INTERROGATING THE ENFORCEMENT OF CREDIT SECURITY RIGHTS IN NIGERIA, GHANA AND KENYA.[488]

Abstract

The paper examined the enforcement of credit security rights in Nigeria, Ghana and Kenya.Enforcement of various forms of credit security in any economy and especially in the three countries which form the focus of this paper concern how quick and easy it is for a creditor to realise credit lent to a borrower. The ability to recover loans advanced encourages further advances and positively affects the economy of nations while the opposite is a sine qua non to economic stagnation and retardation. The motivation for this paper is to underscore the importance of credit financing backed by adequate securities to the growth of the nation's economy and the need for effective enforcement of provisions of enabling laws. The paper adopting the doctrinal research methodology examined primary and secondary sources of law on the subject matter and found amongst others that common credit security systems existed in the three countries under scrutiny with relevant laws particular to each country. It was also found that secured credit transactions as live wires of economic businesses thrive on the borrowing and lending of credit which oil the wheels of a nation's economic development thereby guaranteeing sustainable wealth for persons, organizations and the nation at large. Furthermore, it was found that there were significant differences between credit regimes of the three countries especially in the enforcement of credit security rights. The paper therefore recommended amongst others, the harmonisation of all relevant laws on credit financing and credit security in Nigeria and more particularly,the amendment of section 40(5) of the Secured Transactions in Moveable Assets Act 2017 which provides for the use of the police in the recovery of a collateral to be subject to the creditor first obtaining a court approval for involving the police.

KEYWORDS:Credits; Credit Security; Secured Credit systems, Mortgages and Charges.

(4) Introduction

Credit businesses in form of borrowing and lending to grow businesses as well as solve other personal, private, corporate and communal problems remain common to the human race the world over. It is trite that most major world economies actually thrive on credits and various forms of mortgage financing as it may be very difficult for enterprises both private and public to remain self-financing in all aspects of their business. The need to rely on other sources of credit become more apparent in the face of economic meltdown experienced world over and more keenly pronounced in a country like Nigeria which relies heavily on a mono economic product; that is, petroleum products with dwindling demands for purchase and low global prices as a mainstay for national economic growth and development.

The Nigerian economy suffered a setback like other economies in the world during the global credit meltdown that shook the foundation of world biggest economies sometime in 2007 and most recently in 2019 with the incursion of the dreaded Covid 19 pandemic which paralysed economies globally. While the Nigerian version of the economic meltdown of 2007 was *inter alia* linked to huge portfolio of unsecured credit and gross insider abuses resulting in huge non-performing insider related credits, in other jurisdictions such as the United States of America,

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the financial instability was caused by sub-prime mortgage lending and consequent failure of investment banking.[489]It was thus through the instrumentality of borrowing and lending of credit backed by relevant laws that most world economies stabilized and made redresses. It remains apposite therefore that creditors must be assured of getting back the loan advanced to borrowers through the relinquishment of control over the borrower's property on agreed terms to the creditor.A creditor who obtains security for any credit given has to grapple with issues of enforcing the agreement in cases of debtor's default in payment which is the focus of this paper.

From the above, it is pellucid that secured credit transaction has a prominent role in the economy of any nation. It is akin to the bricks on which the economy of every nation is built. The creation of quality risk assets in the financial industry and protection of the rights of parties in a credit transaction is erected on the need to have a secured lending portfolio. In other words, the place of secured credit or quality risk asset is the only clear remedy to the already strained economic order. Secured credit in modern business development and expansion cannot be over emphasised as the availability of credit is the substratum of modern economic prosperity, and States which hope to encourage strong domestic markets and develop strong international competitive economies must have legal infrastructures that facilitate secured credit transaction[490] and the enforcement of same.

(5) Appreciating relevant concepts of Credit; Security, Credit security; Mortgages and Charges.

2.1 Credit

Generally speaking, credits concern money and the ability of persons and organisations to access funds to either fully pay for goods and services needed or to acquire the goods with an assurance of a later promise to pay. It is the ability of any person to obtain goods and services before payment based on the trust that payment will be made in future. It is defined as ä method of paying for goods or services at a later time usually paying interest as well as the original money;[491]and according to Brock[492] the term defines ä contract agreement in which a borrower receives a sum of money or something of value and repays the lender at a later date, and generally with interest.From the above definitions, credit concerns the ability of persons and organisations to enter into commercial agreements which permit goods and services to be granted and rendered to a debtor who has given assurances of payment of goods on agreed conditions and at a future date. Credit is loan of money, goods or services granted to a party called the debtor on agreed terms of repayment which may include interests and costs. The essence of the advancement of credit is to enable a party who lacks immediate funds to be able to carry on his business on a borrowed loan facility.

