

# Mortgage As Security for Loan in Nigeria

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## Abstract

Mortgages are a common form of security used by banks and other mortgagees when providing loans to mortgagors. It is an agreement between two or more parties where property is conveyed by the mortgagor to the mortgagee for a grant of loan and there is an undertaking by the mortgagee to re-convey once the loan has been repaid. By taking out a mortgage, the mortgagor pledges his property as collateral for the loan, giving the mortgagee a legal right to sell the property in the event that the mortgagor's defaults on the loan. This reduces the risk for mortgagees and allows them to offer loans at lower interest rates compared to unsecured loans. The study examines the challenges of utilising mortgages as security for bank loans such as title issues under the Land Use Act, 1978, multiplicities of laws, cumbersome process of registration of mortgage transactions, and insufficient collateral. In Nigeria, the Land Use Act 1978 centralized control of land ownership in the hands of the government, with individuals only able to hold leaseholds on properties while requiring consent of the government before they can deal with their land. In contrast to the UK and United States of America, land ownership is based on the concept of freehold or leaseholds, where individuals can own land outright or lease it for a certain period of time without permission from the government. The registration of mortgage transactions in the UK is centralized while Nigeria has a decentralized system with individual State Land Registries. Nigeria could expand access to financing options for potential mortgagors, and have a sound mortgage practices in promoting financial stability and protecting the interests of the stakeholders. The Land Use Act should be amended; multiple laws regulating mortgages should be scrapped as it leads to confusion and complexity for both mortgagors, and mortgagees.

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## 1.0 Introduction

The use of mortgages as security for bank loans in Nigeria is fraught with many challenges, hindering the growth and development of the mortgage market. Despite the importance of mortgage financing in facilitating homeownership and economic growth, Nigerian banks face significant obstacles when accepting mortgages as collateral. These challenges stem from issues related to land ownership, documentation, enforcement, and regulatory frameworks ultimately increasing risk for both lenders, and borrowers especially with the advent of AMCON's act in Nigeria.

Land no doubt constitutes the basis of man's livelihood and existence. This is especially true because the extent of man's development is embedded in the value and measure of land. Inextricably linked with land is the housing sector, which is at the core of any developed nation. The impact of the housing sector on the economy of any nation cannot be undermined, as it is crucial to any solution proffered to the process of the nation's development. In most developed economies, it is seen as an important sector for stimulating economic growth.<sup>1</sup> It plays a prominent role in both developed and developing economies of the world. In fact it has been acknowledged as one of the guaranteed means for the creation of jobs, eradication of poverty, reduction of corruption and ensuring the security of the nation.<sup>2</sup> It has also made an impact in terms of ensuring social benefits in the aspect of

<sup>1</sup> Okonjo, I. 'Unleashing the Housing Sector in Nigeria and in Africa' 2014

<[http://www.housingfinanceafrica.org/wpcontent/uploads/2014/06/6th\\_Global\\_Housing\\_Finance\\_CME\\_Keynote\\_Speech.pdf](http://www.housingfinanceafrica.org/wpcontent/uploads/2014/06/6th_Global_Housing_Finance_CME_Keynote_Speech.pdf)> accessed 9 August, 2024

<sup>2</sup> Omotoso, K. 'Mortgage Banking/Housing Finance Sector in Nigeria: Past. Present. Future.' 2011

<<http://mban.org.ng>> 18August, 2024

contributing to community and nation building. As opined by the Minister of Finance in her keynote address<sup>3</sup> in India, each new housing unit generates 1.5 direct and 8 indirect jobs and in South Africa, each housing unit creates 5.62 direct jobs and 2.5 indirect jobs. This shows that the housing sector is one, which must be assiduously focused on by every nation. Even in Nigeria, housing has been recognized as a major priority but despite 54 years of her independence, much is still left to be desired in the mortgage industry. The housing sector has a significant impact on other sectors of the economy. This is because other sectors of the economy like agriculture, education, health, finance, technology among others have the use for land and housing in one way or the other.

It is well established in any modern economy that the use of credit is essential for business and economic growth.<sup>1</sup> Sometimes, private individuals and companies do not have the capital to embark on certain projects from time to time. Therefore, there is the need to obtain funds from lending institutions. Collateral is an important factor in credit underwriting.<sup>2</sup> Real property serves as valuable collateral for loans. Although real property is not the only property that can be used as collateral for loans but about 80% of collaterals in banks is real property. This is because its value generally appreciates over time, it is more stable and reliable, and it is easier to enforce judgment in case of default. Thus the mortgage market plays such a vital role in the grand scheme of the ultimate development for the country. A typical mortgage situation involves the transfer of interest in land as security for the discharge of a debt or the performance of an obligation subject to redemption.<sup>3</sup> It is the practice of giving rights/interests over land as security for debt.

The major role of the Primary Lending institutions in any free market economy is to transfer and direct funds from the financial surplus units of the economy to such areas as such funds are required in order to ensure growth and uniform development.<sup>4</sup> These lending institutions are financial arbiters. They perform such a vital role in the development of the economy of every nation as they act as the channel through which funds are conducted towards specific and general requirements of other sectors in the economy. It is pertinent that these lending institutions are able to sustain this duty. In order to achieve this, it is crucial that the proportion of outflow to inflow of funds to these institutions should be equal at the least. In no situation should the outflow of funds exceed the inflow of funds. In the event of a default, recovery must be made from those sectors to which such funds have been channeled. However, this is not always the case.

Having established the link between real property and the Primary lending institutions which gives rise to the mortgage transaction, it is therefore pertinent to consider not merely how the lending institutions are able to generate and keep funds in the event of default by the mortgagor but also how effective the methods of debt recovery are. This is the crux of this research.

This paper explores the specific challenges associated with mortgage as security for bank loans in Nigeria under the Land Use Act 1978 and AMCON's Act, 2021 highlighting the complexities and implications for mortgagor, mortgagee, the banking sector, and the broader economy.

This paper has four sections and this section constitutes section one.

