

EFFECTIVE GOVERNANCE AND RATIONAL DISPUTE RESOLUTION

ENFORCEMENT OF CONTRACT; POWER OF SALE, SUMMARY PROCEEDINGS

INTRODUCTION

The term contract is widely defined to mean a promise or set of promises which the law will enforce. It is an agreement enforceable by the law between two or more persons to do or abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises. Hence, the central purpose of contract is primarily to impose a duty on the individual parties to carry out their respective obligations under it, failing which a party who defaults or refuses to discharge his obligations under the contract will be liable for a breach of contract. However, beyond the simple agreement entered between persons for commercial transactions, a contract exist in property transactions. That is, there are elements of contract in a Sale of Land Agreement, Lease/Tenancy Agreement, and even a Mortgage/Pledge Agreement. Commercial contracts/transaction shares the same elements with property transactions. Nonetheless, the ability to make and enforce contracts and resolve disputes is fundamental. Good enforcement procedures enhance predictability in commercial relationships and reduce uncertainty by ensuring that the rights of contractual parties will be upheld promptly by local courts. Thus, when procedures for enforcing contracts are bureaucratic and cumbersome or when contractual disputes cannot be resolved timely and, in a cost, effective manner, it to a large extent make persons tepid from entering into any contractual relationships.¹ Accordingly, the aim of this work is to examine the enforcement of contracts vis-à-vis the effective resolution of disputes between contractual parties with particular reference to property transactions in Nigeria. It seeks to achieve this by examining the concept of contracts in property transactions, the laws governing property transactions in Nigeria, the systems in place for the judicial enforcement of contract in a timely and effective manner, taking into consideration, the provisions of the contract, the parties to the contract, the time between the filing of a lawsuit and resolution in judicial enforcements and the cost of judicial enforcements as a percentage of claim value. It shall also consider judicial foreclosure and the power of sale as a method of enforcing a mortgage agreement between a mortgagor and a mortgagee.

¹<https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contractenforcementanddisputeresolution.htm> accessed on the 27th of October, 2020.

THE CONCEPT OF CONTRACT IN PROPERTY TRANSACTIONS

A contract is defined as an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties.² It is an agreement between two or more parties which creates reciprocal legal obligations to do or not to do particular things. Thus, for a contract to be valid, “there must be mutuality of purpose and intention.”³ Accordingly, the Court has held in a plethora of cases that the requirements for a valid contract are offer and acceptance, consideration, intention and capacity to contract.⁴

Consequently, with particular reference to property transactions, sales of land agreement can be defined as a contract whereby the seller transfers or agrees to transfer the property to the buyer for a money consideration, called the price. For a contract of sale of land to be valid and enforceable, in addition to the ordinary element of offer, acceptance, and consideration there must exist the capacity to enter into the contract and the intention to create legal relation. In the case of **Nidocco v. Gbajabamila**⁵ the Supreme Court has held that failure to pay the purchase price under a sale of land is a fundamental breach which goes to the root of the contract of sale; and, secondly, that the effect of a contract without consideration is that it cannot be taken as complete, nor can the court decree specific performance of it. Hence, it is deducible that the elements of offer, acceptance, consideration and intention to create legal relations is present in a contract or land sale agreement.

Also, a mortgage is a form of security over land or other titled properties for a debt or obligation made by a debtor to a creditor against the promise or assurance to repay the debt with or without interest at a future date.⁶ Put differently, a mortgage transaction is generally an agreement between the mortgagor and the mortgagee, whereby the mortgagor offers his house, land or other property as collateral to the mortgagee for a loan facility. It is the conveyance of a legal or equitable interest in a property with a provision for redemption, that is upon the repayment of the loan, the conveyance becomes void or the interest is reconveyed.⁷ Therefore, intrinsic in a mortgage transaction is the elements of a contract. That is, an offer made by the mortgagor, the

² I.E. Sagay, “Nigerian Law of Contract”, Spectrum Books Limited, Ibadan, 2nd Edition.

³ Orient Bank (Nig) Plc v. Bilante International Ltd (1997)8 NWLR (Pt. 515) 37 at 76, Per Tobi J.C.A (as he then was).