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[489] Sanusi Lamido Sanusi: "Global Financial Meltdown and the Reform in the Nigerian Banking Sector"(A Speech delivered at a Public Lecture at the Tafawa Balewa University, Bauchion 10 December, 2010 available at https://www.bis.org>review accessed on 6/10/2021.

[490]R C Cuming;"Some Preliminary Considerations with A View to The Drawing Up of a Check List of Issues to be Addressed in a Possible Future Model Law in the General Field of Secured Transactions. (1994) *Unidroit* 1.

[491]Elizabeth Walter, *Cambridge Dictionary*;https://dictionary.cambridge.org>cr... Accessed 5/10/21

[492]Thomas Brock, "What is Credit? https://www.investopedia.com>terms; accessed 6/10/21

2.2 Security

Aiyar[493] argues that security with regard to credit means anything that makes the money more assured in payment or more readily recoverable. The English Court in *Bristol Airport Plc* v. *Powdrill*[494] noted that security is created where a person (the creditor) to whom an obligation is owed by another person (debtor) by statute or contract in addition to the personal promise of the debtor to discharge the obligations, obtains rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtor's obligations to the creditor. Aiyar's definition is very precise of the true meaning of security as anything that makes the repayment of a loan more assured. In structured and unstructured lending, this assurance or comfort stands on five pillars that is now technically known as the 5 Cs of credit which are character, capacity, capital, collateral and conditions. These are the barometers used to measure the credit worthiness of a borrower. Unfortunately, the focus of secured credit conversations has always been viewed from the binoculars of collateral alone.

Credits are not secured by collateral alone. The sufficiency of a collateral may not necessarily secure a facility structured for a fraudulent borrower. It has been stated that the best financial statements, the best loan documents, and the best collateral will not prevent a loss if the borrower is a crook.[495]Althougha borrower can pledge collateral to offset weaknesses in the other Cs, a commercial lender, concerned about an industry's overall financial condition, may not lend to a new business in that industry unless certain assets are pledged as collateral. It is however true that collateral provides the bank or lender a secondary source of repayment if the primary source of repayment is not available asto repay a loan, collateral must be liquidated.[496]

Goode,[497]states that security is the right given to one party in the property of another to secure payment of performance by that other party or by a third party because the property itself is not the security rather it is the right to the property which is transferred to the creditor that is the security. Akolokwu[498] on the other hand explains that a security is used to describe property to be appropriated by the lender/creditor for the payment of the sum of money borrowed by the debtor. These definitions are considered somewhat restrictive as they consider security only from the use of property. There are other forms of security recognised by law and business practices in the financial industry that requires the performance of an obligation.

Security in relation to credits and loans have been statutorily defined.It is"a property right in a collateral that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as security interest but it does not include a personal right against a guarantor or other persons liable for the performance of

[493]KJ Aiyar, *Judicial Dictionary* (14th ed. Butterworths India, Lexis Nexis, 2007) 978
[494][1990] 2 All ER 493
[495]J E Baiden, "The 5 Cs of Credit in the Lending Industry"(June 26, 2011) available at *SSRN;* https://ssrn.com/abstract=1872804 or http://dx.doi.org/10.2139/ssrn.1872804 accessed 15/09/2021.
[496]*Ibid* 25.
[497]R M Goode, *Legal Problems of Credit and Security* (2nd edition, Sweet & Maxwell, London, 1988) 14.
[498]G O Akolokwu, *Law of Mortgages and Charges: A Learning Guide* (Ledum Publishers, Port Harcourt,Faculty of Law, RSU, 2019) 7.

the secured obligation."[499]In Ghana,[500]section 3(1) of the Borrowers and Lenders Actprovides that "a security interest is created by a transaction that in substance secure payment orperformance of an obligation, without regard to the form of the transaction, where a borrower or a third party who has title to the collateral willingly creates a security interest in favor of the lender." Under the Kenyan law,[501]security interest is defined as "a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation…"

