Quest Journals
Journal of Research in Humanities and Social Science
Volume 9 ~ Issue 8 (2021)pp: 54-59
ISSN(Online):2321-9467
www.questjournals.org

Research Paper

The Institution of Legal Customary Pledge as a Mechanism For Economic Growth In Nigeria. Obstacles and Needed Reforms.

Ekeocha, UgochukwuChidiebereUkwuoma
Department of Social Sciences, (Law Unit), Federal Polytechnic Nekede, Owerri, Imo State, Nigeria.

ABSTRACT
The concept of pledge is a transaction in the nature of a contract with a right of action assured to the pledgee. It has also been described as a deposit of chattels with a lender as security for a debt. Pledge is basically a customary law creation especially as it concerns customary land relationship in the use of land. Basically, land as a bedrock of human activities within a society is saddled with huge economic significance in terms of providing security for capital, investment, business and agriculture. Notwithstanding, pledge has some merits and demerits as long as dealings in land are concerned. Consequent upon this fact, this research reappraised the type of title which a pledgor or pledgee has in the course of transactions. Recourse was made on the scope of its acceptability and applicability vis-à-vis the customary land relationship. On the other hand, it is noticeable that the concept or practice of pledge meets with several obstacles in its applicability, hence the needed reforms.

Received 02 August, 2021; Revised: 14 August, 2021; Accepted 16 August, 2021 © The author(s) 2021. Published with open access at www.questjournals.org

I. INTRODUCTION

Pledge (or pawn, as it is sometimes inaptly called) is a kind of indigenous mortgage by which the owner-occupier of land, in order to secure an advantage of money or money's worth, gives possession and use of the land to the pledge creditor until the debt is fully discharged.

In view of the above averments, it is obvious that the concept of pledge is one of those dealings which centers on land and ownership; it is therefore of paramount importance if an insight into the import of land is attempted.

Land as conceived by law is fraught with controversies. However, for our purpose, land by many be defined as the earth surface, subsoil, the air space above it. The property and conveyancing law defines land to include buildings, structure, rights and privileges and rents, etc. thus both the common law and statutory definitions are in agreement. Land as conceived consists of natural and artificial elements. This is usually expressed by the Latin Maxim, quic quid plantatur, solo, solo cedit. The legal significance of this is that whatever human improvement that is attached to the land accrues to it and belongs to its owners unless there exist a contrary intention.

Having attempted a clearer explanation of what land is, we shall in the course of this research critically analyze what type of interest in land pledge affords the owner, especially under the customary law relationship in order to ascertain if there are obstacles to its full applicability and the scope of its acceptability, and finally, suggest some needed reforms.

II. BACKGROUND OF STUDY

In Nigeria, as in practically all the former British West African Colonies ownership and interest in land in the accepted English sense is unknown. Land is held under community or customary ownership and not, as a rule by the individual as such.

But, following the treaty of cession of 1861, the real ownership of land in the British Colony vested in the British Crown to which belong, in constitutional theory, all the territories of the British commonwealth and Empire.

The legal effect of the cession of 1861 then is that the root title of land contained in the treaty is thereby passed to the British Crown on the principle that the Crown owns Lagos lands, which has been the consistent judicial view, one would naturally want to see stated a clear idea of the nature of right.

Moreso, in section 18(91) of the interpretation Act, 1964, we find that "land" does not include minerals, though, under the customary law relating to land, no such and enjoyment of the land usually carried with it the full right to its mineral which pledge is an acceptable form of interest and dealings with/on land, subject of course to the requirement of the prevailing custom and the relation of the particular occupier to the land. If occupation was merely temporary or permissive, conditions might be imposed by the immemorial "owner" otherwise, land usually includes minerals. This position however,is now entirely governed by legislation.

The Mineral Act 1964, with minor amendments made the mineral Acts 1916 and all subsequent amending Acts to come into operation on February 22, 1946. Its relevant provisions are: 3(1) the entire property in and control of all minerals, and mineral oils, in, under or upon any land in Nigeria, and of all rivers, streams, and water course throughout Nigeria, is an shall be vested in the crown (state), save in so far as such rights may in any case have been limited by an express grant made before the commencement of the Act.