⁴ Enemchukwu v. Okoye & Ors (2016) LPELR-40027 (CA)

⁵ (2013) 56 (Pt.1) NSCQR 230

⁶ Olulana, O.J.A. “The Law and Practice of Banking, Collateral Securities and Mortgages” Lagos; Diversities Enterprises Publishers, 2000, 246

⁷ Per Amaizu JCA, in B.O.N. Ltd v. Akintoye (1999)12 NWLR part 392 at P. 403.

acceptance of the offer by the mortgagee and the collateral and facility being the consideration. There must also exist the capacity and the intention to enter into the mortgage transaction.

More so, a Leasehold Agreement is defined as an agreement between two persons which results in the relationship of a Landlord and a Tenant. It is a contract for the exclusive possession and profit of land for some definite period.⁸ In a lease agreement, the consideration flowing from the lessor to the lessee is the demised premises, while the consideration paid by the Lessee is the rent and the observance of any condition or covenant in the lease. In essence, the lessee makes the offer, the lessor accepts the offer and the rent paid by the lessee and the premises demised by the lessor constitutes the consideration.

From the foregoing therefore, it is crystal clear that in every property transaction, there exist the elements of a valid contract. Consequently, it is safe to say that for a property transaction to be valid, there must be an offer, the acceptance of the offer, the consideration flowing from either party, the intention to create legal relations, and the capacity to contract.

JUDICIAL ENFORCEMENT OF CONTRACT

In examining the judicial enforcement of contract, we shall consider the applicable laws to property transactions in Nigeria, the systems in place for the timely and judicial enforcement of contracts, the cost of judicial enforcement, the time between the filing of a lawsuit and resolution in judicial enforcements.

APPLICABLE LAWS TO PROPERTY TRANSACTIONS IN NIGERIA.

According to Ezike, the commercial and economic life of people in the society very much consists of agreements. It will be chaotic and topsy-turvy as regards trade and commerce, if the law permits a promisor to break his promise without at least placing him under an obligation to pay compensation to the promisee for the loss occasioned by his default.⁹ Accordingly, there are legislations in place to regulate property transactions in Nigeria. And these legislations include:

- The Stamp Duties Act
- Mortgage Institution Act,
- The Land Use Act,
- Tenancy Law of Lagos State, 2011,
- Recovery of Premises Law of Lagos State,

⁸Prudential Assurance Co. Ltd v. London Residuary Body (1992)2AC 286

⁹ Edwin Obimma Ezike, Nigerian Contract Law (LexisNexis 2015) 3.

- Mortgage and Property Law of Lagos State
- High Court of Lagos State (Civil Procedure) Rules, 2019

These laws are enacted with the primary purpose of ensuring the regulation of property transactions in Nigeria while also creating framework and rooms for the enforcements of these transaction.

THE SYSTEMS IN PLACE FOR JUDICIAL ENFORCEMENT OF CONTRACT IN A TIMELY AND EFFICIENT MANNER.

Property owners, property managers, governments and investors in the real property sector the world over, have invested enormous resources in developing model leases, tenancy agreements, mortgages, purchase and sale agreements, licenses and other instruments that are routinely used in connection with the development and operation of land and landed properties. The rights and obligations contained in these instruments are of great practical use when they are enforced in an efficient and effective manner.¹⁰ Hence, in the case of **Attorney General of Nasarawa State v. Attorney General of Plateau State**¹¹ the Supreme Court, per Mohammad J.S.C. (as he then was) noted; “if mutual agreement entered into by parties to it shall be treated lavishly and that any party shall be allowed to unilaterally resile from the commitment both parties have signed to bind themselves, then the essence of any agreement or mutual contract is woefully defeated. Also, in **SA & Ind Co Ltd v Ministry of Finance Incorp**,¹² the Court of Appeal minced no words in firmly stating that ‘Parties to a written contract agreement are bound by the terms of a contract which the parties in their free-will mutually adopted and signed provided such terms are not illegal or contrary to public policy. Thus, the afore cited decisions of the Appellate Courts glaringly illustrate clearly the readiness of the Nigerian court to protect legitimate bargains/contracts entered between individuals and even between private individuals/organizations and the government. Therefore, there are systems in place to ensure the timely and efficient enforcement of contracts in Nigeria.

These systems include;

- 1) The provisions of the contract, that is, the terms of the contract,
- 2) The laws regulating property transactions in Nigeria,

¹⁰ Andrew CL. (1987). The Role of Rental Housing in Developing Countries: A Need for Balance. Washington DC: World Bank, Report No. UDD-104

¹¹ (2012) 10 NWLR (Pt. 1309) 419

¹² [2014] 10 NWLR (Pt 1416) 515.