A comparative view of the definitions of security interests from these three jurisdictions clearly encapsulate three fundamental characteristics of secured credit; the parties, the loan amount or performance of an obligation and the collateral. From the definitions above, the Nigerian law[502] with the objective to facilitate access to credit secured with moveable assets recognises bank and personal guarantees as secured credit transactions because they are credit transactions that requires the guarantor to perform an obligation on behalf of the party requesting the guarantee. It also defined moveable assets to mean tangible property other than real property.[503]While the Ghanaian law[504] expanded the security interest to include moveable and immovable assets, the Kenyan law[505] though restrictive in the use of the word "moveable," defined moveable asset to include tangible and intangible assets which includes intellectual property. Secured Credit therefore is a transaction wherein the lender accepts the property right of the borrower or that of a third party in a property to provide additional assurance or guarantee that the loan amount advanced and accrued interest if any will be repaid or that the obligation will be performed within a specified period of time.

2.3 Credit Security

This term concerns strategies that make repayment of credit advanced to a debtor better assured in favour of the creditor. The security of the credit advanced is usually in anticipation of a possible default in repayment by the borrower which security may be in form of an asset of the borrower provided for the transaction and for which the creditor is granted the right to sell to recover his interests.So, a credit becomes secured with the pledge of the debtor's assets as further assurance and collateral for the repayment of the loan. The right of the creditor to liquidate the asset of the borrower and recover the loan agreement is the distinctive feature between a secured credit and an unsecured credit.Secured credit systems are therefore the means

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[499]The Security Transactions in Moveable Assets Act, 2017(hereinafter known as The STMA Act); Section 68 (1).

[500]Borrowers & Lenders Act, 2020 (Act 1052) as Amended (hereinafter known as BALA-Ghana);Section 3(1).

[501]The Movable Property Security Rights Act, 2017 came into effect in Kenya May 2017 vide LN No 77; Section 2. The Act repeals the Chattels Transfer Act (Cap. 28) and the Pawnbrokers Act (Cap. 529). It also amends several sections of the Agricultural Finance Corporation Act (Cap. 323), The Stamp Duty Act (Cap. 480), the Hire Purchase Act (Cap. 507), the Business Registration Services Act (Act No. 15 of 2015), the Companies Act, 2015 and the Insolvency Act, 2015 to ensure they are aligned with the new Act.

[502]STMA Act, 2017; Section (1)c

[503]Section 63.

[504] BALA-Ghana, 2020.

[505]Movable Property Security Rights, Act 2007(hereinafter known as MPSRA-Kenya).

by which credits backed by security or collateral are regulated by laws and institutions.The term 'secured credit transactions presupposes that some credit financing may be unsecured thereby exposing the lender to greater risks[506]withthe primary purpose of security being to reduce loan risks by giving the secured creditor a privileged claim.[507]

2.4 Mortgages

Lindley M R in*Santley* v *Wilde,*[508]explained a mortgage to mean "a conveyance of land or assignment of chattels as a security for the payment of a debt or the discharge of some other obligations for which it is given the definition has been seriously criticized by Essien[509] who prefers to view a mortgage asjust a charge on land and not as a form of conveyance of title for repayment of debt. It "is a legal or equitable conveyance of the title as security for the payment of debt or the discharge of some obligations which it is given subject to a condition that the title shall be re-conveyed if the mortgage debt is liquidated;"[510] and "a conveyance or other disposition of land designed to secure the payment of money or the discharge of some other obligations."[511]Deducible from these definitions is the fact that a mortgage is a security transaction for the advancement of credit; an interest in property created as a form of security for a loan or payment of debt and is terminated on the repayment of the loan or debt. It is the transfer or conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to stipulated terms.[512]

2.5 Charges

A charge is a security whereby real property is appropriated for the discharge of debt or other obligations but does not pass either an absolute or special property in the subject of the security to the creditor nor any right to possession. Furthermore, charges have been explained by Denman J in *Tancred v Delagoa Bay*[513] to mean a document which does not absolutely transfer property as security for loan with a condition for re-conveyance but is a document which only gives a right to payment out of a particular fund or particular property without transferring that fund or property. A charge thus gives the creditor the right to demand and pursue definite remedies against the property of the borrower that is appropriatedfor the purpose of discharging his debt.