Consequently, with the inception of the land use Act 1978, the issue and acceptability of pledge as consisting real interest in land became a most problematic one in the contemporary Nigeria instance owing to the fact that pledge is now saddled with a lot of uncertainties. The problem was brought about mainly by the land use Act which basically divested land from individuals, families, and communal ownership and vesting it in the state governor and consequently turning individuals to become beggarly.

It is therefore against this background that this research aims at actually focusing on pledge as interest in land under the customary land relationship with the view of ascertaining its obstacles, strength and weakness.

III. STATEMENT OF PROBLEM

Under pledge, there is no transfer of ownership or title. In a secured credit transaction, the creditor is entitled to collect rents and proceeds from the pledged property. It is notable also that time does not run against the pledgor to redeem his property. The Maxim is once a pledge always a pledge.

Notwithstanding in principle, property can be pledged to banks to secure loan, the security practice however are not usually keen in the security of pledge as they are not interested in making their profits through rents or proceeds from property. The reason being that by the end of pledge, the pledgee makes his profit mainly by reaping the proceeds, and the income calculated and paid to the borrower who in return directly pays the pledgee.

In Adjei V. Dabanka, it shows that there is no right of outright sale even if the pledgor defaults rather it was held that the transaction created an equitable mortgage, and as such it was important for the pledgee to have obtained from the court an order of foreclosure before a sale, failure of which is nullity.

It is therefore obvious that the interest in land created in form of pledge is not a good one and does not provide the full force of law. Therefore, there should be a timely reform on the institution of pledge in order to make it attractive to land owners, borrowers and businessmen and financial institutions as the case may be.

IV. OBJECTIVE/PURPOSE OF STUDY

The importance of the institution of pledge cannot be overemphasized for the pledge transaction provides a means of raising necessary capital and reassurances for investments, especially to farmers. They are not normally able to raise a loan by way of mortgage due to the absence of the title deeds to their kinds and this may linger for sometimes. Pledge is still beneficial because it may serve as a safety factor against the evil of outright sale, and the use of pledge as a security for short terms small and medium sized loans is enhanced, because the institution is indigenous to the people. According to Onuoha, R.A., pledge is better understood by them than the received institution, and it is a relatively simple transaction which is devoid of all technicalities of legal and equitable estate of the received legal institution. The justice of this institution lies in the fact that it is indigenous to the people accommodating their way of life, giving them happiness and liberating them from the clog of documentary legal complexities; this research work will thereby encourage the government to fashion or put a legal framework in place that will accommodate this institution at the informal sector level for the enjoyment or rural communities and further intend towards solving the clogs/draw back associated with pledge institution which will make it attractive by proffering suggestions for reforms.

V. RESEARCH METHODOLOGY

The methodology to be adopted in this work will be purely doctrinal. By this approach, it will be analytical and prescriptive. The critical examination as well as appraisal of the Land Use Act and the drawbacks that arise in the nature, use and enforcement of landed security under the Act makes the analytical and doctrinal approach a preferred option.

The perspective method is adopted in that recommendations on useful suggestions for the reform of the Act in the area stifling landed security transactions are proffered.

VI. LITERATURE REVIEW AND HISTORY OF CONCEPTS

LITERATURE REVIEW

The literature review will focus on the views of some prominent scholars on land. According to Nwabueze, B.O. it is said, however, that a customary pledge has no right to insist on the repayment of the sum he had lent, and if he wants his money back and the pledgor is unwilling or unable to repay; his remedy is to repledge the land to a third party for an amount exceeding that of the original pledge. This suggests that a pledge is something different in nature from a mortgage in English law, it is also submitted that in English law, a pledgee can sue for the repayment of the loan. Nwabueze, went on to establish that for a proper understanding of the types of security created by a pledge, it is necessary to be sure of what the security consists. The authorities are agreed upon one thing, namely that a loan secured upon cannot be pledged unless the pledge is let into possession of the land as at the time of the transaction.

Elias, T.O. in his own view postulated pledge as such that could be referred to as pawn inaptly sometimes. He presents it as a kind of indigenous mortgage by which the owner-occupier of land, in order to secure an advance of money's worth, gives possession and use of the land to the pledge creditor until the debt is fully discharged.

An English mortgagee's rights against a defaulting mortgagor are:

1. To sue on the personal covenant
2. To foreclose in proper cases
3. To sell the land under certain conditions, and
4. To enter into possessions, which is rarely done (at least since the Law of Property Act 1925) because of the rather strict liability to account imposed on the mortgagee who goes into possession of the mortgaged land.