3) The Nigeria courts.

These systems shall be discussed seriatim.

THE PROVISIONS/TERMS OF CONTRACT

Terms of contract means the legal rights and obligations of parties as determined by the provisions of the contract or by law.¹³ Every contract have key terms and they fall into different categories. The terms of a contract can be expressly agreed orally or in writing. Terms may even be implied by law, the conduct of the parties, custom in a particular trade, previous dealings or the parties' intentions.¹⁴ These terms are to be determined by the parties and not by the court. All that a court does is to construe the words used by the parties in the agreement. Thus, in the case of **Agnotech vs. MIA & Sons Ltd.**¹⁵, it was held that parties are bound by the terms of contract contained in an agreement without any subtraction or addition. The court has no power to rewrite the contract for the parties. Therefore, it is a general rule that where parties enter into a contract, they are bound by the terms thereof and the court will not allow to be read into such a contract, terms on which there is no agreement.¹⁶

In essence, the terms of the contract between the parties is the primary system that ensures the timely and efficient enforcement of a contract. This is so because, the parties can in their contract evidenced by an Agreement make provisions for the enforcement of the contract in a timely and effective manner and the court will not imposed on them any provision not contained in the Agreement. Therefore, if the parties make the procedure for the enforcement of their contract onerous or somewhat difficult to achieve, then they will be bound by it since the court will be hamstrung from rewriting or subtracting any terms agreed upon by the parties.

It is in this light it is commonly seen in an Agreement, that in the event of any dispute, parties will resort to arbitration, or mediation to resolve the dispute and as well enforce the contract. Thus, parties in dispute over contract terms choose to engage an impartial adjudicator to settle disagreement. This process typically involves a third party, sometimes with specialized knowledge

¹³ Asher v. Seaford Court Estates Ltd (1950) A.C. 508, 520.

¹⁴ <https://www.fortunelaw.com/back-to-basics-terms-of-a-contract/> accessed on the 28th of October, 2020.

¹⁵ (2000) 12 SC Pt.11 page 1

¹⁶ See Baba vs. Nig. Civil Aviation Training Centre (1991) 5 NWLR Pt.192 page 388; Koiki vs. Magnusson (1999) 8 NWLR Pt.615 page 492."

about the issues being contested. Suffice to say that arbitration is a mechanism for the resolution of disputes between two or more persons under which they agree to be bound by the decision to be given by a neutral third party (the arbitrator) according to law.

Accordingly, although a party to an arbitration agreement may decide to institute proceedings in court, rather than explore arbitration as agreed by parties. However, where the other party insists on his right to have the matter resolved by means of arbitration, the court's responsibility is to ensure that the parties' agreement is enforced by referring them to arbitration. This position is reflected in section 4 (1) (2) of the Arbitration and Conciliation Act CAP 18 LFN 2004 which provides as follows:

- 1) A court before which an action, which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.
- 2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.

Stemming from above, it is therefore apposite to state that the terms of contract between the parties plays a pivotal role to determine whether they will be enforced in a timely and efficient manner.

The Laws Regulating Property Transactions

The laws regulating property transactions are designed to regulate the relation of persons to property thereby providing a secure foundation for the acquisition, enjoyment and disposal of property and also the enforcement of any rights arising from property transactions. These laws include the rules set and administered by the State that determine when an agreement is enforceable, the grounds on which a breach of the agreement will be found and the consequences. These laws therefore serve as a system to ensure the enforcement of property transactions.

For instance, the Tenancy Law of Lagos State, 2011 contains provisions on the rights of a tenant,¹⁷ the obligations of a landlord and a tenant,¹⁸ and further provided in section 12 that, where

¹⁷ Section 6, *ibid*

¹⁸ Section 7 and 8, *ibid*.

there is a breach or non-observance of any of the conditions or covenants in respect of the premises, the landlord shall subject to-

- a) any provision to the contrary in the agreement between the parties; and
- b) the service of process in accordance with the relevant provisions of the Law, have the right to institute proceedings for an order to re-enter and determine the tenancy.

Consequently, the Tenancy Law of Lagos State clearly made provisions for the enforcements of a tenancy agreement. It also confers on the parties the right to resort to arbitration and also the court to enforce the tenancy agreement.

