REMODELING CUSTOMARY LAW PLEDGE OF LAND INTO A VIABLE FORM OF SECURITY TRANSACTION IN NIGERIA: A LEGAL APPRAISAL

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Abstract

Pledge of land under customary law is bedevilled by inherent problems such as pledgee's accountability and perpetual redeemability, a situation further complicated by the Land Use Act's requirement that the governor's consent must be obtained before a transfer of interest in land can be valid. This has made the pledge transaction unattractive to modern businessmen as a means of security for loan and is now poles apart from its English counterpart of mortgage. The paper posits that since the pledge was devised by our forefathers as a means to raise needed capital for development, it is imperative that impediments to the efficacy of the pledge be removed so as to serve the need of our time. The paper explored the use of legislative intervention as a remedy but this is hard to achieve because law relating to land is deeply entrenched in the Constitution. The other way is for the court to view a pledge essentially as a contract; and where it is so viewed, the issue of accountability of the pledgee and perpetual redeemability of pledge should be determined on the basis of the particular custom and contract of the parties over and above any other consideration.

Key Words: *Customary pledge of land, accountability of pledgee, perpetual redeemability, unsuitability of pledge as security, pledge under the Act.*

1. Introduction

Customary law pledge of land as a form of security stands out as one of the enduring legacies of our forefathers in using what they had (land) to get what they needed (money or money's worth) to solve life socio-economic challenges of their time. That they were able to conceive and nurture it across generations as a viable means of exchange shows its vitality and resilience. What then is a pledge? A pledge is a form of security by which a landowner puts the pledgee in possession of land for as long as a debt is unpaid or other obligation remains unfulfilled. It is a close cousin of the English-type mortgage of land. Indeed, colonial judges referred to it as native mortgage.[1] According to Elias, a pledge 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 possession and use of the land to the pledgee/creditor until the debt is fully discharged.[2]

To Olawoye, a pledge is created when an owner of land transfers possession of his land to his creditor as security or, rather, in consideration of loan with the object that he should exploit the land in order to obtain the maximum benefit as consideration for making the loan.[3] A not too different definition is provided by Umezulike[4] when he penned that 'strictly speaking, a pledge is a peculiar indigenous credit transaction, exhibiting incidents, some known and others unknown

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[1] E. Chianu, *Law of Trespass to Land and Nuisance* 3rd ed. (Ambik Press, 2014) 209-210.

[2] T.O Elias, *Nigerian Land Law*, 4th ed. (London, Sweet & Maxwell, 1971) 153-154

[3] C.O Olawoye, *Title to Land in Nigeria* (Evans Brothers Ltd. 1974) 49.

[4] I.A Umezulike, *A B C of Contemporary Land Law in Nigeria*, Revised and Enlarged ed. (Snaap Press Nigeria Ltd. 2013) 237. See also Smith I. O. *Practical Approach to Law of Real Property in Nigeria* (Ecowatch Publications Limited, 2013), 109-110.

to English law of property, whereby a person wishing to borrow money goes to another and surrenders his possessory rights over named property for the latter's economic user.'

A pledgee goes into possession of the land pledged. He enjoys exclusive possession and benefit of the land until the loan or debt is paid and the land redeemed.[5] The concept of land pledge as a form of security is done by putting the pledgee into possession of land by the pledgor while the latter retains ownership of land. The pledgee therefore is to be in possession and make use of the land until whenever the pledgor is ready to redeem. Whether a transaction was a mortgage or a pledge, is a matter of substance, not form. For this reason, it has been said that in a pledge, actual possession of the property is the whole gist of the creditor's security. The pledge may therefore be classified as a possessory 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.[6]

There are two types of land pledge under the Nigeria's customary law, namely self-liquidating and non-self-liquidating pledges. In the former, what is usually pledged is a land that is planted with economic crops. Under the arrangement, the pledgee satisfies his principal loan and interest by harvesting the fruits of the land, and when he has duly satisfied his entitlement, usually over an agreed time period, he hands over possession of the land back to the pledger. In this case, the pledgor is not necessarily required to take positive steps toward redeeming the loan but is to wait until the benefits arising from the use of the land by the pledgee are enough to discharge his (pledgor's) obligation in the transaction.