Under the indigenous system, however, the pledge creditor obtains possession of the land from the very inception of the deal and also enjoys the usufruct of the land for as long as it is considered necessary to give him an equivalent credit. The pledge may be restricted to the usufructuary enjoyment of only those trees or crops planted on the land by himself since taking possession of it, or he may be permitted to exercise all the powers of an owner occupier. In the latter case, if he plants permanent or economic trees like kola, palm, cocoa trees on the pledged land, he is usually not allowed any compensation for the improvements when the time comes for him to vacate the land on payment of the debt or satisfaction of the credit by the pledgee's exploitation of the land. Since the whole original arrangement does not envisage a permanent state of affairs, this custom is understandable. Indeed, only the crops are sometimes pledged, the land remaining in the occupation of the pledgor. This occurs mostly in palm oil, kola or cocoa-growing areas.

In his own perspective, Onuoha, R.A. posited that pledge in the first sense is a loan of money secured by the possession of chattels delivered to the lender. In the second sense, it is a form of security transaction known to customary law. It is created where the owner occupier of land known as the pledgor, in order to secure an advance of money or money's worth, gives possession and use of the land to the creditor known as the pledgee until the debt is fully discharged. Although the lender has certain power of sale, the general property in the goods remains in the borrower and the lender has possession in a mortgage. In the other land, the lender assures ownership and the borrower usually retains possession. According to Megarry, the great advantage of a mortgage as opposed to a pledge is that the borrower can thus keep possession of his property for the time being.

Onuoha, sees the philosophy behind the institution of pledge in the society as having its foundation on the satisfaction of human needs. This is the offshoot of the nature of man since creation, and the fact that existence precedes essence and our essence lie in our existence in the society, and man's struggle for "essence". Fortunately, pledge happens to be one of the essential tools for the maintenance of man's existence in the society. The acquisition of right either out of "interest" or "wills" of human beings over pledged property gives credence to the study of pledge as a security.

Conceptually, a pledge is a transaction in the nature of a contract with a right of action assured on the pledgee. It has also been described as a deposit of chattels with a lender as security for a debt.

Pledge according to Onuoha, R.A. when described as an "indigenous mortgage" a "native mortgage" or a "customary security transaction" the objective are used to differentiate the customary law transaction from the legal and equitable mortgages recognized by virtue of the received laws. However, in holding a contrary view, Olawoye, G.O. opined that describing pledge as an indigenous mortgage has been the source of confusion, which has in effect encouraged the court to take the view that the pledged land is given as a security for the payment of the sum borrowed as in the case of mortgage in English law. He stated further that customary pledge in its original conception is not a security of transaction. He distinguished between a pledge of economic trees, which in substance may be viewed as a security transaction and a pledge of farmland, which was not.

Onuoha, further established that a pledge has also been described as an indigenous kind of mortgage by which the owner occupier of land, in order to secure an advance of money or money's worth gives possession and use of the land to the pledge creditor until the debt is fully discharged. Pledge in customary law is akin in some respects to the mortgage in common law. Whether a transaction is a mortgage or a pledge is a matter of

substance, not form. For this reason it has been said that in pledge actual possession of the property is the whole gist of the creditor's security. The pledge may therefore be classified as a possession security, as distinct from common law mortgage which provides a proprietary security because it is out of the possession granted under the agreement, that the pledgee's rights spring. In customary law, the pledgor retains the radical title while the pledgee has possession. A pledge transaction therefore vests in the pledgee only a right to possession of the land and the enjoyment of profits thereof; title remains in the pledgor.

Notwithstanding, according to Smith, I.O. it is postulated that a pledge is a form of security transaction know to customary law. It is created where the owner-occupier of land known as the pledgor in order to secure an advance of money or money's worth, gives possession and use of the land to the creditor known as the pledgee until the debt is fully discharged. From the above description, two essential features are discernable viz:

a. That the pledge provides the pledge-creditor with security for the performance of the pledgor's obligation of repaying the debt.

b. That the security takes the form of giving the pledgee possession of the pledgor's property.

Sometimes, the customary pledge may be confused with the English language. The problem is further compounded by the practice of reducing transactions into writing and failing to use language precise enough to indicate in the case of Nwabuoku V. Ottih stemmed from an agreement of loan between the parties whereby the plaintiff gave the defendant possession of his house with the right to collect rents and profits therefore but a document later executed describing the transaction as a mortgage.