Also, the Mortgage and Property Law of Lagos State made provisions for the mode of creating a mortgage,¹⁹ the rights of the mortgagor and the mortgagee and the remedies available to the mortgagee in the event the mortgagor breaches the mortgage agreement. However, the choice of a remedy available for the mortgagee usually depends on whether the mortgagee wants his capital or the interest. Where the mortgagee wants his capital and seeks to put an end to the security, he commonly opts for either action for enforcement of covenant to repay, sale of the security or foreclosure. Whereas where he is concerned with the interest, he takes to possession of the property or appoints a receiver. It therefore suffices to say that, the Mortgage and Property Law of Lagos State apart from making provisions for the creation of mortgage agreement, also provides the mechanism and remedies available to a mortgagee to enforce the terms of the mortgage agreement.

Furthermore, Order 55 of the High Court of Lagos State (Civil Procedure) Rules, 2019 made provisions for the enforcement of mortgage agreement. It provides that a mortgagor or mortgagee whether legal or equitable may take out an Originating Summons to enforce the terms of the mortgage agreement and seek any of the following reliefs; payment of money secured by the mortgagee, sale, possession, delivery of possession etc.

THE NIGERIA COURTS

When a dispute arises between parties in a contract and settlement procedures are not defined within the contract, and if informal methods of resolution are exhausted, the most commonly used forum to resolve disputes or enforce contracts is by an action in court. Thus, the Nigeria court plays a pivotal role in the enforcement of contract. The court interprets the terms of the contract,

¹⁹ Section 15, *ibid*

stating the rights and liabilities of the parties, and consequently delivering its decision on the terms of the contract.

Nevertheless, before a party can bring an action before the court for the enforcement of a contract, certain factors should be considered. These factors are, the status of the other party, that is, whether it is a government organization or a corporate organization which requires a pre-action notice to be issued before the suit is commenced and whether sequel to the laws regulating the particular transaction, an action cannot be commenced to enforce the transaction unless a notice is served on the other party. The latter is common in an action to recover possession and an action to commence foreclosure proceedings. Also, a mortgagee is mandatorily required to serve on the mortgagor a notice before he exercises his power of sale on the mortgage property in order to enforce the mortgage agreement.

The object of this notices is to give the other party an opportunity to reconsider its stand or position in the matter complained of and if that course is justified, to make amend or settle the claim out of court. The requirement of service of pre-action notice or notice simpliciter cannot therefore be ignored. Accordingly, if there is failure by a party to comply with the mandatory requirement to serve the notices, the jurisdiction of the court to determine the suit will be put on hold pending compliance with the pre-condition.

It is therefore imperative to note that, before a party to the contract commences his action at the court, he should consider the status of the other party and the existence of any statute that will require the service of a pre-action notice on the party before action can be commenced to enforce the contract.

THE COST OF JUDICIAL ENFORCEMENT OF CONTRACT

The cost of judicial enforcement largely depends on the solicitor's fees, the cost of instituting the suit at the court, the average length of time required to enforce the contract through the court system which in turn is determined by the number and complexity of pre-trial and trial procedures mandated by the law, and finally the cost of enforcing the judgement upon conclusion of trial.²⁰

²⁰<https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contractenforcementanddisputeresolution.htm> accessed on the 27th of October, 2020.

THE TIME BETWEEN THE FILING OF A LAWSUIT AND RESOLUTION IN JUDICIAL ENFORCEMENT

The time between the filing of a lawsuit and the resolution/ judgement to enforce the contract is uncertain and it is dependent on so many factors. Trials in Nigeria takes a considerable length of time. From the filing of the lawsuit, to pre-trial proceedings, to trial proceedings and finally to the delivering of judgment can estimably be two to five years and this also depends on the willingness of the counsel involved in the suit to expedite resolve the dispute. After the delivery of the resolution or judgement, another hurdle to cross is the enforcement of the judgment. Thus, while it is trite that, a party is entitled to reap the fruit of his judgment, it is however a herculean task for the party to “pluck the fruit” (enforce the judgement) to enjoy it as same is fraught with its own challenges and another procedure.

WHAT IS THE COST OF JUDICIAL ENFORCEMENT AS A PERCENTAGE OF CLAIM VALUE?

The cost of judicial enforcement as a percentage of claim value according to a report is assumed to be equivalent to 200% of income per capita or \$5,000, whichever is greater.²¹ However, this is not applicable in Nigeria, as there is no rule, statute, or judicial authorities providing for the percentage of claim value.