On the other hand, a non-self-liquidating pledge refers to when a vacant land is pledged and the pledgee makes gainful use of the land by cultivating on it. In this case, the pledgee is not obliged to give account to the pledger because the use and enjoyment of the land before redemption are taken to be the interest of the loan. A pledgee is, however, advised to sublet his possession for a fee to a third party if he is unwilling to cultivate land subject of non-self-liquidating pledge.

In Nigeria, land is the main productive resource of the rural populace which makes up about 52 per cent of the nation's population.[7] Emphasizing the significance of land, Augustinus and Deininger[8] assert that "land access and the ability to exchange it with others and to use it effectively are of great importance for poverty reduction, economic growth and private sector investment as well as for empowering the poor. Having regard to the foregoing this article sets out to examine the customary law of pledge in Nigeria with a view to decipher whether the essential requirements such as pledgee's accountability and perpetual redeemability have one way or the other reduced its effectiveness as a modern means of raising funds for economic growth and development in Nigeria.

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[5]T. Adewale *The Nigerian Land Law*, revised ed. (Princeton & Associates Publishing Co. Ltd.) 190.

[6] J.F. Fekumo, *Principles of Nigerian Customary Land Law* (F &F Publishers, 2002) 259.

[7] U. Modum Legal Reform of the Land Use Act: Protection of Private Property Rights to Land in Nigeria" unpublished thesis Machester University, 2012, 19, available online at https://www.research.machester.ac.uk accessed on 6/3/2020.

[8] C. Augustinus and K. Deininger Innovations in Land Tenure Reform and Administration in Africa In "Land Rights for African Development from Knowledge to Action." (2005) CGIAR system wide program on collective action and property rights, United States Development Programme (UNDP) and International Land Coalition, Geneva. Cited in U Modum (n8) above

2. Key Distinction Between A Mortgage and Customary Pledge

A pledge is a transaction in land regulated by customary law. It cannot be equated to a mortgage even though it displays certain characteristics similar to a mortgage. The difference between the two in terms of creation and incidents are numerous. A pledge could be created orally while a legal mortgage must be by deed. Whilst pledge is regulated by customary law with certain variations depending on the social formation, a mortgage is regulated by common law and statute.[9] When a pledge is created, the pledgee goes into immediate possession and user of the pledged property while a mortgagee in possession is a rarity because common law made the possession by a mortgagee precarious. The mortgagee is the legal owner of the property but a pledgee is not and may never be. This is because the pledgor retains his paramount interest in the property no matter the duration of the pledge. No interest is chargeable on the loan or credit given to the pledgor by the pledgee because the pledgee is in any case, in possession and use in lieu of the interest that may have accrued on the loan. But interest is usually a component of a mortgagee's credit facilities. Whilst a mortgagee can exercise a power of sale over the mortgaged property such power does not avail the pledgee.[10]

3. Essentials of a Customary Pledge

3.1 Parol Creation

One of the essentials part of customary pledge is that it could be created orally without the need to evidence the transaction in writing. This fact was judicially acknowledged by Macaulay, J.C.A. in the case of *Diyelpwan v. Golok*[11]when he observed that 'a pledge of land was in times past largely made orally before witnesses, at least 2 witnesses, and the procedure dates back from the days when deeds or other written documents were unknown.' It has been observed that there is a form of customary rites performed to evidence this transaction and the witnesses are required to by present during the performance of these rites.[12]

The absence of writing has been noted to be the bane of the customary pledge of land because since it is a possessory security, once the witnesses have all died, it is usually very difficult to prove, and invariably, the unscrupulous pledgee successfully converts the transaction to an outright sale.[13] Since proof of a pledge is a question of fact, the onus is on the party who alleges a pledge of the land to prove it.[14] The success or otherwise thereof would depend on the credibility of the evidence adduced in support of the assertion. This challenge could be overcome if the transaction is reduced to writing signed by the parties and their witnesses. Although the document may not qualify for registration as an instrument because no interest is being transferred or extinguished thereby, it would be admissible as documentary evidence that such transaction had taken place on a given date.[15]

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[9]Umezulike (n4) above 238

[10]ibid.

[11] (1986) C.A. (Pt.II), 267 at 286

[12]Umezulike (n4) 238.

[13]See *Onobruchere v. Esegine* [1986]1NWLR (Pt. 19) 799. See also Fekumo (n7)260

[14]See *Nwosu v. Mbadugha* [2000] 1 NWLR (Pt. 641) 486 at 495, *Iwuchukwu v. Anyanwu* [1993] 8 NWLR (Pt. 311) 307 at 319.

