in return for the loans. These institutions earn a return on the loans /advances made in form of interest charges, legal charges, COT and other ancillary bank charges. Mortgage Institutions

[13] R.K.O Osayameh: Practice of Banking, 1st ed,1997 Vol 2 Chap.1 at 9.

[14] Moratorium period is a period during and after the final disbursement of the loan to a mortgagor. After the final release of the mortgage loan, the mortgagor's first instalment payment is expected.

basically are at a disadvantage in this regard because their rates of interest on Loans/advances are lower than (or equal to) the cost of capital (i.e. in the case of loans from NHF)

Secondly, they have little or no cot and ancillary charges. This is unlike in the case of commercial loans. Loans to manufacturers[15] are the most ideal because they embody prospects of foreign business, local transfers, agency functions, collection of cheques etc; but mortgage institutions do not give loans to manufacturers

LEGAL DOCUMENTATION

In our environment where credit information is very rarely available, or where borrowers positions do sometimes change quickly or where many people have unreliable business integrity, security is normally taken as an additional leverage to the mortgage Institution for his money. Security must always be taken in advance of loan disbursement because experience has shown that most customers turn recalcitrant or uncooperative when funds come within their control.

This explains why only letters of intent are first issued subject to customers agreement to the terms and conditions expressed therein. Usually, the authorized slip for loan drawn down is normally issued on the facility after confirmation from the Legal Department of the Mortgage Institution that the necessary documents have been submitted, perfected and are in the Institution's custody. No banker has ever ignored the issue of security in the lending process. It is in the nature of man to go back on his promise after he has been freed from the emotional, economic and psychological trauma or serfdom imposed on him by lack of funds. The banker is not minded so much about impounding and selling off the customer's property as he is about getting his money back.

This is drummed into the ear of the customer during the negotiation. Bankers also take security because some customers may have ability to pay back but lack the willingness to pay. At the beginning of this work, we emphasized that Banks create legal mortgages instead of Equitable Mortgages. In this respect, banks expect a would be

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[15] Okonkwo Onuigbo, Mortgage Finance in Nigeria, Op.cit, p160.

mortgagor to come up with the security for such loans. The security in this respect may be land and banks always like to know whether the land or the property is a personal property, family land or purchased land.

In whatever case, the issue of land document is referred to the legal section of the Bank or the Mortgage institution[16] whose duty is to investigate the land document to make sure it is free from encumbrances. The mortgage institution will like to know the type of collateral the customer has and whether, with it, the bank will have anything of value to fall back upon in case of default and what will be the bank's position if the plans for repayment fails. Security is normally required by banks more as an insurance against unknown events which may render the proposed loan repayment difficult or impracticable[17].

Before the loan is finally drawn, the mortgage institution is satisfied that the mortgagor has a good security for the loan. This security deposited by the mortgagor must have been inspected and search conducted for verification, for approval or disapproval. The valid title documents are as follows:-

(i) Certificate of Occupancy

(ii) Deed of Assignment

(iii) Lease

(iv) Sub- Lease

(v) Letters of Allocation/ Undertaking

(vi) Power of Attorney.

These are some of the valid title documents which can be deposited at the legal department of a mortgage or financial institution for verification as to their authenticity and genuineness. It is to be noted that a search has to be conducted at the corresponding Land Ministry of a state where the property is situate in case of a lease or a certificate of occupancy.

The purpose of the search is to confirm that the property is free from encumbrance of a third party. Because of the high premium placed on

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[16] Mortgage institution is defined by Decree N0.53 of 1989 as any company licensed to carry on Mortgage business under the Decree is give and mortgage loans and advances for the purchase, construction improvement extension of housing.

[17] Osayameh R.K.O Practice of Banking, 1st ed,1997.Vol 2. Chap.1 at 1.

the property offered as security for mortgage, it is also important to conduct a legal search on the documents submitted to ensure that:-

a) It belongs to the prospective mortgagor.

b) It is free from encumbrance; that is, no other person has any competing or superior title over the property.

Similarly by conducting a thorough search, the mortgagee is put in a proper perspective on the value of the property and its adequacy as security for the loan. As said earlier, the search is conducted at the relevant land registries and at the Corporate Affairs Commission where the land belongs to an incorporated company. For the search, an original copy of the document must be submitted. Note that Letters of Allocation /Undertaking perse are not good title documents. Sometimes, a valid title document may have to be accompanied by a power of Attorney or Letters of Administration or probate.