Section two discusses the challenges posed by the Land Use Act 1978, and AMCON's act 2021 on mortgage as security for bank loans in Nigeria by identifying the lapses in the legislations, and its impact on access to loans.

Section three presents the findings as obtained from section two, concludes, and makes possible recommendations.

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<sup>1</sup> Nwuba, C.C., Egwuatu, U.S., and Salawu, B.M. The Application of Real Estate as Loan Collateral in Nigeria's banking sector *Journal of Finance and Accounting Research* (2013) (4) (11) <<http://www.academia.edu/6582723>> accessed 2 October, 2024

<sup>2</sup> *ibid.*

<sup>3</sup> Oniekoro, F.J., *Mortgages in Nigeria: Law and Practice*. (Enugu: Chenglo Publications (2007)

<sup>4</sup> Agbakoba, O. *Debt Recoveries and the Judicial System* (1992) <[www.agbakoba-associates.com/Debt-Recoveries-and-the-Judicial-System-A-Call-for-Alternative-Debt-Recovery-Mechanisms-and-the-Establishment-of-Commercial-Courts.pdf](http://www.agbakoba-associates.com/Debt-Recoveries-and-the-Judicial-System-A-Call-for-Alternative-Debt-Recovery-Mechanisms-and-the-Establishment-of-Commercial-Courts.pdf)> accessed 5 September, 2024

## Section Two

### 2.0 The Effect of Land Use Act, 1978 on Mortgage Transactions

Nigeria's mortgage laws need reform to bring them up to date with modern needs.<sup>1</sup> The Land Use Act 1978 has caused difficulties that may impede the exercise of certain remedies by the mortgagee. For instance in a sale, by virtue of the provisions of Section 21 and 22 of the Land Use Act, the responsibility to obtain consent to alienate a statutory right of occupancy is on the mortgagor who is the holder. The mortgagor may intentionally or negligently fail to do this. This renders the mortgage void in law<sup>2</sup> where the mortgagor defaults and the mortgagee would not be able to exercise the power of sale.<sup>3</sup> This is aggravated by the herculean consent application process in Nigeria. Some states have turned the request for consent into a money making venture.

This has caused unnecessary delay in the process of giving consent thereby slowing down land development.<sup>4</sup> In practice, obtaining Governor's consent for transactions takes 61 days depending on the state where the land is located.<sup>5</sup> Ultimately, this affects the mortgagee seeking to enforce the security.<sup>6</sup> Obaseki, JSC in the celebrated case of *Savannah Bank (Nig.) Ltd. v Ajilo*<sup>7</sup> on this issue stated thus:

The Land Use Act is bound to have a suffocating effect on the commercial life of the land and house owning class of society who use their properties to raise loans and advances from the banks

In the case of *Savannah Bank (Nig.) Ltd. v Ajilo*<sup>8</sup>; where the Supreme Court held that the Consent of the Governor is required for a valid alienation or transfer of interest in land with regard to all types of statutory right of occupancy. In the case, the Plaintiff executed a deed of mortgage dated 5<sup>th</sup> September 1980 in favour of the 1<sup>st</sup> Defendant. Upon default by the Plaintiffs, the 1<sup>st</sup> Defendant sought to sell the property involved by advertising the Auction sale. The Plaintiffs sued for declaration that the Deed of Mortgage was void and also that the Auction Notice was also void.

The grounds of the action were that -

- a) The property involved was situated in an urban area in Lagos;
- b) The property was already vested in the 2<sup>nd</sup> Plaintiff before the Land Use Act 1978 came into force;
- c) By section 22 of the Land use Act, the consent of the Governor of Lagos State ought to be first sought and obtained before the execution of the Deed of Mortgage and also the Public Auction; and

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<sup>1</sup> Jibueze, J., 'Adoke, others seek mortgage laws reform The Nation' <<http://thenationonline.net/new/adoke-others-seek-mortgage-laws-reform/>> accessed 4 January 2024; Kehinde Ogundimu, 'Legal and Regulatory Framework for the Mortgage Industry in Nigeria' Home EFR (2019) (57) (4) <<https://dc.cbn.gov.ng>> accessed 4 January 2024; Mohammed Aduke, and Prof. Imran Smith 'Foreclosure Law and processes in relation to Mortgage security in Nigeria' 2013.

<sup>2</sup> Section 26, Land Use Act 1978.

<sup>3</sup> LLM Class seminar UNILAG 2004: 'The mortgagee's power of sale- problems and solutions' <[http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fsecuredcredit.files.wordpress.com%2F2011%2F02%2Fthe-mortgagee-grp-6seminarpaper.doc&ei=wfiyVPziEoTnUs2Pg4AI&usq=AFQjCNF5p--hEiNSVx3\\_l28pMi4QeMZFAw&sig2=R1dMhnMStZgG2eCzYhdYkA&bvm=bv.83339334,d.d](http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fsecuredcredit.files.wordpress.com%2F2011%2F02%2Fthe-mortgagee-grp-6seminarpaper.doc&ei=wfiyVPziEoTnUs2Pg4AI&usq=AFQjCNF5p--hEiNSVx3_l28pMi4QeMZFAw&sig2=R1dMhnMStZgG2eCzYhdYkA&bvm=bv.83339334,d.d)> accessed 6 September, 2014

<sup>4</sup> Olanrewaju D., 'The fallacy of using power of attorney to avoid the consent provisions under the Land Use Act', Babcock University Socio-Legal Journal (2012) (1) (2) 176.

<sup>5</sup> Bode Agoro, Lagos State To Speed Up Land Titling and Governor's Consent Processes <<https://greymile.wordpress.com/tag/nmrc/>> accessed 3 January, 2024

<sup>6</sup> This is especially so because it is the Governor's consent that vests a valid title on the mortgagee. *P.I.P. Ltd. v Trade Bank (Nig.) Plc* (2009) 13 NWLR (Pt. 1159) 577 C.A.

<sup>7</sup> (1989) NWLR (Part 97) 305 at 329.