[15]This would depend on the form of the agreement in view of the provision of the Land Use Act that recognises pledge transaction as transfer of interest in land that would require the consent of the Governor of the State.

Moreover, because some pledge transactions last for up to two hundred years, such document could be handed down by the original parties from one generation to another. It would provide a more reliable evidence of the transaction, especially where the original parties and witnesses have all died.[16]

The requirement that the transaction be in writing as aforesaid, is a contemporary innovation. But as James[17] had argued, if the necessity for witnesses is of an essential nature, then the existence of a document may well supersede this requirement. The requirement of writing it is submitted has gone beyond the level of contemporary innovation to that of legal necessity having regard to the provisions of *sections 21, 22* and *26* of the *Land Use Act* that require the Governor or Local Government Chairman's consent in any transfer of interest in land. If the Governor's consent has to be sought for pledge transactions then it becomes imperative that such transaction has to be evidenced in writing in order to receive such consent of the Governor which may be endorsed on the said document containing the transaction.

3.2 Perpetual Redeemability

One other essential feature of customary pledge of land is its perpetual redeemability. This principle is said to be universally recognised throughout Nigeria, or indeed, Africa. In *Ikeanyi v. Adighogu*[18] Mbanefor, J. observed that:

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 had been pledged, for, in native customary jurisprudence as in English Law, once a pledge always a pledge.

In *Laregun &Ors v. Funlayo*[19]where the plaintiffs sued for the recovery of land which was pledged to the defendant for over thirty years, during which the defendant had planted economic trees. It was held that the mere planting of economic trees and lapse of time did not defeat the right of the plaintiff to recover the pledged land. In *Okoiko &Anor v. Esedalue &Ors*,[20] the plaintiff's grandfather pledged the land in dispute to the defendant's grandfather many years ago to secure a loan of three pieces of clothes assessed at N30.00. When the plaintiffs wanted to redeem the land, the defendants demanded first the sum of N2,000.00, later N1,200.00 and finally asserted that the transaction was a sale. During the period of the pledge, the defendant had made vast improvements of rubber plantations on the land. The Supreme Court held that a pledged land was perpetually redeemable, and that the planting of economic crops like cocoa or rubber could only be undertaken by the pledgee in possession at his own risk, unless there was an express contract permitting him to do so. In emphasising the perpetual redeemability of pledge the Supreme Court in this case observed that:

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[16]Umezulike (n4) 238.

[17] R.W. James Modern Land Law of Nigeria cited in Umezulike (n4) 239.

[18](1958) 2 E.R. N. L. R. 38 at 39. This principle was reaffirmed in the case of *Nwagwu v. Okonkwo* [1987] 3 NWLR (Pt. 60) 316 where Kazeem J.S.C stated that '... if the transaction was pledge of land *per se* in return for a loan of money, the land is redeemable however long it may be in possession of the pledgee.'

[19](1956) WRNLR 55**.** See also *Samuel Okpowagha v. Thomas Ewhedoma*[19](1971)1All NLR 203; see also the case of *Ihekwoaba v. Aham* (1978) IMSLR 469

[20](1974) 3 S.C. 15

One other important point is that the pledgor's right of redemption cannot be clogged in any way by the pledgee, such for instance as by demanding any amount in excess of the sum for which the land was originally pledged, or by planting the pledged land heavily with economic trees, or by using other subterfuges to delay or postpone the pledgor's or his successors right to redeem; nor is lapse of time a bar to the exercise of the right of redemption, for customary pledges of land are perpetually redeemable. [21]

The Court of Appeal in *Suleman v. Musa*[22]stated the governing principle of pledge of land to wit:

1. That a pledge is perpetually redeemable and the pledgors' family is entitled to redeem the pledged land for the amount of the original loan and for nothing more.
2. That on the redemption by the pledgor, a pledgee of land is not entitled to compensation for putting the land to extra-ordinary economic uses while in possession.
3. That when pledged land is being redeemed by the pledgor or successor in title, the pledgee must account for the benefits derived by him from exploitation of the land while in possession and
4. That the pledgee in possession must not do anything to clog the pledgors right of redemption of the pledged land.