S.7 read together with S.20[18] makes it an offence for any mortgage Institution to grant a loan or advance to any person without taking adequate security on either an existing real property or the property in respect of which the loan or advance is being granted.

Accordingly, it is an offence for any manager, official or employee of a Mortgage Institution to grant any loan advance or credit facility to any person unless he is authorized in accordance with the rules and regulations of the mortgage institution and after taking adequate security[19].

Prospective Mortgagors are therefore advised to make adequate consultation or negotiations prior to entry into any Mortgage Agreement either by themselves or through their solicitor to avoid running into problems. Also, the mortgage companies and their staff have been warned by the law to beware of creating a bad mortgage because of the legal consequences or carelessness in this regard[20].

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[18] Mortgage Institutions Decree N0.53 1989.

[19] See Mortgage Institutions Decree N0 3 .1992, and 53 of 1989.

[20] SS. 7 and 20 Mortgage Institutions Decree N0.53 1989,

CERTIFICATE OF OCCUPANCY

Because of the nature of this paper, it is pertinent to talk specifically about certificate of occupancy which forms part of the valid title documents needed as security for the creation of mortgage. Where a prospective mortgagor has a land of his own or has purchased a land without a certificate of occupancy, he has to move and secure one to make it easy for him to secure a loan. The procedure for processing applications for certificate of occupancy (C of O) is fairly the same throughout the federation. Depending on whether the applicant is a corporate body or an Individual, the steps to be taken preferably by a lawyer to obtain a certificate of occupancy for a client are as follows:-

PROCESSING OF CERTIFICATE OF OCCUPANCY

a) Obtain Clients brief to process certificate of occupancy over developed or undeveloped real property.

b) Further obtain information from your client on the following

(i) The name of the client / applicant

(ii) Location of the property (whether developed or bare site.)

(iii) Proposed use of property.

(iv) Nature of title (Gift, conveyance, etc.)

c) Then make an application in writing for the forms. This application should be forwarded with a photocopy of the applicant's instrument of title to the Bureau of lands and the Ministry of lands of the relevant state Ministry.

d) The Bureau of lands, after assessing the application shall advice you on the fees payable at this stage which is usually made through designated banks).

e) Obtain and fill the statutory forms

f) Proceed to the High Court Registry to make an oath verifying the information contained in the application

Thereafter, return the completed forms with the following:-

1.For individuals:–

(a) Copy of the receipt of payment for the forms

(b) Copy of the tax clearance certificate of the applicant

(c) 4 passport photographs of the applicant

(d) 6 copies of the survey plan of the property.

2. For Corporate bodies.

In addition to the requirement listed for an individual certificate of occupancy, a corporate body requires to furnish further information as follows:-

(i) Copy of the Memorandum and Articles of Association.

(ii) Copy of the Certificate of Incorporation.

(g) After submission of the application with the requisite documentation, the application goes to the Bureau of lands and if approved proceeds to the Survey department for charting. This is a critical stage in the process and needs a follow up. Essentially, the Survey Department has to determine whether the land does not encroach on any Government acquisition or another person's property and that the survey details are accurate. They also authenticate the enclosed survey plan for purposes of the certificate that will be eventually issued.

(h) When the application returns from the survey Department and is approved, the applicant now pays for publication. This publication is a notice to the general public that the applicant is in the process of obtaining a Certificate of occupancy and provides an opportunity for the Bureau of lands to receive objections from members of the public[21]. Where there are substantiated objections, the processing of the Certificate of occupancy ceases automatically. If however there are no objections 28 days after the publication, the Bureau of Lands will advise the applicant on the Deed fees payable. Once the applicant settles the fees, the C of O. is prepared and forwarded to the Executive Governor for Execution.

In practice, the tight schedules of a State Governor often warrant a fairly long delay before he executes the document. It is therefore necessary to explain this state of affairs to the client even while making efforts as much as possible to facilitate the process. When the signed Certificate is ready, it moves to the Deeds Registrar for registration at the Registry. Thereafter, it is ready for collection and you can collect same and forward to your client who will proceed to the Mortgage Institution of his choice to process for a Loan.

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[21] Juris: Procedure and precedent manual, Law Quest Ltd. Vol. 1 page 66- 67.