SUMMARY PROCEEDINGS; JUDICIAL FORECLOSURE.

Cheshire in his book “Modern Law of Real Property” defined foreclosure as a judicial procedure by which the mortgagee acquires the mortgaged property for himself free from the mortgagor’s equity of redemption.²² It is a more effective remedy available to the mortgagee in urgent need of his capital which he cannot realize from the rents and profits accruing from the mortgaged property, or which in fact, is non-existent.²³

In *Royal Bank of Canada v Aldridge*²⁴ foreclosure was defined as a legal proceeding to terminate a mortgagor’s interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property. When invoked

²¹ <https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts> accessed on the 4th of November, 2020. However, this is not the position in Nigeria.

²² Cheshire’s Modern Law of Real Property, Butterworth (12th edn) p. 673. The equity of redemption is that right that is vested in the mortgagor with the effect that he is entitled to recover his property upon repayment of the mortgage debt. It is his subsisting interest after mortgaging a land and surrendering the certificate or title document. It is a necessary element in a mortgage transaction – *Rafuka v Kurfi* (1996) 6 NWLR (Part 453) 235.

²³ I.O. Smith, “Practical Approach to Law of Real Property in Nigeria” Ecowatch Publications (Nigeria) Limited, 1999.

²⁴ 2003 SKB 331

irrevocably it cuts off beyond the possibility of recall the mortgagor's rights, including his equity of redemption.²⁵ Thus, foreclosure is a procedure pursuant to which the court determines the amount due under the mortgage; orders its payment within a certain period; and prescribes that in default of such payment a debtor will permanently lose his equity of redemption. Upon default in payment, the title of the property is conveyed absolutely to the creditor, without any sale of the property.²⁶

By Order 55 of the High Court of Lagos State (Civil Procedure) Rules, 2019, the High Court of Lagos State went further in making provisions for the steps a mortgagee or mortgagor will take in ensuring the enforcement of the mortgage agreement. Order 55 of the High Court of Lagos State (Civil Procedure) Rules, 2019 reads thus;

Any mortgagee or mortgagor, whether legal or equitable or any person:

- a) Entitled to or having a property which is subject to a legal or equitable charge or
- b) Having the right to foreclose or redeem any mortgage, whether legal or equitable may take out an Originating Summons for any of the following reliefs as may be specified in the Summons and as the circumstances of the case may require;
 - a. Payment of money secured by the mortgagee or charge
 - b. Sale
 - c. Foreclosure
 - d. Delivery of possession, whether before or after foreclosure, to the mortgage or person entitled to the charge, by the mortgagor or person having the property subject to the charge...
 - e.
 - f.
 - g.

Thus, the order of foreclosure is usually made upon the proved default of the mortgagor to observe the mortgage terms. The reason why the court orders foreclosure is not farfetched. The mortgagor for many reasons such as unemployment, lack of property management, terms of the loan, medical challenges and even death might not be able to defray the mortgaged debt. Hence, upon

²⁵ *Harlem Savings v Cooper* 199 Misc. 1110 (1950).

²⁶ In the case of *Afriland Nig. Plc v. Alhaji Muraina Adeniyi Alade* (2000) LPELR-10722(CA), the Court of Appeal defined the word 'foreclosure' as a term of art used in conveyancy practices, particularly in a legal mortgage which means that the estate mortgaged or secured in, as the mortgaged property has become the property of the mortgagee by the order made in a foreclosure suit. Sometimes, the agreement of foreclosure is contained in the deed. Failing the institution of a suit, the terms of the mortgage may provide conditions upon which the mortgaged property may be sold if the mortgagor defaults in payment of the mortgage debt.

giving the mortgagor a reasonable time within which to redeem in accordance with the terms of the proviso for redemption, and the mortgagor is unable to do so, the mortgagee may institute an action for foreclosure against the mortgagor and where the Court deem it fits to decree foreclosure, an interim order known as *foreclosure nisi* is first decreed giving the mortgagor six months within which to redeem the mortgaged debt. Upon the lapse of this period (the six month) and the mortgagor fails to pay, the foreclosure order is made absolute and its effect is to vest on the mortgagee absolute ownership of the mortgagor's whole estate and to extinguish the mortgage terms and all subsequent mortgage terms.