<sup>8</sup> (1995) 4 NWLR part 390 at 379

d) As no consent was sought as aforesaid both the Deed of Mortgage and the Auction Notice were void.

The contention of the Defendants on the other hand was that the provision of Section 22 of the Land Use Act did not apply to land being held before the coming into effect of the Land Use Act. Section 22, of the Land Use Act 1978 amongst other sections<sup>1</sup> considered and it provides as follows:

It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever without the consent of the Military Governor first has and obtained.<sup>2</sup>

The Plaintiffs succeeded in the High Court and the Defendants appealed to the Court of Appeal; the appeal was dismissed. Being dissatisfied with these judgments, the Defendants further appealed to the Supreme Court but the Supreme Court Justices unanimously dismissed the appeal.

Obaseki J.S.C who presided and delivered the lead Judgement observed that the appeal was **probably one of the earliest of contested matters that will bring the revolutionary effect of the Land Use Act to the deep and painful awareness of many.** (Emphasis mine)

Obaseki J.S.C said -

In my view and I agree with Chief Williams expression of anxiety over the implementation or consequences of the implementation clauses in the decree, it is bound to have suffocating effect on the commercial life of the land and house owning class of society who use their properties to raise loans and advances from the bank. I have no doubt that it will take the whole working hours of a state Military Governor to sign consent papers (without going half way) if these clauses are to be implemented. These areas of Land Use Act need urgent review to remove their problems.<sup>3</sup>

A distinction was made between a deemed grant and an actual grant<sup>4</sup>. A deemed under the Land Use Act is a grant by operation of law. It was decided that the holder of a statutory right of occupancy granted by the Military Governor as contained in Section 22 of the Act includes implied grant in Sections 34(2) and 36(2) of the Act. Any failure by a holder under Sections 34(2) or 36(2) of the Act to comply with the provisions of Section 22 would attract the full rigour of section 26 of the Act and render a transaction or an instrument arising out of it void.

One of the issues canvassed in the **Ajilo case** is whether the 1<sup>st</sup> Defendant required the written consent or consent in writing previously obtained to mortgage his property called the mortgaged property to the 1<sup>st</sup> Appellant having regard to the fact that the property was vested in the 1<sup>st</sup> Plaintiff before the commencement of the Land Use Act 1978.

According to Fidelis Oditah<sup>5</sup> while discussing the issues and problems in corporate debt financing in Nigeria noted that the decision in Ajilo's case put to rest an argument first developed by Omotola<sup>6</sup> that a mortgagor or other alienation of a statutory right of occupancy deemed to be granted by the Governor did not require Governor's consent. Oditah went further to note that in **Ajilo's case**, the mortgagor on whom the obligation to obtain consent was imposed by the Act obtained a declaration that the mortgage was void for want of consent. The consequence being that he obtained money from the bank, which now had no security. He noted that the case did not however decide that the personal obligation of the mortgagor to repay the loan was void, only the security was invalid. Fidelis Oditah also stated that Ajilo's case illustrates with startling clarity, one of the pitfalls of legal mortgage on land.

<sup>1</sup> Sections 1,26 and 34 of the Land Use Act,1978

<sup>2</sup> Section 22 ,Land Use Act,1978.

<sup>3</sup> *Savannah Bank (Nig.) Ltd. v Ajilo* op.cit. at page 329

<sup>4</sup> *Savannah Bank (Nig.) Ltd. v Ajilo* op.cit see also *Olalomi Industries Ltd v. NIDB LTD* (2009) LPELR-2564(SC)

<sup>5</sup> Contemporary issues in Nigerian Law: Chapter 8 Pg 129

<sup>6</sup> Essay on the Land Use Act 1984pg 27

In the case of *Awojugbagbe Light Ind. Ltd v. Chinukwe*.<sup>1</sup> The issue considered was the validity of a loan and mortgage agreement when the mortgagee performed his obligation under the agreement, by lending to the mortgagor the sum of N215, 000.00. The mortgagor changed by way of first legal mortgage his property as security for the loan before the Governor of Oyo State gave his consent for the mortgage under Section 22 of the Land Use Act. It was held that the holder of a statutory right of occupancy is certainly not prohibited by Section 22(1) of the Land Use Act 1978 from entering into some form of negotiations, which may end with a written agreement for presentation to the Governor for his necessary consent for approval. Bello J. C. N., (as he then was) delivering the lead judgment distinguished this case from Ajilo's case he noted that: the controversy in this instant case does not revolve on lack of consent but on consent given after the execution of the mortgage deed. Thus, he held that to hold that a contravention of or non-compliance with Section 22 of the Act occurs at the time when the holder of a statutory right of occupancy executes or seals the deed of mortgage and will be contrary to the spirit and intendment of Section 22 of the Act. The relevant questions are what is the effect of the provisions of the Act on mortgage transactions?

## 2.1 The Challenges

To put it more plainly, how secured is a mortgagee's interest in land in a mortgage transaction in the face of the provisions of the Land Use Act.

This would be examined under three major headings

- a) Consent provisions;
- b) Revocation and Compensation; and
- c) Certificate of Occupancy.

## 2.2 Consent Provisions<sup>2</sup>

By virtue of Section 21 of the Act, the approval of the Local Government is required for any alienation by way of assignment, mortgage; transfer of possession or sublease of a customary right of occupancy<sup>3</sup>. Under section 22(1) (a) of the Act, it appears to be discretionary whether to ask for consent to an equitable mortgage<sup>4</sup> or not since it seems to contemplate the possibility that an equitable mortgage might be created without consent.

Perhaps before we proceed, it is pertinent at this juncture to elucidate more on some of the consent provisions:

Paragraph (a) of Section 22(1) of the Act is to the effect that where an equitable mortgage has been previously created with the consent of the governor, consent will not be required for a legal mortgage thereon. This rather implies that equitable mortgages also require the consent of the Governor.