TAX CLEARANCE CERTIFICATE

Also, the lender banker or institution is to scrutinize during the negotiation for a loan the tax clearance certificate of the prospective mortgagor for about 3-year duration to ascertain it's genuineness since this is required during the application for Governor's consent to mortgage[22]. It also scrutinizes the Resolution of the Board of Directors to borrow if the application for the loan is from a Limited Liability Company, and the Certificate of Incorporation of the company also has to be presented and scrutinized

CONSENT OF THE GOVERNOR

The Land Use Act of 1978[23], makes it a mandatory precondition to the creation of a mortgage that the consent of the relevant authority must be obtained, otherwise the transaction is void. To this effect, applicants for a Mortgage Loan must apply through the Bureau of Lands just as he did for the C of O. to obtain the consent of the Governor of State for approval to mortgage a piece of Land[24]. The importance of this provision of the Land Use Act is felt at the terminal stage of the Mortgage when the Mortgagee attempts to exercise the power of sale under the Mortgage Deed. Despite the fact that it is the duty of the Mortgagor to procure the statutory consent, his failure nevertheless renders the transaction unenforceable in Law. More over, he can even rely on such fault of his to challenge the sale of his property by the mortgagee in time of default.

The problem encountered here is that the procedure for obtaining the statutory consent in some states is tedious and cumbersome. Because of this, some mortgage institutions therefore undertake to perilously pursue the issue of consent at the behest of the impatient customer to grant and disburse mortgage facilities on the assumption that the consent would come as a matter of time.

But it is to be noted that this method delays the final execution and perfection of the mortgage deed since this cannot be done without the consent attached to the mortgage deed for registration purposes.

A LEASE

Holders of a lease document may also tender it as a security for mortgage. A lease of land means a legal contract between Lessor and

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[22] Section 21-22 Land Use Act 1978.

[23] Juriscope: Procedure and Precedent Manual, 1st ed.2001 Law Quest Ltd. Vol.1 p 66 at 67.

[24] SS: 22-26 Land Use Act 23.ss 22-36 Land Use Act.

Lessee i.e. putting land or property of the former (Lessor) at the disposal of the later (Lessee) usually for a stated period for a stipulated rent, and under specified conditions, the document itself or the period stated.

Under a lease, ownership of property does not pass from lessor to lessee, only possession does. Lease is a form of land or property alienation which in Nigeria, by virtue of the Land Use Act, requires Governor's consent otherwise it will not be used for mortgage agreement and if used will remain null and void25.

ASSIGNMENT OF LEASE

An Assignment is also another document which can be used to apply for a mortgage loan. The parties to an Assignment are the assignor who has assigned to the Assignee who is the Receiver or the grantee. The Assignee of such lease can also assign to other person or persons the interest which he has. When the landlord assigns, he is said to have assigned his reversion.

An Assignment should be distinguished from a sub-lease which also confers or transfers title to land. There is an Assignment when a tenant transfers to some other person either the whole or part of the property which has been let to him for the whole period remaining of the lease. There is also a sub-lease when the tenant himself acting as a landlord, lets to another person the whole part of the promises for some period shorter than the remaining period of the lease but less one day as provided by law26.

In Ogun and Ondo states, a sub-lease is accepted as good collateral for mortgage loans particularly when they are issued by the Governor for state lands through Land Development Corporation of these states and moreso when consent on them are easy to obtain.

The Assignment must be made by a Deed, i.e. a document not only signed by the tenant who is assigning, but also, bearing his seal.

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[25] SS. 21-22 Land Use Act 1978; Also, Uhamber V. A: Power of Attorney and the Requirement for consent in Mortgage News, Edition in house Journal 2001 FMF Ltd. Vol.1 N0.5 at 10

[26] SS. 21-22 Land Use Act 1978 (supra)

POWER OF ATTORNEY

An Applicant for a mortgage loan who has a power of Attorney can also approach a Mortgage Institution with it. Though some institutions frown at it, some accept it whole heartedly. The fear by those who reject it is that the genuiness of its root of title may be shrouded in controversy.

A power of Attorney is a legal document made under seal and evidencing the appointment of an agent over landed property when it becomes necessary for a person to appoint another as his agent, to do acts for him which includes the execution of documents under seal. The appointment of the agent must be made itself under seal i.e. by a deed and the document evidencing or creating the appointment is known as a Power of Attorney. The donee appointed will usually execute all deeds on behalf of his principal by signing the name of the principal, (the Donor.) He may also execute the document in his own name, in which case it will be as fully binding as if it has been executed in the name of the principal.

