

Legal Framework of Mortgages: Cost Effective Options for Finance

Fabian Ajogwu

Session Outline

- The Company Director
- Legal Position of Directors
- Separation of Management from ownership
- Board Autonomy & Independence
- Fiduciary Duties
- Roles & Functions
- Sanctions for Maladministration
- Wrap up

The Legal Framework

- 36 states & FCT, land in Nigeria has a plural dimension in terms of the legal framework - Some land vests in the FG & the rest vests in the Gov. of each State.
- The legal framework – the Land Use Act is entrenched in the 1999 Constitution (from 1979).
- Case law (land mark pronouncements) also affect the administration of land – A.G. Lagos vs. A.G Federation (on Building Control). Also AG Fed v. AG 36 states (Littoral States, resource control & alternative financing in oil and gas industry)

Legal Framework contd.

- The Land Use Act, (“the Act”), vests all land comprised in the territory of each State (except land vested in the Federal Government or its agencies) **solely in the Governor of the State, as trustee of the people.**
- The State represented by the Governor, is responsible for allocation of land in urban areas to individuals resident in the state and to organisations for residential, agricultural, commercial and other purposes.
- Similar powers with **respect to non-urban areas** are conferred on **Local Governments** subject to the Governor’s powers to designate any part of the state as urban area.

Implication of the Act

- No individual really owns land, and therefore cannot mortgage the ownership.
- What is owned and can therefore be mortgaged, is in fact not land, but a **right of occupancy of the land**, either arising by operation of the Act, or granted by the Governor.
- All owners of land are “deemed” holders of a statutory or customary right of occupancy.
- Rights/titles with regard to leaseholds are sub-titles flowing from the title of the holder of a statutory/customary right of occupancy.
- Any assignee or sub-lessee of land (sale/lease transactions) must obtain the Governor’s consent
- Deemed holders of a statutory or customary right of occupancy only need to formally apply for a certificate of occupancy as proof of ownership.

Requirements for Processing Deed of Legal Mortgage – S.22 of LUA

- S22 provides – “It shall not be lawful for the holder of a Statutory Right of Occupancy granted by the 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 Governor first had and obtained
- Accordingly, any instrument that requires registration must first be endorsed by the Governor and duly stamped as required by the Stamp Duties Act before presentation for registration.
- The application for Governor’s consent is done by a letter directed to the Director, Land Services.

Documents required

Fiduciary Duties of Directors

- Form 1C duly signed by the parties;
- Certified true copy of the Mortgagor's title documents;
- **Tax clearance of both parties**;
- Development levy of both parties;
- Consent fee of the consideration as shown in the deed;
- Tenement rate if the property is fully developed or affidavit in lieu if undeveloped;
- Four copies of the deed;
- Receipt of payment of consent fees, Land form 1C, Charting and endorsement fees
- Where the subject property is State land or otherwise covered Certificate of Occupancy then evidence of payment of Ground Rent up to the date of application.

Stages in the Processing of Legal Mortgage

1. application is submitted accompanied with the relevant Bank drafts
2. where the application is found satisfactory, it is accepted and the application is assigned a number;
3. on the application being accepted and given a number, the file is forwarded to the Survey Department for charting;
4. once charting is complete and its result successful the application is forwarded to the Ministry of Justice where consent is endorsed for and on behalf of the Governor;
5. four (4) copies of the Deed upon which consent has been endorsed are then released to the applicant with a view of having them stamped;

Stages contd.

- upon stamping of the Deeds(the Stamp Duty Officers will assess the Deed and Stamp them indicating thereby original and counterparts) same will be presented to the Registrar of Titles who will advise the Applicant as to the amount payable as registration fees;
- once the appropriate registration fee is paid, the Deed is assigned a Registration Number and the original number given on the submission of application becomes spent. The Registration Number given becomes the reference number for the subject transaction.