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[506] GO Akolokwu, "Interrogating the Challenges of Real Estate Development and Secured Credit Financing in Nigeria,"(2019) 6(1) *NAU.JCPL* 88.
[507]V Finch, "Security, Insolvency and Risk: Who Pays the Price?" (1999) 62(5) *Modern Law R*eview 633.
[508] (1899) 2 CH 474
[509]Enefiok Essien, *Law of Credit and Security in Nigeria*(Second edition; Uyo: Toplaw Publishments Ltd,2012)68-76
[510] I O Smith, *Practical Approach to Law of Real Property in Nigeria* (Nigeria: Ecowatch Publications Limited, 1999)236
[511] E H Burn, *Cheshire's Modern Law of Real Property* (12th edition; London: Butterworths, 1976)636
[512] B A Garner, *Black's Law Dictionary* (11th edition, Minneapolis-St. Paul, Minnesota, Thomson Reuters,2019)1026
[513] [1889]23 QBD, 239

(6) The Problem

The problem investigated in this paper is the enforcement of credit securities in Nigeria, Ghana and Kenya. The choice of these nations is premised on the fact that they are third world countries of the African continent grappling with the challenges of economic development and institution of sustainable economic growth.African countries generally have not succeeded in establishing credible and workable credit financing strategies to promote economic activities. It is trite that most of the indigenous manufacturing companies in these nations have been stagnated out of commercial existence due to difficulty in accessing needed funds amongst other factors such as inadequate legal protection that discourage and disable investment ventures. The reticence of most financial institutions to advance credit to needed borrowers mostly concern the ease with which they are able to enforce their security in cases of borrower's default. Some of the legal rules providing for enforcement of credit security become clogs to the business interests of the creditors who in a bid to recover the loan unwittingly buy long and drawn-out law suits laced with different injunctive reliefs and procedural requirements in favour of the borrower and to the detriment of the creditor. The delayed judicial enforcement of securities in the face of the globally harsh economic realities remain avoidable pitfalls that discourage secured credit financing and demands the examination carried out in this paper.

(7) Positive Imperatives for Credit Security.

4.1 Enforcing Repayment of Loans

One advantage of secured credit is that it facilitates the enforcement of payment or performance of an obligation under the credit scheme. In the words of Schwartz[514] one of the expectations of the creditor is that the obligor will make good the repayment obligations under the transaction. To reinforce the obligor's covenant to repay, he is required to secure the sum advanced either by a physical property or a guarantee from a third party. Secured credit therefore enhances the lender's ability to enforce payment in at least three separate ways namely: by encumbering collateral (so that the lender has a permanent interest in an identifiable asset or group of assets); by granting priority (so that the lender will be paid before other creditors); and by enhancing the lender's remedy (so that the lender can coerce payment more quickly than it could if its debt were not secured).[515]

4.2 Limiting Subsequent Borrowing

For most secured commercial loans, the purpose of collateral is to provide a source of repayment in case of default and to limit the borrower's capacity to borrow from other sources.[516] Where an obligor's capacity to access funding from other sources is encumbered, it is believed that such an obligor will be committed to ensuring that the cash flow for the repayment of the facility is handled with seriousness. The problem for the lender here is not so much that the leverage caused by debt tends to make the borrower operate the business more riskily, but that the absence of equity tends to lessen the borrower's incentive to attend to the

[514]Alan Schwartz, "Security Interests and Bankruptcy Priorities: A Review of Current Theories", (1981) 1(1)10 *J. Legal Studies* 7-30.
[515] Lynn M. LoPucki, "The Unsecured Creditor's Bargain" (1994) 80 *VA. L. REV*. 1887, 1892-96.
[516] Ronald J Mann, "Explaining the Pattern of Secured Credit" (1997) 110 *Harvard Law Review* 625.

business at all.[517] In other words, the obligor will pay attention to the business. Subordinate loans have the tendency of dissipating and disrupting the agreed repayment plan of the senior loan. Although the legal rights that constitute a grant of collateral do not directly bar subsequent borrowings, a grant of collateral can limit the borrower's ability to obtain future loans by reducing its ability to grant a valuable security interest to subsequent lenders. In most cases, any subsequent security interest would be subordinate to the existing security interest. Thus, the subsequent interest would be considerably less valuable, both because it would be subordinated to the debt secured by the previous security interest and because of the relatively unfavorable strategic position of a subordinate secured creditor.[518]