All the other forms of documents differ from a power of Attorney in one respect by virtue of the Land Use Act 1978[27]. They require the consent of the Governor before they can be registered in the Land Registry but a Power of Attorney does not.

A power of Attorney, even where it is for consideration, is expressed to be irrevocable, and has been treated as not falling within the category of forms of alienation requiring the Governor's consent. It creates groups of rights slightly different from those created by other forms of alienation mentioned above. Some other differences are as follows:-

(a) Whatever rights that are created by a power of Attorney are exercised by the Donee (receiver) of such powers on behalf of the Donor (giver) of such power. This is not applicable to other forms of alienation[28]

(b) In the case of power of Attorney, an agency of sorts arises, where as, the beneficiary of the other forms of alienation exercises the accruable rights for and on behalf of himself without reference to a second person.

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[27] By sections 21 and 22 of the land Use Act, “any alienation of a consent Customary right of occupancy or a statutory right of Occupancy without the of the relevant issuing authority is null and void and of no effect.”

[28] Odetuntua, Niyi- The concept of Tenement Rating Housing Today; Nov. 1992 –page 47.

(c) Whereas, in other forms of alienation, e.g. a lease, mortgage, etc, the original holder retains a reversionary interest in the mortgaged property, which interest automatically reverts to him upon the redemption of the mortgage, a Donee of Power of Attorney for as long as he does not use the Power for Criminal purposes, acquires rights that subsist till the expiration of the original tenure of the leasehold created by the certificate of occupancy in question[29].

THE MORTGAGE DEED

The most important document in the creation of mortgage is the mortgage deed. A mortgage deed is defined as a legally binding agreement under which the mortgagee's interest in the mortgage property is absolutely conveyed to the mortgagee bank/ lender, giving the mortgagee a number of specific remedies without recourse to the court as long as the mortgage remains in force.
The bank/lender must obtain the original title deed which must have been examined to ensure that it is duly registered. The bank /lender makes a draft of the legal mortgage deed for the customer to execute.

In most cases, banks have pre-printed legal mortgage deed forms that require only completion by the borrower and endorsement.
It is to be noted that there is a difference in execution between individual and company. Also, note that illiterate customers must sign or thumb print in the presence of a Magistrate. Each page of the deed must be initialed as a testimony that the customer has understood the contents of the deed and is therefore estopped from pleading non-est factum (ignorance of the facts contained).

A deed of legal mortgage is a registrable instrument within the meaning ascribed to it under the Registration of Instrument Laws of all states of the Federation, being a document affecting land. Therefore, it must be stamped in the Federal Stamp Duties offices (in Lagos or Abuja and registered in the land Registry of the state where the land is situate. Where the charge affects the property of an incorporated company, the deed must, in addition, be registered at the

[29] Uhamber V. A. Power of Attorney and the Requirement for Consent in Mortgage: Mortgage News. (In house journal) FMF Ltd. Op cite page 18

Corporate Affairs Commission within 90 days in compliance with the companies and Allied matters Act[30].

INSURANCE:

To ensure that the mortgage property is safe, the property under mortgage must be insured against fire and any other hazards. The bank or mortgage institution makes the arrangement with insurance houses for the insurance of mortgage houses but the expenses are borne by the customer. The insured risk must cover the full value of the property or more. The insurance company must be told in writing of the bank's interest in the insured property.

GENERAL ADMINISTRATION OF MORTGAGE BY BANKS / MORTGAGE INSTITUTIONS

It is the primary focus of this paper to allay the fears of prospective mortgagors who are afraid of fraudulent practices or of inadequate record keeping by some of the institutions. It is very clear that administration or mortgage accounts are not much different from what obtains in the case of the other classes of banks, i.e. Commercial, Merchant, Development, Cooperative and Community banks, and Savings and loan institutions.

Globally, the banker -customer relationship is generally well documented. In this respect, all necessary papers are filed and scrutinized by these institutions personnel. This is done to enable the institutions escape the accusation of negligence and corruption in case of default by the customer. In administering mortgage accounts or advances, proper records are kept and necessary books recorded and balanced on daily basis to reduce fraudulent practices.