An equitable mortgage can be created by mere deposit of title deeds where the deposit was done with the intention to be used as security, mere agreement to execute a legal mortgage, the use of Form 15 in the Registration Area, and the use of equitable interest in land to secure a debt. An equitable mortgage transfers interest to the mortgagee nonetheless equitable. Though equitable, it is an interest in land and falls within the purview of Section 22 of the Act. It has been argued that if the nature of interest anticipated under the Act must be legal, section 51 of the Act did not define mortgages to include equitable mortgage.<sup>5</sup>

Though it is acceptable that agreement to alienate a Right of Occupancy is not prohibited under Section 22 of the Act, it is not absolutely correct to say that deposit of title deeds with intention for the title deeds to be used as security for the loan is not alienation. To alienate is to transfer or convey a property to another<sup>6</sup>. The equitable

<sup>1</sup> (1995) 4 NWLR part 390 pg 379

<sup>2</sup> Section 26 of the Act provides that transaction without the requisite consent is null and void.

<sup>3</sup> Governor's consent/approval is required for same on statutory right of occupancy under section 22 of the Act.

<sup>4</sup> Section 50 (1) of the Act defines mortgage to include mortgages legal or equitable, second and subsequent

<sup>5</sup> NojeemAkinjideAmodu, op. cit

<sup>6</sup> See Black's Law dictionary<sup>6</sup> (7<sup>th</sup>Edition).

mortgagor undoubtedly transfers or conveys an equitable interest to the mortgagee<sup>1</sup> or the interest the mortgagor possesses<sup>2</sup> It must therefore be taken that the prohibition of alienation without the consent of the Governor refers to alienation of legal interest. This is buttressed by Section 22 which provides that, for a duly executed approval of the mortgagor who is the holder of the statutory Right of Occupancy and who has obtained consent to the creation of the equitable mortgage may not need to apply for another consent over the same transaction<sup>3</sup> when converting to a Legal Mortgage<sup>4</sup>.

Furthermore on consent provisions, Section 24(b) of the Act provides that the interest of an occupier can only devolve on the beneficiaries wholly without any divisions. The implication of this is that the division of land can only be validly made with the consent of the Governor.<sup>5</sup>

It must however be emphasized that the consent of the Governor is only required where the land subject matter of the right of occupancy is to be divided and where it is a statutory right of occupancy of an occupier. Thus, where the devolution does not entail division of the land. But the whole of it or a Will is made by a holder, and not an occupier or where it is a customary right of occupancy, the consent is not required for there to be a valid transfer<sup>6</sup>.

It is therefore unsafe for a mortgagee to accept statutory right of occupancy by an occupier who became vested by devolution upon the death of the original occupier as security for a loan unless he the mortgagor relying on devolution must have received the whole property and not as a result of partition of a larger land. Such security is liable to be voided for the title was not properly conferred on the mortgagor, he cannot transfer a better title to the mortgagee.

It should be noted however that the courts are not likely to be inclined to accede to a mortgagor seeking to void a mortgage because the title is defective under Section 23 of the Act. This is based on the principle that a person shall not be allowed to benefit from his own wrong. This has been settled in a plethora of authorities<sup>7</sup>. The court in the case of *FBN Plc v Songonuga*<sup>8</sup> was of the view while stating the position of the law (correctly) that,

The respondent is the holder of a statutory right of occupancy who should have applied for the consent of the Governor but failed, refused or neglected to do so. He cannot be allowed to turn around to foist his neglect as a basis of his claim. It is settled law that no one should be permitted to profit by his own wrong or default. This is aptly put by the Latin expression *nollus commodum capere Patost de injuria sua propria*.<sup>9</sup>

Another noticeable impact on mortgage transactions under this heading is what happens where the consent is obtained subsequent to entering into the mortgage transaction. As an obiter dictum in *Savannah Bank Nigeria Ltd vs. Ajilo*<sup>Error! Bookmark not defined.</sup>, the Supreme Court of Nigeria said consent must be obtained prior to the mortgage. However, in order to give a human face and protect the efficiency of mortgage transactions under the Act, the Nigerian courts have rather held such a mortgage transaction inchoate rather than illegal or void.<sup>10</sup> In the dissenting judgement of Onnoghen JSC in the case of *Union Bank v Ayo Dare* the former Chief Justice was of the view that, **"... to hold that the document attached to exhibit I does not constitute evidence of the fact that the appropriate authority did approve the transaction as held by the learned trial Judge is to be very**

<sup>1</sup> *Awojugbagbe Light Industries Ltd. v Chinukwe* (1995) 11 NWLR (Pt. 390) 379

<sup>2</sup> *Fbn Plc v Songonuga* (2005) LPELR-7495(CA) (Pp. 59-60 paras. F)

<sup>3</sup> Section 22 (1) Land Use Act 1978

<sup>4</sup> Section 22(1)(a)

<sup>5</sup> This is a strange requirement because it restricts the rights of a testator who is merely an occupier to give out his occupational rights in parts to several persons. This raises some crucial questions. (Who should obtain the consent? - beneficiary or testator), at what stage should the consent be obtained? Et cetera.

<sup>74</sup> *NojeemAkinjideAmodu, op. cit*

<sup>6</sup> Section 21 and 22 of the Act

<sup>7</sup> *Union Bank Of Nigeria Plc & Anor. v. Ayo Dare & Sons* (2007) 13 NWLR (Pt. 1052) 567, *Ugochukwu V. Co-Op. & Comm. Bank (Nig) Ltd. (1996) 6 NWLR (Pt. 456) 524,*

<sup>8</sup> (2005) LPELR-7495

<sup>9</sup> Per Salami, JCA (Pp. 60-61, paras. F-B) *FBN Plc v Songonuga* (2005) LPELR-7495(CA) (Pp. 60-61 paras. F) see also *Adedeji v. N.B.N Limited* (1989) 1 NWLR (Pt. 96) 212, 226-227; *First Bank of Nigeria Plc v. Mary Medical Clinics* (1996) 9 NWLR (Pt. 471) 195, 204."