4.3Enhancing Obligors Capacity to Pay

The value of the collateral securing any loan amount is usually higher in value than the value of the loan amount. Collateral adequacy is to enable the creditor/lender have allowance for inflation and cost of converting the asset into cash. In practice, banks will only accept collateral that are 150% above the loan amount. Where the collateral is a property, the property should be located in prime area and have market value; and because this asset is usually a prime asset of the borrower, they usually ensure that loan and interest elements are paid as at when due. The borrower's desire to avoid this loss provides an added incentive to repay the loan voluntarily.[519]

(8) Review of some Works on Secured Credit Transactions

Several works have been done in the area of secured credit transactions in Nigeria. This paper will highlight the position of some writers in this regard.In discussing the challenges facing lenders of credit especially in the banking sector, Awah,[520] opined that the indices discouraging banks and other financial institutions from providing lending and credit facilities should be speedily addressed as they negatively impact economic development and growth. This work which underscored the relevance of proper legislation on lending transactions was however limited to the banking sector in Nigeria. While discussing the role of credit and law in Africa, Allot[521] presented the view that security may be of various kinds, including charges over land which may or may not involve the creditor's going into possession, the charging of chattels or goods, and personal security where the person of the debtor or of some other individual on his behalf is liable to be seized or otherwise affected if the obligation is not duly performed.Halliday,[522]on the other hand captured the essence of proper enforcement of proprietary security in Nigeria when he stated that in translating the country's economic policies

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[517] Michael C. Jensen & William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" 3 *J. Fn'. ECON*. 305, 313 (976).
[518]Note 19.
[519] Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtors and Creditors: Text, Cases, and Problems* (3rd edition, Aspen Casebook Series, Boston USA,1996) 4-6
[520] Animi Esther Awah, *Harnessing Nigeria's Banking System: Potentials for Sustainable Development* (Inaugural Lecture Series 2014, Nigerian Institute of Advance Legal Studies, Lagos)98-100
[521] A.N. Allot, "Credit and the Law in Africa: A Special Study of Some Legal Aspects of Economic Development" (1975) 19 *J Afr L* 73
[522]Chidi E. Halliday, "Reforming Receivership as Mechanism for Enforcement of Proprietary Security inNigeria"(2017) (6) (1) *The Journal of Property Law and Contemporary Issues,* 112

to reality, incorporated companies doing business in Nigeria especially indigenous companies must be encouraged to achieve optimally through adequate financing and opportunities for credit facilities in form of debt capital to be able to compete with foreign companies.The tools of encouragement of indigenous companies to achieve these goals for instance through reduced special interest rates were not canvassed by the writer.

Financing of programmes and projects remain key to economic growth. Financing cannot be achieved without funds as underscored by Sangosanya who deliberated on the primacy of credit advancement in the nation's quest for economic growth and stability. According to him"credit financing refers to the process of obtaining funds or capital generally for the purpose of supporting a development and/or investment by gaining control over assets." [523]The issues of a more effective enforcement of the identified credit financing models were however not discussed. Sykes & Walker state that security concerns rights exercisable against some property of the debtor to discharge an obligation. [524]A mortgage deed therefore is that instrument showing a mortgage transaction that is, loans secured by collateral where the borrower or the mortgagor is obliged to pay back on predetermined terms.[525]A 'debenture' is a document which either evidences or acknowledges the creation of a debt[526] or makes provision for the repayment of a loan to be made in the future.[527]. This acknowledgment may entail some form of security over property and may also take the form of debenture stock.[528]The capital requirements of a big conglomerate may not be met for the purpose of carrying out its business by its shareholders thereby utilising its borrowing powers subject to its Articles of Association to meet its capital requirement and providing assurance of repayment by issuing debentures secured by a charge on the company's assets.[529]

The literatures reviewed place emphasis on forms of secured credit transactions and the need to deploy credit advancement for economic growth and stability. Whilst acknowledging the need for enforcement of advanced credits, the writers limited their work on Nigeria and did not delve into examining the constraints (both legal and otherwise) which make enforcement of credit securities difficult in Nigeria, Ghana and Kenya. Furthermore, the legal instruments for credit advances were not given particular attention in the works already examined. This paper thus attempts to fill some of the identified gaps by examining the relevant statutory provisions that relate to enforcement of credit securities in Ghana, Kenya and Nigeria.