It is therefore, clear from the foregoing that a pledgee of land can never be the owner of the land by virtue of his length of occupation unless all members of the pledgor's family are extinct.[23] Nevertheless until redemption, a pledgee in possession, even of family land, could successfully maintain an action in trespass against any member of the family who farms on it without his consent, even though the pledgee himself is a member of the family.[24] Similarly, where a member of the family redeems family land on the condition that it becomes his, the family loses the property to the redeemer.[25] And conversely, where there is a court order to redeem the pledged land and the pledgee refused to accept the redemption fee offered by the pledgor, the pledgee becomes a trespasser from the time of such refusal because the permission to continue to remain in possession of the land by the pledgor was withdrawn when the offer of redemption was made.[26] He could even be ejected, if he refuses to vacate the land.[27]

3.3 Accountability of the pledgee in possession

Another essential of customary pledge of land is the accountability of the pledgee in possession. On the strengths of authorities on the point it would seem that liability of the pledgee to account to the pledgor would be a function on the construction to be put on the contracts between the parties. If from the contract, it is evident that the pledge agreement was that which is self-liquidating, the obvious inference is that the pledgee may need to account to enable the pledgor to decipher the state of account in the transaction between the parties. This can only be possible if a fair account is rendered by the pledgee. But if the nature of the transaction between the

[21]at 33. This position has been reiterated by the Supreme Court over the years in such cases as *Achilihu &Ors v. Anyatonwu* 2013) LPELR 20622 (S.C.)
[22](2017) LPELR 42647 (CA)
[23]Uwazulike (n4) 241
[24]see *Ogbonna v. Ubaria* (1977) 1 IM.S.L.R. 107 at 113
[25]see *Ofondu v. Onuoha* [1964] N.M.L.R.120
[26]*Ihekwoaba v. Aham* (supra)
[27]*Ebiassah v. Ababio* (1946) 12 W.A.C.A. 106.

parties does not indicate that it was a self-liquidating pledge, the irresistible conclusion to be drawn in that regard is that the general principle that the pledgee in possession would not be liable to account would be inferred. This is clearly demonstrated in a number of cases. In *Kuahen v. Avose*,[28] where there was a pledge of palm trees, Smalman Smith, C.J., held that the amount of the produce which came to about ^12 per annum while the prevailing customary tribute was ^9 per annum must be taken into account so that the capital borrowed could be reduced each year by the excess ^3 per year. The learned Chief Justice regarded as "unjust and inequitable and opposed to natural justice" a custom according to which, as alleged by the plaintiff, the pledgee was entitled to "farm the trees and hold them until the original debt be paid, giving and rendering no account of the value of the produce, which in this case amounted to more each year that the amount paid as tribute."

Commenting on the above dictum Ollenu and Woodman observed that:

The purpose for which a pledgee is put in possession of the pledged land and given absolute right to use and enjoyment of the proceeds of the land without liability to account is that he should derive as much interest or benefit as possible from the land in return for this money. Therefore, he can harvest the fruits of any economic trees on the land, and may fell palm trees and tap wine therefrom, etc., depending upon the title or interest of the pledgor. It is consequently in the interest of the pledgee that he should improve the land, in order that he may derive the maximum benefit from it. He may grow economic trees such as cocoa, coffee, rubber, coconuts and palm, and while the pledge lasts he is entitled to use the land as fully as if he were the owner of the particular title or interest pledged…. The cost of such improvement as he makes is not chargeable to the pledgor, unless it is made with prior consent of the pledgor, or at his request. But as customary law abhors ill-gotten gain, if the pledgor takes steps to redeem the property too soon after the improvements have been effected, so that the pledgee could not have a reasonable return for the expenditure on the improvement, customary law would compel the pledgor to compensate the pledgee for the improvement, or for any reasonable expenditure which the pledgee might have incurred to give the pledged land an economic value which it did not possess before the pledge…. Subject to these exceptions, any improvements which a pledgee makes must be entirely at his own expense: as a counterpart of the right to absolute enjoyment of the land, and of the fruits thereof, he alone must bear the cost of the improvement.