VII. OBSTACLES

REDEEMABILITY OF A PLEDGE

In Nigeria, pledge is created under customary law; the pledgor always has the right of redemption regardless of the length of time. One cardinal principles of the local pledge system is its ultimate redeemability. It is never lost under the principle of "foreclosure" as is the case under mortgage. Since the pledgor does not vest title in the pledgee, but only a right of possession, on the principles of memo dat quad non habet in the general law of contract, the pledgee cannot transfer without consent of the first pledgor. The Maxim of customary law is "once a pledge always a pledge". This Maxim signifies two basic principles; a thing which is pledged is never lost. A pledgor's right of redemption is reflected in the kikuyu proverb "a debt on land can never finish the land" and some tribes in Ghana that "debt dries rots"

In Nigeria, the position is that as long as it is possible to identify the original purpose or understanding, the land and the parties or their successors to the pledge, there is a right to redeem the land no matter how many years have elapsed from the date of the transaction and the extent of permanent improvements the pledgee may have made on the land during the period of its use. This was illustrated in the case of Laregun&Ors V. Funlayo, where the plaintiffs sued for recovery of land which was pledged to the defendant for over 30years during which the defendant planted economic trees, it was held that mere planting of economic trees and lapse of time did not defeat the right of the plaintiff to recover the pledged land. The pledgor or his successor in title may redeem the pledged property, the general rule is that where any member redeems it with his own money, it remains a family land and he has legal right to the money from the farming funds.

PERPETUAL REDEEMABILITY OF PLEDGED LAND IN NIGERIA

The perpetual redeemability of pledged land is universally recognized throughout Nigeria. As Mbanefo, J. (as he then was) puts it in the case of Stephen Ikeanyi V. OgbonnaAdighogu.

The issue between the parties is whether or not the land was given on pledge or as a gift. If it was pledged to the defendants the plaintiffs would have the right of redemption and it does not matter for how long the land has been pledged, for, in native customary jurisprudence in English law, once pledge always pledge.

THE NEEDED REFORMS IN THE INSTITUTION OF PLEDGE

Pledge, which is a kind of indigenous mortgage by which the owner-occupier of land, in order to secure an advance of money or money's worth gives the possession and use of the land to the pledge creditor until the debt is fully discharged needs some reforms.

The reforms here is supposed to be encompassing, if the practice and institution of pledge must seem attractive, otherwise it would remain as obsolete as it is to banks, lenders and other financial institutions, and thereby create untold hardship to rural farmers who need money or loans in order to engage in Agriculture.

More still, the land use Act itself needs a radical reform so as to create a nabbing legal framework that would be palatable and conducive for operations.

The research shall now recommend the needed reforms –

THE NEEDED REFORMS - AMENDING THE LAND USE ACT 1978

Given the above situation, some suggestions have before now been proffered concerning the consent provisions of the land use Act. One learned writer had this to say- "This problem is nationwide and if we heed the humble suggestions of Obaseki, J.S.C., there is urgent need for the amendment of the Act in the direction to make it mandatory for the lands and Housing Commissioner or Attorney General or possibly the Director of Lands to exercise these powers of the Governor in order to ease congestion and the suffocating effect.

CREATION OF STATUTORY PLEDGE

Another ways of reforming the institution of pledge is by creation of a statutory pledge. The statutory pledge will make it possible for pledge to be acceptable to lenders as a good security. The statutory pledge will make it possible for the pledgor to assign the interest he has in the pledge property following the case of Inua Wada V. Thomas Bryme. If however, the property covenants not to assign or sublet without qualification, he cannot do without being breach of the assignment covenant. The statutory pledge will also make it possible for interest to be charged as stipulated by the parties, but if not, an equitable interest rate of 4 or 5% per annum which was affirmed in the case of Re Drax and the case of Mandle V. Smith with respect to mortgage should be allowed. Again, statutory pledge should jettison the recognition of an oral pledge especially when it involves pledge of real properties. This will be consistent with section 67 of property and conveyance law of 1959. This will reduce the anxiety which has scared lenders out from the attention of pledge. The perpetual redeemability of a pledge should be reviewed to make it possible for the lending industry to dispose of the pledged property after a certain period of time. This is to avoid liquidity problem. If the banks should continue lending money without redemption by the pledgor, then the bank will soon be out of business.