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[523] A. G Sangosanya, 'Development and Financing of Mass Urban and Rural Housing in Nigeria'(1988) *The Gravitas Review of Business & property Law,* 63.

[524] Sykes & Walker, *The Law of Securities* (5th ed Law Book Co, Sydney-Australia, 1993)6

[525] G.O. Akolokwu and Linus Nwauzi, "Mortgage Transaction in Nigeria: Is the Security Interests of the Mortgagee Under the Land Use Act 1978 Guaranteed?"(2018) 14*Unizik Law Journal* 6.

[526]*Levy*v *Abrrconis Slorr & Slo6 Co* (1887) 37 Ch D 260 per Chitty J at 264.

[527]*Handevel Pty Ltd* v *Comptroller of Stamps* (1985) 10 *ACLR* 207

[528]R. Howell and A. Jones, "Redemption and Re-issue of Debentures: Its Effect on Security Transaction" (1994) 6 *Bond LR* 149.

[529]Chigozie. Nwagbara. "Ä Legal Appraisal of the Concepts of Shares and Debentures as Company Securities in Nigeria;" (2016) 4(3) I*nternational Journal of Business & Law Research* 4(3)74.

(9) Enforcement of Security Rights: Comparative Analysis

The differences between secured credit regimes in the three different nations are quite significant. Regimes differ, for example, as to whether they provide unified treatment for virtually all security interests in one system or separate regimes for particular types of collateral and particular types of transactions.[530]The Security Transactions in Moveable Assets,[531]The Borrowers &Lenders Act[532] and The Moveable PropertySecurity Rights,[533] are the principal legislation for the protection and enforcement of security right in Nigeria, Ghana and Kenya respectively. They provide for the rights and obligations of parties and third-party obligors and the enforcement of security.

The MPSRA-Kenya[534]defines collateral to mean a moveable asset that is subject to a security right and a secured obligation as one which is secured by a security right. It recognises the existence of security rights over present or future, determined or determinable, conditional or unconditional, fixed or fluctuating assets.[535]This recognises debentures and charges as secure credit transactions as well as third party effectiveness of a security right; and the enforcement of a security right against a third party in Kenya.[536]It also provides for the enforcement of security right[537]after the failure of the debtor to pay or perform a secured obligation.The secured creditor may exercise its post default rights by application to court or in accordance with the law without applying to a court.[538]Where there is a default with respect to any obligation, the secured creditor shall serve on the grantor a notification, in writing or in any other form agreed between the parties, to pay the money owing or perform and observe the agreement.[539]

The following enforcement rights exist in the jurisdictions examined; namely,

(1) the right to sue:

In the MPSRA-Kenya[540]where the grantor does not comply within the time period indicated in the notification after the date of service of the notification, the secured creditor may exercise the right to sue.The secured creditor can elect to sue the grantor for the performance of the secured obligation under three conditions. Firstly, where the grantor is personally bound to satisfy the secured obligation.[541] Secondly, where the collateral is rendered insufficient to fully satisfy the secured obligation and the secured creditor has given the grantor a reasonable opportunity to provide additional sufficient security and the grantor has failed to provide the

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[530] Neil B. Cohen, "Harmonizing the Law Governing Secured Credit: The Next Frontier"(1998) 33 Tex. 173 *International Law Journal* 176
[531]STMA Act, 2017 No.3 A53
[532]BALA - GhanaAct 1052
[533] MPSRA-KenyaAct No.13, 2017
[534] Section 2(a)
[535]*Ibid;*Section 7.
[536]*Ibid;* Part III.
[537]*Ibid;* Part VII
[538]*Ibid;* section 66.
[539]*Ibid;* Section67(1)
[540]Note 49, Section 67(3)
[541] *Ibid,* Section 68(1)(a)

additional security[542] and thirdly, where the secured creditor is deprived of the whole or part of the security right through or in consequence of, or a wrongful act or default of the grantor or the debtor.[543] The law empowers the court to order parties to resort to alternative forms of dispute resolution including reconciliation, mediation, arbitration among others.[544] However, under the BAMA-Ghana,[545] there was no condition precedent the creditor must satisfy before exercising his right to sue. The situation is different under the STMA-Nigeria which provides that where there is a default, a creditor may exercise his right under the Act and in the Security Agreement or resort to any appropriate judicial remedy.[546]