The length of the notice to foreclose (usually six months and termed *foreclosure nisi*) given to the mortgagor by the mortgagee is to afford the mortgagor ample time to redeem the mortgage and therefore obviate the necessity of commencing a foreclosure proceeding and the expenses associated with it. However, the rights of prior mortgagees are not foreclosed so that the mortgagee takes subject to their interests.²⁷

More so, although a judicial foreclosure is usually used to enforce a legal mortgage, howbeit, it is also available to an equitable mortgagee in respect of an equitable mortgage created by deposit of title deed accompanied by an agreement by the borrower to give a legal mortgage if required to do so.²⁸

Furthermore, it is pertinent to note that the length of time and the considerable amount involved in pursuing foreclosure proceeding makes mortgagee usually opt for summary proceedings seeking an order of execution against the mortgagor's estate, which is also fraught with setbacks, that is, it is not a complete alternative to foreclosure proceedings. This is because when the mortgagee institutes the summary proceedings vide an affidavit disclosing the full particulars of the mortgage, the transfer and devolution of the mortgage, and the default giving rise to the right of foreclosure at the requisite court with jurisdiction, the mortgagor can lodge his defense and if the court considers the defense and concludes that it has merit, the summary proceedings will alchemize into a full-flown judicial proceedings which is even lengthier than foreclosure proceedings.

²⁷ The Rule of "Foreclose Down."

²⁸ *Ogundiani v. Araba & Anor* (1978) 11 NSCC, P. 334, *Daily Times of Nigeria Plc v. Skye Bank Plc* (2017) LPELR-43539 (CA)

Summary Proceedings are a fast-track procedure used by persons or institutions who claim to be owed what is known as a 'liquidated sum'. A large proportion of cases which appear in courts are issued by financial institutions pursuing debts due by borrowers on foot of unpaid loans. Summary Proceedings differ from other court processes in that there is no requirement for oral evidence (which involves examination and cross-examination of witnesses) nor is there a detailed exchange of pleadings or discovery. However, it is required that all of the relevant details of the dispute are contained in the summary summons and the sworn affidavits and exhibited documents. In the absence of oral evidence, the detail which should be contained in the documents before the court is crucial.²⁹ Hence, there is an obligation on any Plaintiff in Summary Proceedings to produce *prima facie* and sufficient evidence of the debt. And where the plaintiff fails in this obligation, the court will refuse the application for summary proceedings as in the recent Supreme Court decision in *Bank of Ireland Mortgage Bank v O'Malley*.³⁰

In consequent of the above, it is suggested that a mortgagee utilizes the foreclosure proceedings instead of a summary proceeding.

POWER OF SALE

The power of sale is another method utilized by a mortgagee to enforce the mortgage agreement entered into with the mortgagor. The power of a mortgagee to sell the mortgaged property upon the mortgagor's default is statutory and need not be expressed. The power of sale is conferred by section 40 of the Mortgage and Property Law of Lagos State, 2010, Section 19 of the Conveyancing Act on any person for the time being entitled to give and receive a discharge of the mortgage money. Thus, by Subsection 4, at any time after the power of sale has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate, interest or right in priority to the mortgage, all the deeds and documents relating to the property or to the title, which a purchaser under the power of sale would be entitled to demand and recover from him.

Accordingly, a mortgagee's power to sell a mortgaged property is dependent on two main conditions namely;

²⁹ <https://www.eversheds-sutherland.com/global/en/what/publications/shownews.page?News=en/ireland/recent-developments-in-summary-judgments-in-the-superior-courts-part-2> accessed on the 4th of November, 2020.

³⁰ [2019] IESC 83

- a) The power of sale must have arisen in the sense that the mortgage debt must have fallen due;
- b) The power of sale must have become exercisable.

The mortgagee's power of sale shall arise if three conditions are fulfilled, these conditions are cumulative and all three must exist before the power of sale arises. The conditions are;

- i. The mortgage must be by deed.
- ii. The mortgage money must be due-in other words, the legal date for redemption must have passed.
- iii. There is no contrary intention in the mortgage deed.