Cost-saving Techniques of Property Security Documentation

- Stop gap measures have been devised to assist a lender to achieve a comfortable level of security while pursuing the registration of the major documentation (legal mortgage, legal charge, or outright Assignment).
- These include the following:
 - Equitable Mortgages
 - Shared Model schemes
 - Company ownership Structure

Equitable Mortgage with or without a Partial legal Mortgage

- The Bank could create a legal mortgage for a part only of the loan amount. Have lower fees and transaction taxes than it would have were a legal mortgage created on the entire loan amount.
- Remainder of the loan amount would be captured by way of an equitable mortgage.
- Equitable mortgages, when created by way of Deposit of Title Documents with a Memorandum of Deposit, can entitle the Bank to the statutory power of sale which is the major remedy available to a Legal Mortgagee.

Equitable mortgage & Cost saving

- To be able to realize security on the basis of the equitable mortgage, the Bank would need to upstamp the legal mortgage to the tune of the loan amount captured by way of equitable mortgage.
- The Bank would be well advised to get its customer to put down money for the upstamping in advance in a “Stamp Duty Deposit Account”.
- The cost-saving idea here is that payment of stamp duty on the entire loan amount would be ***only an eventuality (becoming necessary only if (or when) the Bank actually needs to realize the security) which may or may not arise.***
- Where it never arises (i.e. for instance loan is performing) then Bank would have saved for itself and its customer the additional stamp duty. If there ever arises any need to enforce the security then the Bank is in good stead to proceed in that course

Ways of Creating an Equitable Mortgage

- Irrevocable Powers of Attorney (whether for a Time Specific or “Coupled with a Grant”). So long as the grant (loan) is not repaid, the power of attorney would remain irrevocable. Where the borrower appoints the bank as Donee, the bank can then sell the property on behalf of the Borrower, irrespective of whether or not the Bond is registered. It must be mentioned also that such a Power of Attorney needs to be registered. That is to say, the Power of Attorney requires the Governor’s consent.
- Deposit of Title Documents coupled with a Memorandum of Deposit
- Undertaking to Grant a Legal Mortgage coupled with a Deposit of Title Documents
- Instrument of Charge under the Registration of Titles Law
- Entry of Caution on the Land Registry under the Registration of Titles Law

Shared Scheme Model

- Akin to the Sectional Titles in practice in South Africa and other jurisdictions. A sectional title development scheme provides for the separate ownership of a property by individuals.
- When buying into a scheme buyers acquire a section (usually a flat or a townhouse) which extends to the mid-point of the outer walls, the lower part of the ceiling and the upper part of the floor particular model envisages the acquisition of separate units in a development by separate individuals/organisations.
- Where property tendered as security for a loan facility is a sectional title the Bank would save money that would have been paid for perfection since no perfection is required outside of change of ownership of shares in the body corporate controlling the entire property (of which the proposed security is only a section)

Strategic Acquisition of the Shares of the Corporate Entity owning the Land

•Where rather than mortgage the land owned by a corporate, the Bank can simply acquire (either directly or through its subsidiary) the entire shares in the capital of the corporate entity, have the board of directors reshuffled to the bank's officers, and effect the transfers and changes at the Corporate Affairs Commission.

. In this type of situation, the law only sees a sale of shares in a company, and not a mortgage, thus requiring no Governor's Consent.

. There must be a proviso to transfer the shares to their previous holder(s) upon repayment of the loan amount. Transfer documents may be executed in blank and entrusted to an escrow party.

Share Acquisition

Additional measures can be provided in the Share acquisition agreement to mirror the transactional terms of a mortgage arrangement.

The only perfection will be the effective transfers and registration of the transfers and changes in the particulars of Directors of the company at the Corporate Affairs Commission. This practice is gaining ground among real estate speculators and developers. Indeed it appears that many local banks in Nigeria favour this option with their low risk clients.

Mortgage of Shares or Pledge of Shares

- When the Bank acquires in its possession share certificates held in the borrower company accompanied by blank signed share transfer forms, a memorandum of deposit and a dividend mandate (“share documents”) from it acquires a mortgage/pledge of shares as security for the loan facility.
- On default of the borrower company, the bank is entitled to sell the shares to a third party or have the shares transferred to itself (pledge and cession of shares coupled with a sale and transfer of shares to the bank/3rd party);
- The bank may opt to register its name against the shares mortgaged to it in the Register of Members, thus giving it legal title to the shares. In practice, even before the borrower company defaults, the share documents are filed at CAC as notice to the world of the bank’s interest.

Thank you

Fabian Ajogwu

fajogwu@kennaandassociates.com