In addition, a system of checks and balances are established in the operation procedures. The apex mortgage Institution, the Federal Mortgage Bank of Nigeria.(FMBN), prior to the recent development in the sector has a well laid down procedure for record keeping, and it carries out a periodic check and examination on all Primary Mortgage Institutions (PMI) in the country31. With respect to loan recovery, mortgage institutions establish policies on what steps to take on delinquent cases to guarantee steady flow of repayment to ensure comfortable liquidity position. These institutions, because of their business image and desire to maintain corporate bank / customer

[30] S. 197: Companies and Allied Matters Act. (Decree N0 1. 1990).

[31] See Okonkwo Onuigbo: Mortgage Finance in Nigeria (supra) p179-180.

relationships, are more often than not sympathetic with borrowers or customers with genuine established cases of hard time and may at times are inclined to reduce repayment rate temporarily. Their final sanction on chronic defaults depends on the nature of mortgage taken, that is, either legal or equitable mortgage (if any).

In case of very serious defaults, the institution may take possession of the mortgage property and sell it. However in the sale, the best possible price is looked for so that the mortgagor will receive any surplus fund from the proceeds of sale which is left after the outstanding capital and interest have been repaid and the expenses incurred by the mortgage institution in realizing the property, has been met[32].

BREACH OF THE COVENANT OF MORTGAGE AND THE MORTGAGEE'S REMEDIES

It should be noted that the mortgage institution is protected by law to recover the money / monies invested on a mortgage property in the case of chronic default[33].

A covenant is a formal agreement which is legally binding[34]. Where a person enters into a contract, it is his duty to do all those things (covenants) which he has promised, by the terms of the contract, to do. Any departure from the terms and conditions of a contract or failure to observe it is known as breach of contract. This breach gives a right to the other party in contract to bring up proceeding for the breach. Breach of the covenant of mortgage is taken very serious by the law and of course the mortgage institutions, because a huge amount of money is involved in the process.

However, for a good business relationship to exist, the mortgage institutions take a very serious look on mortgagors conditions with a view of helping to arrest the problems before they get out of control. This they do through:-

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[32] Adeovoyin Kunle, Mortgage Finance. Delay Ventures, Ilorin. 1998. Chap.4 page 27.

[33] See, Mortgage Institutions Decree N0.53 of 1989,

[34] Oxford Dictionary Advanced Learner's -3rd ed, Page 199.

HOW MORTGAGE INSTITUTIONS ASSIST THEIR CUSTOMERS

ARREARS ADMINISTRATION

When a prospective mortgagor falls into arrears, the following course of action are taken by mortgage institutions to assist in solving the problem.

(i) To identify the cause of the default. This involves calling upon the customer to ask relevant questions and making of other external investigations to find out if the mortgagor is diverting money obtained as housing loan to other areas that cannot service the loan.

(a) In the case of one month default, the institutions send arrears letter to the customer demanding payment of arrears, and withholding further disbursement if any.

(b) In the case of two- months default, the institutions write another notice in form of a reminder to the mortgagor and also visit the mortgagor to assess his problems and to proffer solutions where necessary.

(c) In the case of three – months default, the institutions will write to the mortgagor and give a grace period of 60 days after which the loan will be called in and procedure for an auction sale will be set in motion.

DEBT RESCHEDULING

Another way through which the mortgage institutions help their customers is through the rescheduling of their debts in time of default in the payment of mortgage loans. This is done with the agreement of the mortgagee after an interview with the delinquent mortgagor to ascertain the nature of his predicament and the problems responsible for that. Rescheduling means that when there is default and there are accumulation of debts or arrears of unpaid debts i.e. the amount which had accrued unpaid by the mortgagor as his repayment figure which continues to accumulate as the mortgagor has been unable to pay accordingly on monthly basis as required. It means that the outstanding balance of the loan is spread over a longer period i.e. the tenor of the loan is extended to now become a reduced monthly repayment figure lower than what it used to be. At this stage, the financial position of the mortgagor is put into consideration and the debt is drastically reduced to enable him pay up what remains of the loan.

Under this new arrangement, the mortgagor would need to enter into a new agreement with the mortgage institution and in respect of another deed called “Deed of variation has to be executed to vary the term of the loan and the monthly repayment figures.