Therefore, the question whether the mortgage debt has fallen due can be ascertained from the mortgage deed. And if the money secured by the mortgage is payable by instalments, the power of sale arises as soon as the instalment is due and unpaid.³¹ More so, although the power of sale arises in the aforementioned situations, it nevertheless does not become exercisable until one of the following conditions occurs, either;³²

- a) Notice requiring payment of the mortgage money has been served on the mortgagor or one of two of the mortgagors, and default has been made in payment of the mortgage money, interest on it or of part of it, two months after such service; or
- b) There has been a breach of some provisions contained in the mortgage deed or in this law (the Mortgage and Property Law of Lagos State, 2010) and on the part of the mortgagor, or of some person concurring in making the mortgage to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Consequently, in the case of **B.O.N v. Aliyu**³³ the Court in giving effect to the above conditions (which is somewhat *impari materia* with the provision of Section 125 of the Property and Conveyancing Law, 1959 and upon which the Court gave its decision) held that compliance with them are mandatory and not advisory and that any sale of any mortgage property without the requisite notice is invalid *ab initio* and cannot convey any title to a subsequent purchaser. However, where in a mortgage deed the parties agree to exclude certain provisions of the law to

³¹ Payne v. Cardiff Rural District Council (1932)1 KB p.247

³² Section 37 of the Mortgage and Property Law of Lagos State, 2010

³³ (1999)7NWLR (part 612) 634

enable the mortgagee exercise his power of sale, this is not prohibited by law or against public policy.³⁴

From the foregoing, the mortgagee before selling the mortgage property to enforce the mortgage agreement must first wait for the power of sale to arise and also to become exercisable before he sells. The sale may be by auction or private treaty and may be in one lot or several lots. Thus, the law is settled that applicants as mortgagors who defaulted in the settlement of their mortgage debt may not be entitled in law to restrain the mortgagees from exercising their right of sale.³⁵

Also, where the mortgagee embarks on the exercise of his statutory power of sale consequent upon mortgage instalment falling into arrears, he cannot be restrained from selling the mortgaged property by the mortgagor merely paying off the arrears; only payment in full of the principal sum and interest can restrain the mortgagee from selling.³⁶ Thus, in **Intercity Bank Plc Vs Feed & Food Farms Ltd**³⁷ Omuogbo, JCA stated;

"In my respectful opinion, the complaint of the mortgagor notwithstanding, about the actual sum owing on the mortgage, the court will not intervene or restrain the mortgagee from exercising his right of sale of the mortgaged property. To intervene is to seek to vary the terms of the mortgage agreement and the court will not rewrite the mortgage agreement for the parties. The right of sale of the mortgagee is the only certain shield and he should be allowed to sell, *ceteris paribus* (all things being equal)."

Therefore, the Court of Appeal in the case of **Attigbeye V. UBA PLC & ORS**,³⁸ held that; "It is settled law that a mortgagee will not be restrained nor can his power of sale be affected merely because the amount due is in dispute or because the mortgagor objects to the manner in which the sale is being arranged or because the mortgagor has commenced a redemption action in court." Similarly, in **Kasumu v. Scott and Ors**³⁹ the Supreme Court held that the mortgagee's power of sale is not affected by attachment and sale of the mortgagor's interest and any purchaser of the mortgagor's title in property under attachment takes subject to the existing mortgage.

³⁴ Bank of the North v, Babatunde (2002) FWLR, (P. 119) p. 1452 at 1473.

³⁵ Ndaba Nigeria Limited & Anor. V. Union Bank of Nigeria Plc & Ors. (2007) LPELR-8316(CA)

³⁶ I.O. Smith., *Op Cit*, page 270, see also the Nigeria Housing Development Society Limited .v Mumuni (1977) NSCC P. 65

³⁷ (2001) 17 NWLR 742) 347,

³⁸ (2013) LPELR-20326(CA)

³⁹ (1967) NSCC vol 5, P.227

In the same vein, a mortgagee who exercises his power of sale is not a trustee for the mortgagor and owes no fiduciary obligations to the mortgagor in the manner in which the sale is conducted but is a trustee of the purchase money received and shall, after paying off any prior mortgages, pay all expenses incidental to the sale, interest and cost due under the mortgage and the surplus to the person entitled to the mortgaged property. In this light, the law as to sale under under-value is laid down by the court in **Eka-Etet v. Nigeria Housing Development Society Ltd.**⁴⁰ in these words:

“We think it is now beyond controversy that sale at undervalue alone is not enough to vitiate the exercise of a mortgagee’s power of sale. It must be shown that the sale was made at a fraudulent or gross undervalue. Indeed, it is well established that “if a mortgagee exercises his power of sale bonafide for the purpose of realising his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous unless the price is so low as in itself to be evidence of fraud (see Warner v Jacob) 1882, 20 Ch 220.