<sup>10</sup> *Awojugbagbe Light Industries Ltd vs. Chinukwe* (1995) 11 NWLR (Pt. 390) 379



***technical particularly having regards to the fact that it was the respondent who applied for the consent or approval and did present same for the purpose of obtaining the loan which he duly utilized only turning around, when called upon to repay same with interest as previously undertaken, to say that there is no approval to the transaction. Where there is anything or evidence from which the Court can infer such an approval under the circumstances, it is my view that it will be in the interest of justice to do so rather than allow the mortgagee to eat his cake and still have it back.”<sup>1</sup>***

So, despite the mandatory statutory consent requirement, “first had and obtained”, the courts have held it to mean no more than that the mortgage transaction concluded becomes inchoate (in complete) pending when the requisite consent is eventually sought and obtained.<sup>2</sup>. The facts of this case are a little similar to the position in the case of *Chief D.S. Yaro v Arewa Construction Limited & Ors*<sup>3</sup> the Supreme Court held that contrary to the position being advanced by the respondent in the case that in as much as the parties have agreed to enter into a mortgage transaction without the governor’s consent, then it is void under section 22 of the Land Use Act, there must be a document on which the governor’s consent must be affixed, In other words, even if the governor’s consent is yet to be obtained the document is not illegal, the court explained that,

“The 3rd respondent has raised the question of Section 22 of Land Use Act, concisely, the section requires that Governor’s consent to the mortgage deal has to be first had and obtained otherwise the contract is void. I think with respect that the 3rd respondent’s objection is lame in that as decided in *Awojugbagbe v. Chinukwe & Anor* (supra), it is after the mortgage has been executed that obtaining of the Governor’s consent falls due. It is normally after the parties have agreed that the Deed of Assignment is prepared and sent for Governor’s consent. The instant mortgage therefore has not fallen foul of Section 22 of the Land Use Decree<sup>4</sup>

Departure from doing this would have drastically had a telling effect on efficiency of mortgage transaction in Nigeria.<sup>5</sup>. Clearly the act also provides that there must be a document on which the consent can be granted. Section 22 (2) provides as follows;

The Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so re- quired deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by endorsement thereon.

Another situation is where the requisite consent is not obtained at all. Here, the mortgage transaction is clearly null and void<sup>6</sup>. Then, what happens to a mortgagee, what is his fate, who has advanced a loan but on a mortgage transaction where consent was not sought and obtained. Does it mean he losses everything since the whole transaction is void?

The Nigeria judiciary again rose to the occasion and made a distinction between a null or void transaction on one hand and an illegal transaction on the other. The courts have had to ask whose duty it was to obtain the requisite consent. Found out to be mortgagor’s (as the holder of the right of occupancy<sup>7</sup> since mortgagee is expressly excluded under Section 51 of the Act). The courts have held (applying the principle of Equity) that he would not be allowed to plead a void transaction when he has benefitted from same<sup>8</sup>(the credit facility had already been enjoyed by the mortgagor). In the words of Akpata JCA,

Apart from the principle of law involved it is morally despicable for a person who has benefitted from an agreement to turn round and say that agreement is null and void. Although it appears that judicial

<sup>1</sup> *NIDB V. Olalomi Industry Ltd. (2002) 5 Nwlr (Pt. 761) 532 At 547 – 548:*

<sup>2</sup> (2018) 15 NWLR (PT. 1641) 77

<sup>3</sup> (2007) LPELR-3516(SC)

<sup>4</sup> Per CHUKWUMA-ENEH, JSC (P. 49, paras. C-F)

<sup>5</sup> With This Judicial Activism, Consent In This Situation Is Retained As A “Routine Affair.” See: Omotola J. A, ‘Interpreting the Land Use Act’, Journal of Nigeria Law (1992) ( 1) (108) , see also

<sup>6</sup> Section 26, Land Use Act

<sup>7</sup> F.B.N. Plc. v Songonuga, 2007 NWLR, Part 1021 page 239.

<sup>8</sup> *Adedeji v National Bank of Nigeria* (1989) INWLR (pt. 96) 212, *All. Gen. Federation vs. Sode* (1990) INWER (pt. 128) 500, *Solanke v Abed &Anor* (1962) ALLNLR (pt 1) 230 held No 4 <sup>81</sup> Mortgagor may be entitled to compensation for the value . At pp 266-227.

activism had cushioned the negative effects the Act would have had on mortgage transaction in Nigeria, there are still issues and problems, which militate against a smooth mortgage transaction under the Act.

First, there is always delay in the Governor granting the consent. Also, while it is obligatory to obtain the Governor's consent to a landed security transactions. Such as that in mortgage transactions, there is no corresponding obligation on the Governor to give his consent when applied for, to give it within a reasonable time, not to unreasonably withhold his consent, or to give his reasons in the event of refusing to give his consent. As a matter of fact, it has been said that an order of mandamus cannot compel the performance of a similar function of the Governor in approving mortgage transactions<sup>1</sup>.

### 2.3 Revocation and Compensation

Another major upsetting provision under the Act as it affects mortgage transactions is the definition given to a holder of a right of occupancy. A holder" in relation to a right of occupancy means, "a person entitled to a right of occupancy<sup>2</sup>. The Governor is the only authority empowered under the Land Use Act to grant the Certificate of Occupancy<sup>3</sup>. While only the governor is also the only authority that may revoke a right of occupancy and consequently the certificate where certificate has already been issued on such land that the governor proposed to revoke its Certificate of occupancy. Section 28 provides thus, (1) It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest. The reasons that may be advanced by the governor for revoking a right of occupancy is only 'overriding public purpose' and no more. The law does not specify that all land that is subject of a certificate of occupancy may thereby be exempted but are only entitled to be compensated upon revocation<sup>4</sup>.Section 29(1) provides thus;

If a right of occupancy is revoked for the cause set out in paragraph (b) of sub- section (2) of section 28 of this Act or in paragraph (a) or (c) of subsection (3) of the same section, the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements.<sup>5</sup> Where the right of occupancy has been mortgaged by the holder and the governor has not only issued the certificate of occupancy but also consented to the mortgage transaction, what happens to the right of the mortgagee? Who is the right person to collect the compensation? Except where individual Mortgage Deeds may provide for how the parties may handle or treat the matter, the problem may not be easily resolved, because the effect is to totally destroy the right of occupancy<sup>6</sup>The unpalatable effect of this is, that although the mortgagee may have been preserving his interest in the mortgage security (the right of occupancy and improvements there on). He may even be ensuring periodic payment of stipulated rents, once the Right of occupancy is revoked; his security is gone and cannot attach automatically to the mortgagor's interest in any changed form. So, whereas, the mortgagor may be entitled

<sup>1</sup> Queen v Minister of Land and Survey, Ex-parte, the Bank of the North (1963) CCHCJ 1617/73 @ 61.