Arrears outstanding at the date of rescheduling are set at zero because this figure is subsumed in the capital balance rescheduled. The overall arrears position is impaired or reduced by rescheduling while cash flow too is expected to improve with the above arrangement.

RECEIVERSHIP

Another way through which mortgage Institutions help their mortgage customers is by Receivership. This involves the management of a mortgaged property by a Mortgage institution itself i.e. the Mortgagee Receivership option can be embarked upon if the property is in a prime location and the rent is attractive as to cover the monthly repayment, maintenance, outgoings and the Receivership commission. But this is provided on the customer's request probably due to any of these reasons:-

(a) If a mortgagor, due to old age, poor health, or transfer out of the country requests the Institution to manage the property on his behalf.

(b) If the mortgagor dies and the Estate requests the institution to manage on behalf of the beneficiaries.

(c) If the property is abandoned due to circumstances beyond the mortgagor's control but the property is viable economically.

(d) If the mortgagor is in serious default to the extent that it would not be economically advantageous to auction the property.

SOCIAL AND ECONOMIC EFFECTS OF HOUSING ON LABOUR AND PRODUCTIVITY

(1) The Morale of the workers will be boosted if they are housed and are given credit to build their own homes and in consequence national productivity will be on the increase.

(2) Housing generates revenue in the form of rents and lease charges paid by tenants.

(3) Property can be used as collateral to secure bank loans.

(4) Housing construction are labour intensive activities, they absorb a lot of labour resources and so help to create employment opportunities.

(5) Investment in housing is self- generating and a cumulative process which acting through multiplier effect stimulates growth in the economy and promotes human welfare.

(6) There is a psychological satisfaction that one has made some material progress in terms of ownership of one's own home.

(7) Ownership of house/home enhances the social – status of the property owner. There is always excitement in the realization that one has assumed the status of a Landlord. It shows in Nigerians social parlance that the person has arrived.

(8) Good and adequate Housing helps to promote healthy conditions, enriches leisure and enhances enjoyment of one's rights and privacy. Owners of real property houses, factories etc) do not owe apologies to any body for using them in any way they deem fit, subject to the demands of the law.

(9) Ownership of a home empowers the owner socially in one major way i.e. it enables the owner to acquire the status of a good surety which (status) can be used on several occasions to the advantage of relations and friends.

WAYS OF ALLAYING FEARS AND ATTITUDE OF NIGERIANS TO MORTGAGE

1. The National Housing Fund has to be reviewed. The review will make mortgage banks and mortgage institutions attractive. In other words the Decree setting up the National Housing Fund has to be reviewed.

2. The Land Use Act of 1978 has to be reviewed to make it easy for people to obtain land for mortgage lending. It may not be a total review but certain sections that are obnoxious and harsh have to be expunged. For example, the various state Houses of Assembly should pass a bye law so that their Governors must sign letters of consent at least within two weeks of the receipt of such applications.

Also the economy has to be improved by the Federal Government. It is when the economy improves, i.e. when the per capita income improves, that people will have much money to save. People need much money to save money. Peoples disposable income is low, so, the economy has to be very much improved.

The creation of a secondary Mortgage market is imperative in Nigeria. Today people build houses to hold. Only very few organizations and some state Governments build houses to sell. But in these states, the houses styled low income houses, rarely get to the low income people. The wealthy class still hijack and purchase them.

Our people should be orientated on how to build and sell houses. Banks should also be attuned to lend money in form of loans for people to buy the houses.

There should also be mortgage bonds –where people can buy units of houses. This is not available in Nigeria and should be introduced to encourage the people to save and buy with mortgage loans. We need an enabling environment of this nature to make the creation of mortgage work in Nigeria.

3) Nigeria must begin to implement the United States of America style technology systems to support mortgage origination, servicing and securitization. The technology must also incorporate Australian loan product features and culture. In 1994, the Australian Bureau of statistics estimated that up to 70% of households live in a dwelling they own or are purchasing. Home ownership is a very important and social aspect of Australian life.

This is our prayer for Nigeria. We sincerely urge the Federal Government of Nigeria to focus her attention towards this trend for the entire populace. This is because the Australian Government was quite active in promoting home ownership including enacting controls that capped home loan interest rates at 13.5%: Customers normally got their home loans from the four Australian banks at then – Westpac, NAB, ANZ, including Commonwealth, regional and building societies. The Federal houses of parliament and the State houses of Assembly should borrow a leaf from the Australian system35.