In *Amoo v. Adigun*[29]**,** the plaintiff's claim for an account of rents collected by the defendant pledgee while in possession of the plaintiff's shop was granted. In *Okoiko v. Esedalue*[30] the Supreme Court speaking through Elias C.J.N. on the accountability of a pledgee in possession and after considering the two cases of *Kuahen v. Avose* and *Amoo v. Adigun* wrote:

It seems to follow from these two cases that the court will in all proper cases take into consideration the nature and character of the use to which the pledgee has put the land while in possession, so that any unjustified benefits thereby derived by the pledgee may be brought into the final account when the pledge is ultimately being redeemed. No longer, it would seem, can the pledgee in possession take all the benefits from his commercial exploitation of the land and still get back his original capital; much less can he claim against the pledgor any benefit arising

[28](1889): Law Reports (Colonial Office) cited in Fekumo 275, See also *Dapaah v. Poku* W.A.C.A. 13 June 1950
[29](1957) W.R.N.L.R. 55
[30](supra)

from his having planted the land with economic crops like cocoa or rubber, or from his having carried out improvements on the pledged premises. [31]

The above dictum of the Supreme Court has been criticised by a number of legal scholars. Olawoye[32] submitted that:

> '...where the user consisted of tilling pledged agricultural land, whether through the traditional method or through improved methods of mechanization-however extensive or intensive the use may be and whatever amount of benefit may be derived by the pledgee farmer-there can be no special circumstance to justify the application of the principle of accountability. To apply such a principle is to enable the pledgor to reap where he did not sow. [33]

The above criticism notwithstanding, the law has become firmly established that a pledgee could be held accountable to the pledgor where either from the contract or the circumstances of the transaction the pledge is a self-liquidating one otherwise he would not be held accountable. In the recent case of *Suleman v. Musa,*[34] the facts that emerged from the body of the judgment and as believed by the Courts were that the respondent took a loan of N200,000 from the Appellant with the agreement to pay back the money within 3 months, failure of which the Appellant should take over the 8 rooms belonging to the respondent and be collecting rents thereof until the loan was fully recovered and then the Appellant to transfer the property back to respondent. That after some time, the respondent went to the appellant to demand account of the rents he had collected. The appellant refused to give an account consequent of which the respondent filed this suit claiming amongst others:

(i) Title over the property
(ii) A declaration that the defendants refusal to allow plaintiff to redeem the pledged property is unlawful.
(iii) An order directing the Defendant to render account of the rents collected from the pledged property from January 2003 till judgment is delivered in this case.

The Court of Appeal agreed with the High Court that the transaction was that of a pledge and reemphasised the principle of law laid down by the Supreme Court in *Okoiko v. Esedalue* that a pledgee can be held accountable to pledgor for the benefits derived by him from the exploitation of the land under his possession.

Two salient factors that seem to have influenced the court's decision in Musa's case was that the transaction was oppressive on the part of the pledgee to the pledgor of the land. In that case, it becomes imperative to invoke the principle of accountability to restrain the oppressive hands of the pledgee. This stand of the court is commendable and has been justified by Olawoye[35] when he contended that '...the only special circumstances that may justify the principle of

[31]ibid at pp.31-32
[32]C. O. Olawoye, "The Question of Accountability in the Customary Law of Pledge" (1978) J.A.L., Vol. 22 No. 4, 125
[33] See also Fekumo *op cit.* (n7) 276
[34](supra)
[35]Olawoye (n35) 129.

accountability is where the transaction is oppressive to the pledgor, such that the court is of the view that the pledgee had exploited the defenceless position of a pledgor seeking a loan.'

The second important factor was the nature of the subject matter of the transaction which in both cases are rented premises which are easily quantifiable and self-liquidating. It has been contended that it was difficult to extend the principle of accountability to farmlands, since the essence and incident of a customary law pledge is that it is interest-free. Hence it has a clear analogy with a common-law mortgagee in possession. The only sure way to overcome this is through their own contract.[36] The importance of the contract between the parties cannot be over emphasised. It is thus clear from the cases that whether or not a pledgee would be held accountable or not flows essentially from the contract existing between the pledgor and the pledge and not otherwise. The question is whether a pledgee in a self-liquidating pledge could by contract exclude liability to account. If the case of Musa is anything to go by, it is clear that where such clause is oppressive to the pledgor the court will strike it down and hold the pledgee liable to account.

4. Legislative and Contractual Remedies to make Customary Pledge more Viable as a Security for Loan Transactions

In this discourse the principle of perpetual redeemability of customary pledge has emerged as one key element that distinguishes it from its English counterpart of mortgage that admits the principle of foreclosure to bring to an end the mortgagor's right to redeem the mortgaged property. This seems to be a taboo with regard to customary pledge and this has made the customary pledge poles apart from the mortgage as a means of raising funds for development as no lender of note would give out money that he cannot recoup as and when due. The question is what can be done to overcome the limitations of customary pledge as a viable security transaction?