The Court of Appeal in **Enterprise Bank Ltd & anor v. Emma Bayo Aregbesola Nig. Co. Ltd & Anor**⁴¹ defined with exactitude what constitutes a “sale by a mortgagee at an under value”, which the court said renders the sale invalid. To establish sale at an under value, the mortgagor must prove either under value coupled with impropriety or vice, or under value that is gross and disadvantageous as to raise a presumption of fraud. Once evidence is led by the mortgagor in this way, the onus is on the mortgagee to show that he took reasonable precaution to obtain the best price reasonably obtainable at the time of sale. However, the mortgagee is not obliged to postpone sale so as to obtain the best price reasonably obtainable for, the timing of the exercise of a right of sale by the mortgagee is entirely within his discretion⁴².

In essence therefore, the power of sale is arguably the most effective and significant remedy available to a mortgagee against a defaulting mortgagor. Whether or not mortgaged or charged property has been sold at market value will ultimately depend on the specific facts and circumstances of the sale.⁴³

⁴⁰ (1973) 6 SC 183 at 198

⁴¹ 2013 1 CLRN

⁴² <https://thelawcrest.com/wp-content/uploads/2016/01/TLC-LLP-Newsletter-March-28-2013.pdf>; accessed on the 26th of October, 2020.

⁴³ *ibid*

Having carefully established how a mortgage agreement can be enforced through the systems of judicial foreclosure and the power of sale, it is expedient we also consider how disputes in a leasehold agreement and sales of land agreements are resolved.

THE ENFORCEMENT OF LEASEHOLD AGREEMENT

As earlier defined, a lease agreement is simply a contract between a landlord and a tenant where the landlord gives out or let out his property to the tenant for use for a period and usually, though, not always, in consideration of payment of rent. Hence, in the event of any breach of lease agreement by either the landlord or the tenant, either party can resort to the court with requisite jurisdiction to enforce the lease agreement. Consequently, the landlord of a demised premises is entitled to recover the demised premises from the tenant upon satisfying some preconditions prescribed by statute and subject to satisfactory proof of alleged grounds for recovery of possession. This suffices to say, the right of the landlord to recover possession is not cast in stones as same is subject to the satisfaction of some grounds before possession is granted by the court.

Accordingly, a fundamental condition in matters of recovery of premises is that prior to filing the action, the plaintiff (which is usually the landlord) must have served on the defendant (the tenant) the relevant statutory Notice to quit. This notice is very important, and in fact, it is a condition precedent to the commencement of proceedings for recovery. Thus, where there is no agreement as to the notice in the agreement of the parties, recourse will be had to statutory provisions. Hence, by section 13 of the Tenancy Law of Lagos State, where there is no stipulation as to the notice to be given by either party to determine the tenancy, the following shall apply:

- a. Weeks's notice for a tenant at will
- b. One month's notice for a monthly tenant
- c. Three months' notice for a quarterly tenant
- d. Three months' notice for a half-quarterly tenant
- e. Six months' notice for a yearly tenant.

However, it is imperative to emphasize that the provisions of section 13 of the Tenancy Law of Lagos State is only applicable when the parties failed to make provisions for notice. In this light, where the parties make provisions as to the length of notice to be given, the parties are bound by it as in all contractual relationships where parties are bound by their agreements. And the courts

always avoid the habit of rewriting the agreements of parties to any contract.⁴⁴ However, where the tenancy has already been determined either by effluxion of time or expiry of rent for a particular period of time, then the notice would become unnecessary.

CONCLUSION

While mechanism might be available in principle to enforce contractual agreements, experience often shows that the process might be limiting, because it is expensive, slow and somewhat partial. Another challenge to the enforcement of the contract is the fact that the defaulting party may seek an injunction at the court to block the enforcement action.⁴⁵ Also, in an action for foreclosure by the mortgagee, courts are more inclined to give several opportunities as possible to the mortgagor to redeem. This is aggravated by the fact that foreclosure is enforceable only through the court. Therefore, in assessing the effectiveness of contract enforcement in Nigeria it is suggested that aside from these laws regulating the particular property transaction, policy practice should be put in place. This is because, the systems available for the enforcement of contracts are beset with many challenges.

⁴⁴ A.P. v. Owodunni (1991) 8 NWLR (Pt. 210) 391

⁴⁵ Loan Market Association. < <http://www.lma.eu.com/pages.aspx?p=451>> accessed on the 28th of October, 2020