<sup>2</sup> Section 50(1) of the Act expressly excludes a mortgagee from the definition of a holder; Section 28(2) and (3) state a range of possibilities that amount to overriding public interest to warrant a revocation of a statutory right of occupancy and a customary right of occupancy respectively. For example, the alienation by the occupier by assignment, mortgage, transfer of possession, sub-lease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made thereunder; the requirement of the land by the government of the state or by a local government in the state, in either case for public purposes within the state....<sup>183</sup> Section 51 Land Use Act (LUA). It expressly excludes the mortgagee from its definition. "In relation to a right of occupancy, means a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-underlessee." <sup>184</sup> Section 29 (1) and (2) LUA to the effect that if a right of occupancy is revoked..., the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvement. - Amodu, N.A., 'Efficiency of Mortgage transactions under the Land Use Act: Myth or Reality'

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1843241](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241)> accessed 6 September, 2024

<sup>3</sup> Section 5 Land Use Act 1978 , gives the Governor to grant Right of Occupancy over land within a state whether in urban or non-urban areas, while section 9 also gives the governor the power to issue a certificate of occupancy over land that is subject of a right of occupancy.

<sup>4</sup> Section 29 of Land Use Act 1978

<sup>5</sup> Afolabi v. Gov of Oyo State & ors (2016) LPELR-41945(CA) (Pp. 31-33 paras. D)

<sup>6</sup> Gov of Ogun State v. Coker (2007) LPELR-4217(CA) (Pp. 27 paras. C)



to compensation for the value of his unexhausted improvements<sup>1</sup> on the land, while the mortgagee cannot lay claim to such compensation money. Can the mortgagee claim estoppel against the governor? The governor should not be approbating and reprobating at the same time. This is a major set-back in the efficacy or potency of using land for mortgage transaction under the Nigerian Laws.

### 3.0 Certificate of Occupancy<sup>2</sup>

One other innovation introduced by the Act is the issuance of a certificate of Occupancy by the Governor of a state. It should be noted that a certificate of occupancy is merely an evidence of a right of occupancy for which it does not on its own confer a title or interest in land. The Act has not provided any conclusive means of proving ones entitlement to a right of occupancy.

The certificate raises a rebuttable presumptive right of occupancy<sup>3</sup>. In *Azi v. Registered Trustees of the Evangelical Churches*.<sup>4</sup> The court held that the issuance of certificate of occupancy in respect of any land would not validate defects, if any in the title of the holder; thus, the court summed it up by saying that a certificate of occupancy granted to one of the claimants who has not proved a better title, was invalid.<sup>5</sup> The courts have agreed that the Certificate of occupancy is only a *prima facie* evidence and not a conclusive proof of title to a property<sup>6</sup>. Section 9 of the Land Use Act specifically stated that the Certificate of occupancy issued under his hand is ‘in evidence of such right of occupancy’<sup>7</sup>. It follows that the Certificate of occupancy that was used as security under a mortgage transaction may be set aside anytime when there is any superior title even if it is traditional historical root of title<sup>8</sup>.

This means a certificate of occupancy may be set aside if it turns out that the holder had no right to the land<sup>9</sup>, or in favour of a pre-1978 conveyance or in favour of a deemed grantee of right of occupancy under section 34 of the Act<sup>10</sup>. From the dictum of His lordship, Nnameka-Agu,<sup>11</sup> J.S.C, it can be inferred that a certificate of occupancy issued pursuant to the Act only gives the right to use and occupy land, it neither confers nor is it necessarily an evidence of title. Unlike a conveyance, which is the means whereby a right in land arises, a certificate of occupancy confers no interest in land.

The horror and hellish implication of this is that where the certificate of occupancy is set aside due to any reason, the mortgagee who has accepted it as security realises he has no security he could rely on for repayment of his loan.. The certificate he is holding automatically becomes a piece of paper having no value<sup>12</sup>.

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<sup>1</sup> Section 29 (1) and (2). Award of compensation to holders of undeveloped plots under the Land Use Act – Case for reform: Uche J. and Osimiri, Justice: A journal of contemporary legal problems (1990 ) (3) (7) <http://www.search-worldcat.org> 6 September 2024

<sup>2</sup> The issuance of a certificate of occupancy is provided under section 9 of the Act.

<sup>3</sup> The Registered Trustees of the Apostolic church v Olowokemi (1987) 4 NWLR Pt 58, held No 4 (SC); Ogunleye v Oni (1990) 2 NWLR (Pt 135) 745. Reg. trustees of Apostolic Church of Christ v Reg. Tustees of Grace Church of Christ (Pp. 27-28 paras. E; Hadejia v. Abbas (2016) LPELR-40234(CA) (Pp. 28-29 paras. B); Ibrahim v. mu'azu & ors (Pp. 23-24 paras. D)

<sup>4</sup> (1991)6 N.W.L.R. pt. 195, p.111

<sup>5</sup> Ibid at page 126.

<sup>6</sup> Adeyemi v. Akpa & ors (Pp. 17-20 paras. B)

<sup>7</sup> Section 9 Land Use Act 1978

<sup>8</sup> Dantata v. Dahboul & ors (2016) LPELR-41264(CA) (Pp. 91-92 paras. C)

<sup>9</sup> Adedeji v Williams (1989) 1 NWLR (pt 99) 811.