Fekumo[37] in an attempt to answer the above question surmised that the solution lies on specific agreements by the parties through their contract (express or implied) and legislative action to streamline the pledge transaction generally, and in particular, the of perpetual redeemability of the pledge. [38]

The legislative option may seem an uphill task having regard to the well-entrenched state of the law on the point in Nigeria[39] but the Ghanaian step in this regard deserves some mentioning. The feat was achieved through two legislations, viz: The Mortgages Decree, 1972; and the Mortgages (Amendment) Decree, 1979. The Mortgages Decrees, 1972, in the words of its Memorandum, "simplifies the law of mortgages by bringing together, with modifications, the common law relating to mortgages." It would appear, therefore that the Decree on its original enactment did

[36]Fekumo (n7) 279.

[37]Fekumo (n7) above, 270.

[38]Fekumo (n7) above. The learned author relied on the case of Okoiko v. Esedalue and the reaction of G. Ezejiofor, "AgadaOkoiko& Anor. v. OzoEsedalue& Anor: Have the Last Words been Said?" (1975)9 Nig. L. J. 168; C. O. Olawoye, "The Question of Accountability in the Customary Law of Pledge" [1978] J.A. L., Vol. 22, No. 4, P.125.

[39]Section 315 (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) made the Land Use Act 1978 as one of the statutes that are constitutionally entrenched into the1999 Constitution requiring its alteration or repeal in accordance with the provisions of section 9 (2) of the Constitution.

not affect the customary law relating to pledges. Most notable among the provisions of the Decree for the present purpose were those providing that a mortgagee should not acquire by virtue of the mortgage a right to possession of the mortgaged land and that if he subsequently took possession as he was entitled to do on a default by the mortgage, he became liable to account to the mortgagor for all income he received or could with due diligence have obtained from the land.[40] The purpose of the Mortgages (Amendment) Decree 1979 was to increase the scope of the Mortgages Decree 1972 to accommodate the customary law of pledge. The entire contents of this 1979 Decree consisted of the following two sections:

1. Every customary loan transaction in respect of which any farmland is given as security for a loan shall be made in accordance with the Mortgages Decree, 1972 (N.R. C. D. 96).
2. Where at the commencement of this Decree any agricultural farmland stands as security for a loan under any customary loan transaction shall forthwith be and is hereby converted into a mortgage under the Mortgages Decree, 1972 (N.R. C.D. 96) and accordingly all the provisions of that Decree shall apply to such transaction as far as may be necessary"

From the above legislation, the customary law of pledges in their pure form would continue to exist only for land other than farmland. The positive effect of the legislation is that the pledgee no longer has a right to possession and according to Dankwa:[41]

When possession passed to the pledgee under the old law only one creditor could advance loan(s) in respect of one property. But since under s. 1(1) of N.R.C.D. 96 a pledge is now only a charge on immovable property (farmland) more than one charge can be created with different creditors in respect of the same property. A farmer with a valuable farmland as security may, therefore, be able to raise more credit than previously out of that single property. A.F.R.C.D. 37 has also settled the question whether a pledgee has an implied power to sell pledged property. Pledged farmland now can be sold only after a court has so ordered; and the parties cannot agree to a contrary provision.

According to Fekumo the Ghanaian position could be adapted to Nigerian situations by States Legislatures to take care of problems of accountability and the perpetual redeemability of pledged land. Their advantage is to extend the Limitation enactments to pledges as done by section 8 of the Rivers State Limitation Edict (now Law) 1988.[42]

One other route in overcoming the redeemability of customary pledges is through express or implied contracts by the parties this is possible because pledges itself is essentially a contract albeit orally. Hence the difficulties in establishing their existence if a considerable period has passed and essential witnesses to the transaction have all died. In modern times this need not to be the lot of any party to pledge transactions in view of the increase in literacy and the increased possibility that such transactions could be reduced to writing. This possibility would bring certainty to the pledge transactions on one hand on the other enable parties to the transactions to

[40]Fekumo (n7) above

[41] E. V. O. Dankwa "The End of Pledges in Ghana?" [1989] J.A.L. Vol.33 No.2, 188 available online at https://www.cambridge.org/core accessed 09/12/2019.