(2) The right of redemption:

The position of the law under the MPSRA – Kenya is that any person whose rights are affected by the enforcement process is entitled to redeem the collateral by paying or otherwise performing the secured obligation in full, including the reasonable cost of enforcement.[547] The right of redemption may be exercised until the asset is sold or otherwise disposed of, acquired or collected by the secured creditor.[548] This is the same position in the STMA-Nigeria[549]which in Section 49(2) further provide that a grantor's right to redeem the collateral shall have priority over any other person's right to redemption. The Nigerian court have repeatedly held that it is only the mortgagee exercise of the right to sale that can extinguish the mortgagor's equity of redemption[550] and the right of the mortgagor to redeem cannot be denied him by any term in the mortgage deed.[551] But the BAMA-Ghana did not clearly provide for the right of redemption as provided in Nigeria and Kenya.

(3) The right of the Higher-Ranking Secured Creditor to take over enforcement:

A secured creditor's right ranks higher than other interests in an asset used as security. Under the MPSRA-Kenya,[552]it is provided that despite the fact that another secured creditor or non-consensual creditor has commenced enforcement, a secured creditor whose security right has priority over that of the enforcing secured creditor or non-consensual creditor is entitled to take over the enforcement process. This right may be invoked at any time before the asset is sold or otherwise disposed of, or acquired by a secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.[553] This right of the creditor is not provided for in the BALA – Ghana and the STMA – Nigeria. It only provided for priority of the secured creditor generally.

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[542]*Ibid;*Section 68(1)(b)
[543]Note 53*;*Section 68(1)(c)
[544]*Ibid*Section 68(3)
[545]Section 61
[546]Section 39(1)(a)
[547]Note 56;Section 69(1)
[548]*Ibid*Section 69(2)
[549]Section 49(1)(a)(b).
[550]*Mohamed* v. *Abdulkadir & Ors*[2008] 4NWLR (Pt. 1076)41
[551]*Ejikeme* v. *Okonkwo*[1994] 8NWLR (Pt.362) 266.
[552] MPSRA-Kenya; Section 70(1).
[553]Note 68; section 70(2).

(4) Right of the Secured Creditor to take Possession:

The secured creditor is entitled to obtain possession of the collateral under two conditions under the MPSRA; firstly, the grantor has consented in the security agreement to the secured creditor obtaining possession, in which case no court application is required. Secondly, the grantor has not consented in the security agreement to the secured creditor obtaining possession, but at the time the secured creditor attempts to obtain possession of the collateral, the grantor or any other person in possession of the collateral does not object.[554]Under the BALA – Ghana, the lender may enforce the right to possession without initiating a proceeding in court for that purpose and does not need to give notice to the borrower before repossessing or rendering the collateral unusable under this section.[555] The STMA – Nigeria did make any provision in this regard. It is however instructive to note that while both the MPSRA and BALA recognises the right of the secured creditor to take possession, it would appear that consent or notice to the grantor is not necessary in Ghana.

(5) Right of the Secured Creditor to dispose of the Collateral:

After default, the secured creditor is entitled to sell or otherwise dispose of, lease, or licence the collateral in its present condition or following any commercially reasonable process. The secured creditor may buy the collateral at a public or private auction.[556] The STMA went ahead to provide that in exercising the power of sale, a creditor shall obtain a reasonable price available at the time of the sale or disposal and that the creditor may dispose of a collateral on the grantor's premises provided that it shall not cause any person in possession of the premises, other than the grantor, any serious inconvenience.[557] Under Section 66(2)[558] the price at which a collateral is sold shall be determined by an independent valuer appointed by the lender. It went on to provide that where the process of the realization of the collateral is by way of an auction, the process of realization by the lender shall be deemed to be an execution of a judgement debt.