Thanks to the Private Sector developers of Nigeria for embracing this new trend in housing delivery in Nigeria. As reported in the Daily Independent Newspaper recently, in 2008, a leading private property developer Citiscape International Limited is set to deliver its N35 billion Green Acre Estate. The 3000 units multi- billion Naira imposing Estate which comes in different house types is going to be delivered in phases so as to allow subscribers to move in as the units are completed. According to the promoters of the estate, it is going to be delivered to subscribers by September this year.

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[35] FMBN News- In house Journal of the FMBN. March. 2000.pg-26-33.

Another Estate, Buena Vista Estate has been constructed in the Victoria Garden City in Lagos and is nearing completion. The modus operandi for purchase is to allow for subscription through cooperative societies. The Chairman of the Nigeria Institute of Architects (NIA) Lagos chapter[36] has already blazed the trail by expressing optimism that 2008 would definitely offer a new lease of life for the real estate sector. This is our prayer for Nigeria and we urge the Federal Government of Nigeria, Banks and the Mortgage Institutions to actively involve the private sector developers in the housing delivery in Nigeria.

Mr Adeyinka, the chairman of another estate developer, the Sparklight Group says:- the type of houses we are constructing is of high standard and is affordable when compared with similar ones in the market. He stated,“ we take care of the down- trodden in the design and costing of the houses; we build and sell”. He called on the Government to make housing provision a major priority in the scheme of things even as housing developers are geared towards providing affordable houses for the masses. He also emphasized that it is the responsibility of Government to provide cheap houses for the low income group in the society.”[37]. We welcome the unwholesome development from the private estate developers of Nigeria and we call on the Government to discourage the system where Nigerians are addicted to building houses to hold and encourage the system of building houses to sell to the less privileged and low income group in Nigeria.

It is appreciated that, Mortgage and mortgage Banking is relatively new in Nigeria. But we must look forward to a time when everything will be purchased under mortgage, just as it is obtainable in most developing economies[38]. We therefore call on all and sundry and the entire citizenry to embrace this new challenge and avail themselves of the immense benefits of Mortgage.

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[36] Mr Enyi Ben Eboh is the chairman of the Nigeria Institute of Architect (NIA) Daily Independent Newspaper. Friday February 8-2008.(House and Home) Section.

[37] Mr Adeyinka – is the chairman of the Sparklight group of private developers contained in the daily independent Newspaper of Friday February 8-2008.(House and Home) Section.

[38] Okere: How Mortgage banking can be improved: Executive Newspaper, October 21-27, 2002, Page 24-25.

CONCLUSION

It is generally evident that mortgage as a form of credit transaction is decisively important and of course constitutes a significant expression of and contributor to the national economic and commercial aggregate development of the nation.

To this intent, the mortgage Institutions, the Primary Mortgage Institution's primary responsibility in the housing sub-sector of the Nigerian economy is the creation of houses. And how do they do this? They do it by mobilizing savings from the general public and in turn lend out this to people at a very low interest rate which they use to build their own houses. But the fact remains that only very few Nigerians have benefited from mortgage creation.

The reason for this is first and foremost, that Mortgage operation in the Nigerian economy is like a humanitarian job. There are bottlenecks here and there. The awareness is not there. The second issue is the high cost of building material. Most building materials in Nigeria are imported and local input is scarce. This phenomenon scares people away from obtaining housing loans which turn out to be insufficient to complete a building which it is meant for.

The third is the per capita income. The per capita income of Nigerians is very low. The living wage is very, very low, most people's disposable income is very low.

The fourth is that the Nigerian public has not known the benefits of mortgage institutions or the benefits of mortgage creation for affordable houses. They need to be educated.[39] The fifth is in the onerous statutory requirement for Governor's consent in the alienation of property rights by borrowers as provided for in section 22 of the Land Use Decree, 1978. This has created multiple problems

[39] Learned writers, Adeoye and Hakeem Oguniran of the University of Lagos in their insightful contribution to the Grant as Review of Business and property Law. Guardian Newspaper Thursday November 21, 1996. (Business Law Section) of the Guardian.

in credit transactions more than what the Government intended with the promulgation of the Act.[40]

[40] See also the Guardian August 19, 1991. Article entitled, Socio economic implication of land use law.