[42]The section provides that "When a mortgagee of land has been in possession of any of the mortgaged land for a period of ten years, after the expiration of the time fixed for redemption, no action to redeem the land of which the mortgagee has been so in possession shall be brought to recover it by the mortgagor or any person claiming through him"

determine the essential terms of the contract especially with respect to the redeemability of the pledge. That this is a possibility was hinted by Umezulike[43] when he observed thus:

It is clear therefore that a pledgee of land can never be the owner of the land by virtue of his length of occupation unless all members of the pledgor's family are extinct. It is however contended that in view of the contemporary trend which seeks to reduce the transaction in writing, a clause may likely be inserted therein which may empower the pledgee to foreclose or sell the property free of the pledgor's right to redeem.

The learned author's view may have been informed by the Ghanaian case of *Adobea v. Lassey*[44] where the plaintiffs sued to recover possession of a house on the ground that it had been wrongfully pledged. It was held that the pledged was lawful and that the plaintiffs must redeem it within three months or lose their right. Thus the result was an order of foreclosure.[45]

It is submitted that the authority of *Adobea v. Lassey*[46] supports the proposition that foreclosure may be decreed by the court in appropriate cases in customary law pledge especially in a situation where the pledgor sues for a redemption and an order is made in his favour directing redemption within a specified period, upon the failure of the pledgor to redeem within the specified time, the pledgor will lose the customary right to redeem at any time and the pledgee may then sell the property. The decision seems surprising, since the plaintiffs do not appear to have asked to redeem, but it does indicate that a pledge may be ended by an order for foreclosure.[47] This may be the true position is further buttressed by several Ghanaian cases.[48]

This position may not be peculiar to Ghanaian Customary law of pledge as such practice is applicable in some part of Nigeria as evident from an observation of the Supreme Court in the case of *Achilihu &Ors v. Anyatonwu*.[49]Delivering the lead judgment, Kumai Bayang Aka'ahs J.S.C. cited with approval the work of Nigerian Commissioner for Law Review S.N. C. Obi[50] to wit that:

There is a slight variation in Northern Ngwa concerning the duties and liabilities of a pledgee under a pledge and the time limit for redemption. The duties of a pledgee in respect of property pledged are to take proper care of the property, to deliver it to the pledgor when the debt is repaid or to deliver it to another person if the pledgor so demands. A pledgee does not have to account to the pledgor for any income or natural increase he obtains from the pledged property while it is in his possession or under his control. It is also permissible and normal for a time limit to be fixed within which a pledge must be redeemed in certain divisions including Northern Ngwa.

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[43] Umezulike (n4) above 241-242.

[44] (1956) 1 W. A. L. R. 181

[45]Ibid. Umezurike subsequently recapitulated by stating that 'It is submitted that the case (*Adobea v. Lasse)* cannot provide an authority for the proposition that a pledge could be foreclosed at the suit of the pledgee. In the first place the case was wrongly decided both on the principle and the law. The court gave a relief of foreclosure which was not sought by either of the parties before it. secondly the principle of foreclosure does not apply to customary law pledge.'

[46] *Supra*

[47] G.R. Goldman "Developments in pledges of land in Ghanaian customary law" (1967) J. A. L. Vol.11 issue1, 11 available online at https://www.cambridge.org/core accessed 09/12/2019.

[48] *Kuma v. Anane* unreported judgement of Windsor-Aubrey J., in the Land Court, Cape Coast, delivered on July 10, 1950; cited in G.R. Goldman as above; *Norh v. Gbedemah*, Allot, Akan Law of Property (unpublished), pp. 429-430. Cited in G.R. Goldman as above.

[49](Supra) 18 para A-E.

[50]Customary Law Manual obtaining in Anambra and Imo States, Chapter 34 paragraphs 434 (i), 2(c) and 439(i) prepared by Dr. S.N.C. Obi, Commissioner for Law Revision, Anambra State of Nigeria 1977.