It is the considered opinion of the present writers that while the STMA provision allow the creditor to conduct the disposition in the premises of the grantor, it clearly didn't make any provision where the grantor makes entry into the premises difficult. A creditor who receives such resistance may rely on the decision of the Nigerian court in the case of *Awojugbabe Light Industries* v. *P.N. Chinukwe & Anor*.[559] where the court held that the mortgagee can take possession of the mortgage property *vi et armis* or rely on the provisions ofSection 40(5) and (6)which allows the assistance of the Nigerian Police Force in the repossession of the collateral.The provision of Section 64(1)[560] allows the creditor to deploy the use of the Ghanaian Police Force to assist in taking possession of the security. The difference between both legislation is that while the creditor under STMA – Nigeria does not require a court warrant to deploy the Police, a creditor in Ghana will need the warrant of the court to use the Police Force. The Police in Kenya has no role in the recovery of collateral under the MPSRA – Kenya. The role of the Nigerian Police in debt recovery has been condemned by the courts. The

[554]*Ibid*section 71(1).
[555]Section 63(1).
[556]*Ibid*Section 72.MPSRA, Section 45, STMA.
[557]Section 44(4) STMA
[558]BALA-Ghana
[559](1995) 5 NWLR (Pt.390) 409.
[560]BALA-Ghana

Supreme Court of Nigeria in *Theophilus Kure* v. *Commissioner of Police*[561]condemned the practice of using the Police as debt recovery agents. There is therefore a legal crisis between a clear provision of the STMA-Nigeria and the decision of the Courts. Even though the law did not describe or intend to view the police as an agent in the enforcement of the secured creditors right under a purely civil transaction,in practice there appears to be an agency transaction between the police and a secured creditor seeking to enforce his right.

Also worthy of note is the exclusive right of the creditor to appoint an independent valuer under the BALA - Ghana. This will create more challenges as this may encourage collusion on the part of the creditor and his appointed independent valuer who may undervalue the property.[562]The secured creditor is expected to send notification of his intention to dispose of the collateral to the grantor or any other secured creditor that registered a notice with respect to the collateral.[563] While the STMA-Nigeria requires the secured creditor who intends to sell a collateral not less than 10 working days before selling the collateral, and send notice as required bysection 40 (2) of the Act.[564] The BALA –Ghana requires not less than 7 days before the sale,[565] whereas the notification should be sent at least five working days before the sale in the case of Kenya.[566]

(10) CONCLUSION/ RECOMMENDATIONS

It is a settled statement of fact that the personal economy of the citizens of a nation is inextricably tied to the overall economic outlook of that nation. Credit financing has continued to drive economic growth. As it has been abundantly established, the security of a credit is not based on the value of the collateral deposited by the grantor alone but on other credit litmus and validity tests such character and reliable personality of the borrower. Easier and less rigorous strategies to enforce the rights of the creditor at the legal due date for repayment of an advanced loan would guarantee better growth of businesses.

Along the above lines, it is suggested that since credit security transactions are primarily contractual agreements between parties regulated by statute, issues of enforcement of credit security rights should be treated as responses to contractual breaches which attract general damages in addition to the stated statutory remedies. Also, credit systems usually concern definite sums of money claimed outstanding by the creditor whose recovery can be more quickly achieved through the undefended list procedure beyond the statutory judicial or personal sale of mortgaged property upon debtor's default with its attendant rigorous and lengthy processes.

This paper therefore specifically recommends the harmonisation of all relevant laws on credit financing and credit security in Nigeria; the amendment of Section 40(5) of the STMA to be in line with the provisions of Section 60(4) of the BALA-Ghana which requires a secured creditor to first obtain a warrant of the court giving judicial approval for the use of the Police in the

[561] (2020) LPLER – 49378.
[562]*Intercity Bank Plc.* v. *Feed & Food Farms Nig. Ltd*[2002] FWLR (pt. 128) 1289.
[563]Note 78, Section 73; STMA, Section 40.
[564]STMA; Section 45(1).
[565]Section 67(1) BALA.
[566]Section 73(2) MPSRA

recovery of a collateral. This is imperative because secured credit transaction is purely civil and has no criminal element; the amendment of Section 44(4) STMA to define serious inconvenience to exclude arbitrary interpretations that may frustrate enforcement of credit security rights. This section provides that in exercising the power of sale, a creditor shall obtain a reasonable price available at the time of the sale or disposal and that the creditor may dispose of a collateral on the grantor's premises provided that it shall not cause any person in possession of the premises, other than the Grantor, any serious inconvenience. Serious inconvenience was not defined in the Act. Having armed Nigerian Police Officers in the premises of a grantor is already a serious inconvenience. This section should be amended to exclude the presence of the police a serious inconvenience and allow for situations that will afford a grantor sufficient time to appraise the enforcement efforts so as to avoid what would amount to serious inconvenience under the Act.