<sup>10</sup> Sir Adetokunbo Ademola v Amao &Ors (1982) CGSLR p.273 reported in Omotola J. A. “Cases on the Land Use Act” p. 132

<sup>11</sup> Ogunleye v Oni, op. cit

<sup>12</sup> Per Belgore, JSC in Ogunleye v Oni, I.O. Smith, op. cit. at page 28. The effect is that, a Bank who takes the certificate of occupancy as security only gets a document of transfer but which in reality, transfers no interest in the land to the Bank.

#### **4.0 The Challenge of Section 43(3) of the Asset Management Corporation of Nigeria Act 2010 (as Amended)**

In an attempt to provide for more efficiency in the recovery of debts owed under Non-Performing Loans, and with a ruthless approach to achieving the Federal Government's goal of recovering all the outstanding debts that are seen as a cause for the slowdown in the Nigerian Economy

The Asset Management Corporation of Nigeria (AMCON or the Corporation) is empowered by the AMCON Act to hold, manage, realise, and dispose of Eligible Bank Assets (EBA), including the collection of interest, principal and capital due and the taking over of collateral securing such assets, in accordance with the provisions of the AMCON Act.<sup>1</sup> (the Act) These EBA are Non-Performing Loans (NPLs) which the Corporation was created to resolve as a means of stabilising and re-vitalising the Nigerian economy<sup>2</sup>. The enactment of the Asset Management Corporation of Nigeria (AMCON) Act, 2010 was specifically to bail out the Nigerian banks by buying and taking over the toxic assets that were threatening to destroy the banks and the economy<sup>3</sup>. However, it has shield government agencies from liability, at the expense of the interest of the citizenry and ultimately goes down to defeat the course of justice.

It should be noted that the Act was first enacted in 2010, and has been amended three times, once in 2015, again in 2019 and most recently in 2021. Each time the Act has expanded the powers of the Corporation in resolving the Non-Performing Loans and recovering outstanding debts.<sup>4</sup>

This section intends to give an analysis on the expanded powers of the Corporation in its efforts at debt recovery, especially on the pre-action notice under the Act and the Public Officer's Protection Act and the effect on Mortgage transactions in Nigeria.

Section 43(2) of the Act provides that:

An Action shall not be brought or commenced against the Corporation until after the expiration of 90 days' notice in writing to the Corporation giving details of the alleged wrong, date, and remedy sought.

The Act has increased the time allowed after service of a Pre-Action Notice, before a Claimant may file an action against the Corporation. The time was increased from 30 days to 90 days after service of the pre action Notice.<sup>5</sup>

Section 2(a) of the Public Officer's Protection Act provides that:

the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury within three months next after the ceasing thereof: Provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict prisoner, it may be commenced within three months after the discharge of such person from prison<sup>6</sup>

This grants a limitation period of 3 months from the date the cause of action arose for actions against a public officer, and the simple effect is to rub the jurisdiction of the court and frustrate or render unenforceable any action commenced outside the mandatory three months period.<sup>7</sup>

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<sup>1</sup> Section 5(c) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).

<sup>2</sup> Kunle Aina. A Critical Examination Of The Asset Management Corporation Of Nigeria And The Process Of Securitisation of Eligible Bank Asset . (2016). Justice Journal. Vol. 8. 32-47.

<sup>3</sup> Section 5 of the Act, 2010 As Amended 2019

<sup>4</sup> An Analysis of the extensive powers of the Asset Management Corporation (AMCON) under the AMCON Act. <<http://www.Ajol.info>> accessed August 31, 2024

<sup>5</sup> See Section 43(2) of the Act, 2019

<sup>6</sup> Cap P41 LFN 2004

<sup>7</sup> Though with exceptions as cases of continuance of Damage or injury, acting outside the colour of his office or statutory/constitutional duty. Cases of recovery of land (Salako v L.E.D.B (1953)20NLR 169, breaches of contract (Osun

In the case of *C.B.N. v. Umar*,<sup>1</sup> the Court of Appeal held, that the Appellant, which was created by an Act of the National Assembly to act for the Federal Government, was a public officer. Applying the principle in that case to the Corporation, this would mean that the Corporation, being a body established by an act of the National Assembly to act for the Federal Government, is a public officer.

The effect of the foregoing is that with AMCON being a public officer and also requiring a 90 day pre action notice before an action is commenced against it. Even if such a pre action notice is served on AMCON the day the cause of action arose and the civil action in respect of the said cause of action is filed on the 91<sup>st</sup> day after the service of the pre-action notice. The action would still be statute barred as it would have been filed a day after the 3 month period stipulated by the Public officer's protection Act.<sup>2</sup> This amendment has therefore had the ultimate effect of robbing the mortgagor of any right of action. Such a provision ought to be challenged and struck down as being unconstitutional or at the very least against public policy. Previously, the Act provided that the Corporation could take over a debtor's property only where the property was used as security for the NPL and where the property was not secured by the loan.

Section 34(1)a of the 2019 Act was amended by the section 2 of the Amendment Act 2021 as follows: subject to paragraphs ©, (I) and (d) become vested and acquire legal title to the eligible bank assets and all assets or property tangible or intangible, traced to and in which the debtor has interest in, whether or not such assets or property is used as security for the eligible bank asset. This meant that AMCON acquired immediate legal title in any property secured by the eligible bank asset and could sell and manage same in accordance with Section 34 above. The acquisition of the eligible bank asset also operates to extinguish any equity of redemption of the charge in relation to such assets or property even such assets were never used as security or subject of any mortgage.

As if this was not enough, the Act, as amended in 2021 now provides that legal title over all the debtor's property, regardless of whether same was used to secure the loan, automatically become vested in AMCON<sup>3</sup>. This would empower AMCON to exercise all the rights of a person with legal title over a property, which includes the power to sell and or manage the said property<sup>4</sup>. The 2021 amendment to the AMCON Act is to say the least a veritable obstacle to mortgage transaction in Nigeria and obstacle to economic development in Nigeria.