REMOVAL OF STRICT LIABILITY TO ACCOUNT

The statutory pledge should also remove the strict liability imposed on the pledgee to account especially as the banks might be unwilling to carry out this obligation and they do not want to run the risks inherent in the nature of customary pledge together with discharging their primary function. If reformation is carried out on the institution of pledge, it will be attractive to the lending industry.

ABOLITION OF PERPETUAL REDEEMABLE PLEDGE

The perpetual redeemability of pledge is now trite law. This means that unlike the mortgagor who is barred after twelve years in possession by the mortgage so that the mortgagee acquires absolute title to the property, a pledgor is never barred; the land is redeemable however long it might have been in possession of the pledgee and this is a general law, it cannot become a pledgee's by lapse of time. As it is, perpetual redeemability does not aid development as the pledgee may not be compensated for any unauthorized development and it is doubtful if the pledgor will authorize major developments as these may inhibit his ability to redeem.

RECOGNATION OF EQUITABLE INTERVENTION IN PLEDGE

It is difficult in proving a pledge especially when all the witnesses have died. This is because of the unwritten nature of a pledge.

Admittedly, even when the witness are alive, the existence and the terms of oral contracts generally and of a pledge in particular are always difficult to establish and the resulting confusion lead to increase litigation and uncertainty. However, the evidential value of writing lacking in a pledge, should not overshadow the advantage of oral nature of the pledge; in the event of a dispute, the arguments focus on the substantive issue of whether there was a pledge and not on the formal issue of whether there was sufficient memorandum and signature or on the technical construction of words and phrases which may be incomprehensible to laymen. If one party established the existence of pledge, the other party cannot escape liability on any technical basis or for the reason of formal non-compliance because equity looks at the substance and not form.

VIII. SUMMARY, RECOMMENDATION AND CONCLUSION

SUMMARY

This study has considered the institution of pledge in relationship with the Land Use Act, 1978. This research revealed its merits and demerits as it affects customary land tenure system. The customary law rules governing pledge as examined in this work is universal.

By far, the greatest development in Nigeria land Law and conveyancing in the country is the enactment of the Land Use Act 1978. If the Act achieves what is claimed for it, the whole rules of customary law vis-à-vis pledge in this country would have undergone a chemical reaction and the people to whom the rule apply would also have a great change in their application of alienation of land through pledge. But did the Land Use Act affect a demise of the customary law rules affecting pledge and land? This is the question which this research has tried to answer. In this task, this research has first looked at the peculiar general principles of customary law

before we proceeded to its main institutions. At each stage, the provisions of the Act which bore directly or inferentially on the rules have been examined with a view to ascertaining what effects they had on the stated principles.

CONCLUSION

Attempts have been made in the following analysis to highlight main problems posed by certain provision of the land use Act in so far as it affects pledge and customary system of land tenure in general. From what we have seen, an immediate review of the Act is the only answer. To this effect, the act should be treated as draft legislation on property law. One great advantage of the Act is that at least it has set the ball rolling on the issue of the reform of this branch which has received very little attention in the past. What needs to be done by all concerned is to take the matter further by bearing in mind the culture of the people in re-redrafting a unified property law. The Act seeks to undermine the position of the heads of family, the Obas, Obis and others who from time immemorial have enjoyed a special position in relation to their people and are seen by their customs as trustees in relation to them as regards the issue of pledge. If that act is to be given full effect, it may mean the end of the concept of family ownership, customary tenancy, pledge and the like.

RECOMMENDATION

The present researcher therefore feels the following matters must be looked into at this point in time.

a. The issue of management of land by Local Government in non-urban areas,should be abolished as this clearly undermines the position of the community leaders in the alienation of land, especially pledge.

b. Clarification of the provision in section 36 relating to land in non-urban areas.

c. The relationship of the overlord and customary tenant in relation to land be subject to customary tenancing.

d. Both section 24 and 25 must be carefully studied. Although section 25 does not apply to land held under customary law, it is sometimes taken to apply to all cases.

e. The customary law rules relating to transfer of land must be expressly preserved so as to preserve the culture of the people.

f. Consent provisions in the Act must be reviewed. So also is the power of revocation. The Land Use and Allocation Committee must not be the final arbiter on the quantum of compensation.

g. Perpetual redeemability of pledge should be abrogated.

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