The writing of SNC Obi as cited in *Achilihu's* case showed that the idea of foreclosure is not at all alien to customary law pledge in some customs and thus support the aphorism that in every rule there is an exception. This would also show that parties to a pledge transaction may agree to fix a period within which the pledge transaction should be redeemed. It is submitted that if parties to a pledge transaction agreed on a time frame within which to redeem a pledge such should not lightly be refused by a court if it is established that such practice is permissible in the custom and tradition of the parties to the agreement and such agreement is not tainted with any vitiating elements, this would accord with the dictate of freedom of contract being a result of the exercise of the parties' free choices. This would accord more with the essential nature of pledge than the rigid and inflexible approach. To the parties subject to such custom that permits foreclosure it may be highly unreasonable to subject them to any other customary practices which is alien to them. After all customary law is a mirror of accepted usage of those subjected to it.[51]

5. Pledges Under the Land Use Act

The Land Use Act (LUA) seems to have exacerbated the above stated problems associated with the use of pledges in modern day financial transaction as it has imposed certain restrictions on the transfer of property rights to land through pledge agreements and this has had an adverse effect on the protection accorded to private property rights of individuals within the Nigerian legal system. The first LUA restriction which is applicable to a debtor/pledgor who had pre-existing rights to the land before the commencement of the LUA relates to undeveloped land situated in an urban area. The LUA restricts individual property rights by asserting that the debtor cannot pledge more than a half hectare of the land as that is the maximum quantum that he is entitled to by law.[52]

With respect to developed land situated in an urban area, the LUA makes reference to the Nigerian federal capital and provides that land situated in the Federal Capital Territory of Nigeria can only be the subject of a statutory right of occupancy granted by the 'Governor' of the Federal Capital Territory.[53] The implication of these provisions is that customary pledge agreements can only be created over land which is the subject of a customary right of occupancy. As land in the Federal Capital Territory does not qualify as non-urban or rural land, therefore customary rights of occupancy are not possible in the Federal Capital Territory (Abuja).[54]

Inevitably, the Governor's consent requirement is mandatory with regards to a statutory right of occupancy where there is alienation or a transfer of possession of the land in question.[55] As Nigerian pledges involve the transfer of possession of the property, the consent requirement is needed by law in order to make the pledge agreement valid. Consequently, any pledge created without the consent of the state first had and obtained is unlawful and invalid.[56] In circumstances

[51]Omoniyi v. Omotosho (1961) 1 All N. L. R. 304 at 307.
[52] Section 34(5) LUA.
[53]See section 34 generally.
[54] U. Modum (n 8) above, 109.
[55]See sections 21 and 22, 23, 26 LUA.
[56]Uwazulike (n4) above, 245

where there exists a customary right of occupancy, the consent of the Local Government of the land in question is also mandatory.[57]

The greatest restriction is contained in section 36 (5) of the LUA which appears to prohibit any transfer of land in non-urban areas deemed granted. This sub-section seems to imply a total ban on "transfer of land" transactions on land situated in a rural area where the rights of occupancy on the land are deemed granted. The issue of whether the blanket ban of "transfer of land" is applicable to a pledge which is in essence the transfer of possession of landed property between parties to a transaction is one that is still being argued under the Nigerian legal system.[58] In this wise Umezulike has submitted that what is forbidden under section 36 (5) is the subdivision and percolation of the area covered in the customary right of occupancy for purposes of alienation which includes by definition, a transfer of possession. The section does not seem to bar a plain transfer of the right over the entire land. If this analysis is correct, it would seem that a pledgor can validly create a pledge over the entire land over which the pledgor intends to transfer possession thereof to the pledgee rather than over plots or subdivided portions or parcels of it.[59]

The requirement that consent should and ought to be obtained for a pledge transaction to be valid now made it compulsory that such transaction would necessarily be in writing as consent of the Governor cannot be obtained verbally and on a transaction that is not documented.

6. Conclusion and Recommendations

The paper has examined customary law pledge transaction in its definition and distinction from mortgages. Its essentials such as mode of creation, accountability of pledgee and perpetual redeemability of pledge were considered. The accountability and perpetual redeemability of pledgee are key problems which legislation could have resolved but that is not the case because of the deeply entrenched nature of land in the constitution. A way out may be for the court to view pledge transactions from the peculiar custom and contracts of the parties. The paper also looks at the unsuitability of pledge as security for loan and the exacerbation of the problem under the Land Use Act. Customary law pledge of land being essentially a means of raising fund should be so treated and made usefully serve that purpose. To achieve that it is therefore recommended that:

1. Pledges should be in writing in order to obviate the difficulty for proof of its existence in the event of dispute between the parties and their successors.
2. Accountability of pledgee should be determined by the nature of contract between the parties.
3. Perpetual redeemability of pledge should be a function of the contract and the established customary law practices of the parties to the contract.

[57]Modum (n46) above, 110
[58] ibid
[59]Uwazulike (n4) above, 246.