These challenges test the viability of mortgage transactions in Nigeria.

## 5.0 Conclusion

The fact that easy realisation of credit is crucial to confidence in lending<sup>5</sup> cannot be undermined. The major concern of mortgage institutions is the repayment of the mortgage debt. This could be by the mortgagor simply repaying the mortgage debt or the mortgagee resorting to the security to recover the debt. The ultimate aim is to attain a viable mortgage industry that can favourably compete in the global economy. This can only be achieved where the mortgage institutions are sturdy and there is a balance in the inflow and outflow of funds in the economy. Although there is a variety of remedies available to the mortgagee in the enforcement of the mortgage security in Nigeria, it is evident that these processes are beset with many challenges. Therefore, in order to

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State Government v Danlami (Nig.) 9NWLR (Pt.1038)66, claims for work and labour done etc. see the case of Attorney General of Rivers State v Attorney –General of Bayelsa State & Anor (2013)3 NWLR (pt.1340)123 at 148, para. G

<sup>1</sup> (2019) 10 NWLR (Pt. 1679) 75 (CA)

<sup>2</sup> Kunle Aina. A Critical Examination Of The Asset Management Corporation Of Nigeria And The Process Of Securitisation of Eligible Bank Asset . (2016). Justice Journal. Vol. 8. 32-47.

<sup>3</sup> See Section 34(1)(a) and (b) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended), particularly section 34 (2) (b) of the Amendment of 2021.

<sup>4</sup> The Act expands the power of the Corporation to take custody of a debtor's property under Section 49 and the power to freeze the assets of a debtor under Section 50

<sup>5</sup> Osibanjo, Y. Challenges of enforcement of Securities in Nigeria (2010)

<[http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIESCHALLENGES.pptx&ei=hPWYVKKpGcGyUd-AgeM&usq=AFOjCNFpGf3fD4JDWkvVozFr2MFRM1GoA&sig2=I\\_8usNhZ6xB6lTCEoZM5xw&bvm=bv.8339334.d.d24](http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIESCHALLENGES.pptx&ei=hPWYVKKpGcGyUd-AgeM&usq=AFOjCNFpGf3fD4JDWkvVozFr2MFRM1GoA&sig2=I_8usNhZ6xB6lTCEoZM5xw&bvm=bv.8339334.d.d24)>

[F%2Fwww.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIESCHALLENGES.pptx&ei=hPWYVKKpGcGyUd-](http://www.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIESCHALLENGES.pptx&ei=hPWYVKKpGcGyUd-AgeM&usq=AFOjCNFpGf3fD4JDWkvVozFr2MFRM1GoA&sig2=I_8usNhZ6xB6lTCEoZM5xw&bvm=bv.8339334.d.d24)

[AgeM&usq=AFOjCNFpGf3fD4JDWkvVozFr2MFRM1GoA&sig2=I\\_8usNhZ6xB6lTCEoZM5xw&bvm=bv.8339334.d.d24](http://www.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIESCHALLENGES.pptx&ei=hPWYVKKpGcGyUd-AgeM&usq=AFOjCNFpGf3fD4JDWkvVozFr2MFRM1GoA&sig2=I_8usNhZ6xB6lTCEoZM5xw&bvm=bv.8339334.d.d24)> accessed 31 October, 2024

ensure continuous growth in the Nigerian mortgage industry, improvement and innovation are required in the challenging areas.

### 5.1 Recommendations

Improved Statutory reforms: Reform of our laws should be a continuous process. Wilson<sup>1</sup> asserts that on average, laws in wealthy countries have been enacted or amended much more recently than those in developing countries, whose laws often date to colonial times. Where reforms are frequent (although not indiscriminate) then it is easier to spot lacunae in the law while linking it to areas that cause distress to the people.

On the revocation of the right of occupancy subject matter of mortgagee's security, the Land Use Act should be amended to permit the mortgagee to have an equal right to claim the compensation money in cases of justifiable revocation of the Certificate of occupancy.

To avoid the delays linked with the consent giving process, the Land Use Act should specify a duration within which the consent of the Governor is to be given.<sup>2</sup> The Act should also address the issue of the Governor withholding consent unreasonably. More practically, it has been advocated that mortgage to Banks and other financial institutions should be exempted from the consent provisions of the Act as was the case under the Acquisition of lands by Aliens Law.<sup>3</sup>

It is also recommended that AMCON's Act be amended. The Act, as amended in 2021 now provides that legal title over all the debtor's property, regardless of whether same was used to secure the loan, automatically become vested in AMCON<sup>4</sup>. This would empower AMCON to exercise all the rights of a person with legal title over a property, which includes the power to sell and or manage the said property. While it is almost impossible to sue AMCON. This will only frustrate mortgage transactions, as same will no longer be attractive to investors home and abroad. Therefore, AMCON should be removed from the purview of the public officer and the 90 days' notice to be given before AMCON could be sued should be reduced to 30 days.

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<sup>1</sup> Inam W. Enhancing Nigeria's Economic Development: A Case for Institutional and Regulatory Reforms in Nigeria's Banking Sector (2005)  
<<http://www.mondaq.com/x/32173/Insolvency+Bankruptcy/Enhancing+Nigerias+Economic+Development+A+Case+for+Institutional+and+Regulatory+Reforms+in+Nigerias+Banking+Sector>> accessed 31 October, 2024

<sup>2</sup> Amodu, N.A. .Efficiency of Mortgage transactions under the Land Use Act: Myth or Reality' (2014)  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1843241](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241)> accessed 31 October, 2024

<sup>3</sup> Olanrewaju, D. 'The fallacy of using power of attorney to avoid the consent provisions under the Land Use Act. *Babcock University Socio-Legal Journal* (2012) 1.2: 176.

<sup>4</sup> See Section 34(1)(a) and (b) of the Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended).