An Examination of the Legal Mechanism for Financing Mortgage Transactions in Nigeria

By
Farida Aisha Kera*
Dahiru Muhammad Sani**

Abstract
Nigeria is one of the countries categorised globally among countries having housing deficit. This deficit in most countries is normally addressed through mortgage. But in Nigeria the problem of mortgage financing remains an eyesore. This is largely due to lack of proper implementation of existing legal framework on the matter. There is also lack of synergy between institutional and non-institutional units, which are supposed to facilitate the process of financial inter-remediation and capital formation in the housing sector. The paper examines the legal mechanisms for financing mortgage transactions in Nigeria. The paper finds through doctrinal research that adequate commitment has been made by government through the enactment of relevant laws and establishment of agencies to provide the platform for mortgage financing in Nigeria. But despite this, this has not been realised because of among others, difficulty in perfecting and registering title to land in Nigeria. Based on this, it is therefore, recommended that the cumbersome procedure in the perfection and registration of title to land be relaxed to make mortgage transactions easier to perfect. It is also recommended that government should reduce interest rates on mortgage loans in order to make it affordable to low and middle-income earners.

1.1 Introduction

Central to every housing development is finance. Of all the problems of housing development in Nigeria, the problem of finance is very critical and decisive. Real estate development and investment no matter how excellent and viable in scope will remain unsuccessful, unless there is sufficient capital to concretise it. One major source of raising this capital by individuals and corporate entities is by means of borrowing. Mortgage finance plays a pivotal role in the development of housing in the country.[1] The terms and availability of the needed funds determine the trend of estate operation.

Investment in real property can also take the form of "sale and lease-back". The principle here involves the outright sale of one's interest in a real property as a means of obtaining

* LL.B, LL.M, PhD (ABU), Lecturer, Department of Private Law, Ahmadu Bello University, Zaria-Nigeria. Phone No: 08037031331, 08099070298 email:dahirumsani@gmail.com
** LL.B (Hons), LL.M, PhD, (ABU), Lecturer and Acting Head, Department of Private Law, Faculty of Law, Ahmadu Bello University, Zaria-Nigeria. Phone No: 09061919393

[1] Fidelis, I., et'al, 'Critical Issues in Real Estate Finance as an Index in Building Construction Project Management Success in Nigeria'(2012) (2) (7) *American Journal of Social and Management Sciences*, p.7.

finance. The same property sold is then taken on leasehold basis by the seller. The method has the advantage to the seller in the sense that, he can get enough funds for his project and at the same time secure occupation.[2] He can also obtain higher fund than in a mortgage transaction. The purchaser on the other hand can also rely on the income negotiated as secured one. He can also negotiate for a higher rent and his capital is thus secured.[3] An alternative means for an owner-occupier or potential owner-occupier to raise capital for his investment in real property is to mortgage the property. This would create an indirect property investment for the mortgagee by way of a loan secured on the property.[4] Two other indirect methods of investing in property where an equity type investment is created are through property bonds, and shares in property companies. A property bond is a life assurance scheme similar to unit trust life assurance, but with the premiums and dividends linked to property instead of stocks and shares.[5]

The paper discusses the numerous problems associated with the relationship between mortgage institutions and other institutional and non-institutional units which is supposed to facilitate the process of financial intermediation and capital formation in the housing sector. This lack of synergy is in so many respects, is the major factor which makes mortgage financing to remain under-developed. The paper therefore, has as its objective, examining the legal mechanisms for mortgage financing in Nigeria so as to identify the reasons accounting for lack of efficient mortgage financing for property development in Nigeria with a view to proffering solution that are necessary to enhance an enabling environment for effective mortgage financing that can promote property development in the country.

1.2 Definition and Sources of Mortgage Finance

It is imperative before delving into discussing this paper to define the term mortgage finance and enumerate the available sources of financing.

1.2.1 What is Mortgage Finance?

Finance means to raise or provide funds.[6]Mortgage finance was defined as a long term loan at market interest rate housing extended by formal sector and financial institutions

---

[2]Aminu, G. W., and Ruhizal, R., 'Housing Policies and Programmes in Nigeria: A Review of the Concept and Implementation' (2013) (3) (2) *Business Management Dynamics,* p.65.

[3]Abdullahi B.C. and Abdul-Aziz W.A 'Pragmatic Housing Policy in the Quest for Low-Income Group Housing Delivery in Nigeria' (2011) (8) *Journal of Design and Built Environment*, p.28.

[4]Gbadeyan, R. A., 'Private Sector Contributions to the Development of the Nigerian Housing Market' (2011)(3)(2) *Current Research Journal of Social Sciences*, p.113.

[5]Eziyi, O. 'Challenges in Public Housing Provision in Post-Independence era in Nigeria.' (2011)(8)(2) *International Journal of Human Science,* p.12.

[6]Garner, B.A *Black's Law Dictionary* (2014) 10th Edition, p.747

such as building societies to the qualified mortgagors.[7] Finance is the most important factor among the factors influencing the housing provisions in most developing countries and also identified as a key component of shelter strategy. Mortgage finance is a provision of finance or capital for housing. The term housing finance may mean, According to Olubunmi, three things;

> a capital required for the construction of housing or housing projects ; secondly, resources required for the construction of housing or housing projects; lastly, resources required for acquiring or accessing a building by households or credit supplied by housing finance institutions.[8]

Thus the above definition suggests that housing finance might be in cash or in kind. Cash may be required for construction of houses or housing project. In the same vein as resources required for acquiring or accessing buildings are considered all to be housing or mortgage finance. Mortgage finance has also been defined to mean" a long term loan at market interest rates extended by a formal financial institution, which is typically specialized in housing, such as building society - that qualifies mortgagors based on underwriting criteria.[9] The characteristics include fixed monthly payment at fixed interest rate that varies with the rate of inflation and using a lien on the property which mortgager must have full legal title[10]. Mortgage financing is structured financing provided by approved financial institutions that accept real estate security for loan. The aim of mortgage finance normally centered around two specific objectives. First, the financing seeks to create revenue for the lender. Second, the extension of mortgages allows qualified individual and business entities to secure properties that can be repaid in terms that are within the liability of the recipient of the loan to pay off in timely manner.[11] Although, the primary consideration for every credit transactions is the credit worthiness of the debtor, however, security is taken on a second thought as it gives assurance of having a property to fall back on upon mortgagor's default.[12]

---

[7]Olubunmi, A. *The Role of Secondary Market in Expanding the availability of funds for Mortgage Finance in Nigeria.* (2009) Amasters of science thesis No. 483 submitted to the University of Stockholm, Sweden. p.10
[8] Ibid p.12
[9]Chikezie, O.I. *How Mortgage Finance will enhance Home Ownership*. A(2012) available at www.thenationonlineng.net accessed on 18th October, 2015. 7:21pm
[10]ibid
[11]Onyike, J.A. 'An Assessment of the Affordability of Housing by Public Servants in Owerri, Nigeria' (2007)(3)(1), *Journal of Land Use and Development Studies*, p.21, Wise Geek 'What is Mortgage Financing?' available atwww.wisegeek.net/what-is-mortgage-financing.htmaccessed on 15th November, 2014. 3:01pm
[12]Pedrazzini and Sampson. 'The Legal framework for secured credit: a suitable ease for treatment' (1999)(1) B.I.I p. 127, see also Smith I.O. 'Nigeria Law of secured credit' (2001) p.2.

1.2.2 Sources of Housing Finance

There are different sources of finance available towards startup and thus who have been in business. These include the following:

i) Personal Loan
ii) Capital fund and leasing
iii) Self-financing from the cash assets.
iv) Investments from family and friends
v) Investment from professional investment who invest in companies.
vi) Borrowing money from financial institutions.

The above sources however differ in terms of duration and condition for payment. They are usually categorized into short term and long term loans.
The long term loan is used as a source of fund for working capital. The lender takes a security position in the asset. This is where the significance of mortgage financing comes in especially in Nigeria where there is low savings and low capital formation.

1.3 Legal Mechanism for Financing of Mortgages in Nigeria

The major instruments that are relevant to any discussion on mortgage financing in Nigeria are as follows:

i) National Housing Fund Act[13]
ii) Federal Mortgage Bank Act[14]
iii) Investment and Securities Act[15]
iv) Companies and Allied Matters Act[16]

1.3.1. National Housing Fund Act

Section 2 of the National Housing Fund (NHF) Act[17], has given the National Housing Funds the mandate to facilitate the mobilization of Fund for provision of houses for Nigerians and ensure the constant supply of loans to Nigerians for the purpose of building, purchasing and improvement as well as development of homes. In effect, Section 2 is expected to insulate the housing finance system from the fluctuations that had characterized its past reliance on government intervention. This is consistent with the practice in other countries especially, as sustainable housing finance operations require the mobilization of private sector.[18] Generally, one strategy for mobilization of funds for housing finance in Nigeria evolved around mandatory contribution by workers, commercial institutions and

[13]Cap N45, LFN, 2004
[14]Cap. 132, LFN, 2004
[15]Cap. I15, LFN, 2004
[16]Cap C20, LFN, 2004
[17] Cap. N45, LFN, 2004.
[18]Ocholi, S. O., et'al, 'Critical Review of Nigeria National Housing Policies Delivery' (2015) (4)(9) *International Journal of Engineering Research & Technology*, p.8

the government. For the workers, Section4 of the National Housing Fund(NHF) Act[19]provides that:

> G. a Nigerian worker earning an income of N3,000 and above per annum in both the public and the private sectors of the economy is oblige to contribute 2.5 percent of his basic monthly salary to the Fund. (2) An interest rate of 4 percent shall be payable on the contributions made under subsection (1) of this section.

Thus, participation in the scheme is mandatory for all workers earning N3, 000 or more per annum. The participants contribute 2.5 per cent of their monthly salaries to the housing fund at an interest rate of4 per cent to each savings/contribution made. This money is often deducted from the source as section 9 of the Act[20]provides that an "employer who has in its employment an employee earning a basic salary of N 3,000 and above *per annum* to deduct 2.5 percent of the monthly salary of that employee's contribution to the Fund" and "remit it to the bank within one month of the making of the deduction". Where a self-employed person wishes to participate in the Fund, he shall also deduct from his monthly incomes and contribute 2.5 percent of such income to the Fund and an interest rate of 4 percent shall be payable on the contributions made.[21]

1.3.2 Participation by Commercial Institutions

As for contribution by commercial institutions, section 5 (1 and 2) of the NHF Act[22]**,** requires every commercial or merchant bank to invest in the Fund 10 percent of its loans and advances at an interest rate of 1 percent above the interest rate payable on current account by banks. In addition, every registered insurance company is obliged to invest a minimum of 20 percent of its non-life funds and 40 percent of its life funds in real property development of which not less than 50 percent shall be paid into the Fund through the Federal Mortgage Bank of Nigeria at an interest rate not exceeding 4 percent. Generally, all these investments are subsequently transferred to the Federal Mortgage Bank of Nigeria (FMBN) for the housing sector thereby liberating deposit money banks from the burden of mortgage loans.[23]

[19]Op.cit.
[20] S.9 (1) and (2)
[21]S.10, Ibid.
[22]Ibid.
[23]Amobi, I. C. 'Public-Private Partnership as a Model for Infrastructural Development in Nigerian Universities' (2013) *a paper presented at the Maiden Lecture of the Annual Lecture Series of the Department of Economics, NnamdiAzikiwe University Awka, Nigeria.* African Heritage Institution, p.6.

1.3.3 Contribution by Government

In case of the contribution by the government, Section 5 of the Act[24]makes it mandatory for the Federal Government to make adequate financial contributions to the Fund for the purpose of granting long term loans and advances for housing development in Nigeria. The Federal Government may also make available such other sums either in Naira or foreign currency to the Fund as it may deem necessary. Under this scheme, budgetary allocation is made at all levels of Government to the housing sector to finance low income housing schemes. In this respect, the Federal, State and Local Governments make direct budgetary allocation of a sum not below 2.5 per cent of their revenue to housing scheme. The Federal Government also expanded the Infrastructure Development Fund (IDF) from which the State and Local Governments can borrow to provide basic infrastructural facilities.[25]

1.3.4 Refund at the age of 60 years

Section 17 of the NHF Act[26] allows the refund to a contributor of his funds after he attained the age of 60 years or retired from his employment and becomes incapable of continuing the contribution to the Fund as specified in this Act. However, it is not clear whether such a refund is automatic upon reaching the above conditions or it is subject to application by the contributor. If it is in relation to the latter, the section is still not comprehensive enough as it did not provide the procedure for such application. In fact, more worrisome is section 20 of the Act[27]which provides a fine of N 50,000 (in case of corporate entity) or imprisonment for a term of five years or to both such fine and imprisonment against an employer who fails to make deduction from the basic salaries of his employees or remit the money so deducted to the bank, but no punishment is prescribed for any bank that fails to make funds available to a contributor having met all the necessary conditions.

1.3.5 Interest rate (Incentive)

One burning issue on mortgage financing in Nigeria concerns the interest rate on National Housing Fund. For instance, while high interest rate discourages participation by workers and self-employed, low interest rate level on the other hand, makes the banks and insurance companies reluctant to invest in the Fund especially, as there are some more profitable investment avenues.[28]To regulate this, Section 16 (1) of NHF Act[29] provides that the loans made by the bank shall be at interest rates slightly lower than the prevailing commercial rates in Nigeria. Such interest rate for each loan is to be fixed for the duration of the loan.

---

[24]Op.cit.

[25]Ibem, E. O. 'Public-Private Partnerships (PPP) in Housing Provision in Lagos Megacity Region, Nigeria' (2011) (2)(2) *International Journal of Housing Policy*, p.141.

[26]Op.cit.

[27] Ibid.

[28]Ibem, E. O., &Aduwo, E. B. 'Public-Private Partnerships (PPPs) in Housing Provision in Ogun State, Nigeria: Opportunities and Challenges' (2012) *a paper presented at the 4th West Africa Built Environment Research (WABER) Conference,* 24-26 July 2012, Abuja, Nigeria, p.652.

[29]Op.cit.

Section 5 of the Federal Mortgage Bank Act[30] empowered the Board of the Federal Mortgage Bank to determine such interest rates in accordance with the policy directed by the Federal Government. However, the above provision appears to have created more problems. Considering the strategic importance of interest rate in mortgage financing to both prospective investors and commercial institutions, one expects that the section will at least provide a percentage to serve as a guide for policy makers. The phrase "interest rates slightly lower than the prevailing commercial rates in Nigeria" does not suggest any thing definite. It has rather created an opportunity where interest rate could be manipulated in favour of commercial banks. Unfortunately, going by the above provision, where the Board of the Federal Mortgage Bank determined such interest rates in accordance with the policy directed by the Federal Government, such decision is final, there is nothing prospective investors can do. It is in view of this that having a statutory guide will guard against unnecessary use of discretionary power in this regard.

To alleviate some of the problems that clog the wheel of the National Housing Fund, the Federal Legislature has made a move to repeal the National Housing Fund Act 2004 with the National Housing Fund (Establishment Act), 2018. Below is the brief overview of the new law, albeit, it is yet to receive presidential assent.

1.4.1 The National Housing Fund (Establishment) Bill, 2018

Recently, (On 18th February, 2019), the National Assembly passed an Act to repeal the National Housing Fund Act. The new law has introduced additional ways of pooling more resources to the Fund. The bill introduces a levy known as the Sustainable Development Levy to be paid on locally produced and imported cement at the rate of 2.5% ex-factory price before transportation cost for each bag of 50 kilogram or its equivalent in bulk.[31] Also any employee, whether in public or private sector and even self-employed persons in Nigeria, earning the national minimum wage or its equivalent, shall contribute 2.5% of his monthly income to the Fund.[32]It will be noticed here that, self-employed persons, if the new law applied, are also mandated to contribute as against the current law. The Pension Fund Administrators were also required to invest in the Fund. They were required to invest at least 10% of their profit before tax in the Fund at an interest rate of 1% above the prevailing interest on current bank accounts.[33] The new Act also increased contribution for banks and insurance companies to 10% profit-before-tax (PBT).[34]Another noticeable fact here is that, unlike the current law, the new Act has introduced sanction for the banks in respect of failure to comply with the provisions on contribution to the Fund. The other innovations of this Act include:

[30]Op.cit.
[31] S. 4(1) of the National Housing Fund (Establishment) Act, 2018.
[32] Ibid, s. 5 (1) and (2).
[33] Ibid, s. 12
[34] Ibid, s.6

i) Contribution of employees to the fund to now accrue interest at 2 per cent per annum, as against the 4 per cent payable under the current law, which is significantly higher.
ii) Refunds to contributors can only be made after 60th birthday or 35th anniversary in employment, proving that there are no outstanding loans against the contributors.
iii) Mortgage institutions to be earned a spread of 2 per cent over the interest charged on loans advanced through them to borrowers from the fund. The current law allows a spread of 4 per cent.
iv) Lastly, the contribution of 2.5% of monthly income under the current law is applicable only to workers earning an income of Three Thousands Naira (NGN 3,000) and above while the new NHF Act is expected to cover workers earning the minimum wage or its equivalent and above.

The proposed new Act has tried to pool more resources to finance the housing market in the economy. There is no doubt that the chances of individual Nigerians in fulfilling their housing dreams will increase. But however, this would at last turn to increase the cost of housing as it increase the cost of cement. This is among the reasons that Presidency gave while declining to assent the bill as stated in its letter dated 28th March, 2019 addressed to the President of the senate.[35]

1.4.2 Federal Mortgage Bank Act

Insufficient funding is the key factor that hinders the development of Mortgage Industry in Nigeria. To alleviate this, Section 5 of the Mortgage Bank Act[36] empower the Federal Mortgage Bank to provide from the fund, long-term credit facilities to mortgage institutions in Nigeria at such rates and such terms as may be determined by the Board in accordance with the policy directed by the Federal Government, being rates and terms designed to enable the mortgage institutions to grant comparable facilities to Nigerian individuals desiring to acquire houses of their own. The FMBN was incorporated with the Sum of 2.5 Billion as its capital base. It is also the custodian of the National Housing Fund.
One major problem with Section 5 of the Federal Mortgage Bank Act is in its failure to set up an independent mechanism to ensure compliance particularly with long-term credit facilities to mortgage institutions in Nigeria. This is because the Structure of Bank Deposit Liabilities in Nigeria is preponderantly short term, thus, the deposit money banks tend to avoid fund mismatch i.e. borrowing short but lending long term, which is required in mortgage financing.

[35]Mashood, Q., & Examining the Flaws of the National Housing Fund (Establishment) Bill 2018.' (2019) Published at https://www.mondaq.com/Nigeria/x/796376/Fund+Management+REITs/Examining+The+Flaws+Of+The+National+Housing+Fund+Establishment+Bill+2018.Accessed on 6th April, 2019.
[36]Cap.132, LFN, 2004.

1.4.3 Companies and Allied Matters Act

Section 166 of the Companies and Allied Matters Act (CAMA)[37]empowers a company in Nigeria to create debenture in the course of it business. The section provides that a company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property or uncalled capital or any part thereof and issue debenture, debenture stock, and other securities whether outright or as security for any debt, liability or obligation of the company or of a third party. Debenture is usually created by an instrument. Usually the instrument consists of the terms of the debenture particularly, the principal and the coupon rate.

The company must confirm from its Articles of Association to ascertain that borrowing is not ultra vires to the company. This is important because a borrowing which is outside the object of the company is ultra vires and could be restrained. Where the directors borrow money on debenture in excess of the amount authorized by the Articles, the debenture is void and the security unenforceable unless the lender can rely on the provision of Section 69(a) of CAMA[38]which makes presumption of regularity in favour of any third party dealing with the company. Given that statutory description of debenture is usually classed alongside shares as a type of corporate securities, it is pertinent to inquire if the debenture shares the same characteristics as shares. In contrast with a shareholder, the debenture holder is in law not a member of the company having rights in it, but a creditor having rights against it. In reality, however, the difference between the debenture and the share may not be that clear-cut because the debt instrument may confer on the holder certain contractual rights akin to those of a shareholder. For instance, to appoint a director, share profits (whether or not available for dividend), attend and vote at general meetings. Covenants in the debt instrument may also give the debenture holders considerable influence over the way in which the company is managed. Moreover, where the debenture is secured by a floating charge on all the undertaking the assets of the company, the holder will have a legal or equitable interest in the company's business, albeit of a different kind from that of the shareholders.[39]

Apart from the company's register, companies that issue debentures have a statutory obligation to maintain a register of all debenture-holders[40]. Similarly, where an asset is subject to charge as security for the debenture, such a charge must be duly registered[41]. The registration is done at the Corporate Affairs Commission (CAC) within 90 days after the creation of the charge or debenture. Where the particulars of a charge are not registered,

---

[37] Cap. C20, LFN, 2004.
[38] Ibid.
[39]Kunle, A., 'The Anomalous Position of Trustee to Debenture In Nigeria' 2014) (16)(7) *Journal of Business and Management,* p.11.
[40] S. 193, op.cit.
[41] S. 191, Ibid.

the charge shall be void as against the company's liquidator or creditors. For a loan from one person or a few persons, a simple debenture deed is used. However, for a loan for a large number of persons or to the public at large, section 198 of CAMA requires that this must be done via issue of debenture stock under a Debenture Trust Deed entered into between the company and a trustee appointed for the debenture holders. The Debenture Trust Deed enables many debenture holders to hold security by having legal interest vested in the trustees in trust for the beneficiary debenture holders and the trustees can retain custody of title deeds in the case of legal mortgages[42].What is however confusing is the fact that, although the CAMA allows for naked debenture, it makes it mandatory that all debentures be supported with a trust deed that must state "the charges securing the debenture"[43]. There is need to correct this ambiguity.

1.3.4 The Nature of Interest Created by Debenture and shares

A pertinent question would therefore arise as to the nature of security interest created by a debenture.[44]The concept of unsecured debentures necessarily flags off an enquiry as to the nature of interest conferred on the parties to a debenture transaction. Simply put, does an unsecured debenture confer any security interest on the holder of such debenture note is the nature and incident of such interest? In most secured debenture arrangements, a legal mortgage will occur where the mortgagor transfers the share to the mortgagee and the name of the mortgagee is entered in the register as the holder of the securities. The legal interest in the mortgaged property is usually held by the trustee on behalf of the debenture holders. Hence as between the debenture holder and the company, there exists only an equitable interest. An equitable mortgage is established through the transfer of ownership to the mortgagee or pursuant to an agreement for the transfer of ownership. It should be noted that an equitable mortgage or an assignment of same to a third party is a vulnerable form of security as the company is not under an obligation to register the mortgagee or the assignee and an equitable mortgage will usually be subjected to a prior equitable mortgage.[45]

While legal rules apply strictly to the binding nature of the loan contract envisaged under a debenture arrangement, it is doubtful that the principles of equity apply strictly. For instance, unlike the traditional case in legal mortgage of under conventional loan contracts, the equitable rule which invalidates restrictions on a mortgagor's right to redeem does not apply to debentures[46]. This line of thought was followed by the court in *Knightsbridge*

[42]Omotola, J., *The Law of Secured Credit* (Evans Brothers Nigeria Publishers Limited, 2016) p. 294.
[43] Section 168 (f) op.cit. In further exacerbation of this contradiction, Section 184(c)& (d) reinforces the provisions of Section 168 making the inclusion of details of the asset charge, whether or not the debenture trust deed is required under section 183.
[44]Going by section 650 Ibid., debenture is *"a written acknowledgement of indebtedness by the company setting out the terms and conditions for the indebtedness"*.
[45]Davies, P. *Gower and Davies principles of modern company Law* .(8th ed.) (Sweet and Maxwell, 2008) p. 1141
[46]Kunle, A., op.cit.p.14.

Estates ltd v Byrne[47]. The case concerned an ordinary mortgage on houses, shops and a block of flats by a company to secure a loan of 310,000 pounds from an insurance company. The loan was to be repayable by 80 % half-yearly installments spread over 40 years but became immediately repayable if the mortgagor should sell the equity of redemption. The company was forbidden from selling any of the properties free from the mortgage or from granting leases for more than three year without the consent of the mortgagee. Five years later, the company wished to pay off the mortgage in full and argued that the term making the mortgage irredeemable for 40 years was void as a clog on the equity of redemption. The question was whether the mortgage was a debenture under the relevant statute at the time. The House of Lords held that it was, and further that a debenture was not subject to the rule against the clogging of the equity of redemption. The possibility of excluding application of the equity of redemption for debentures is to allow companies to issue perpetual and irredeemable debentures.

Section 171 of CAMA[48] supports this practice. The section provides that:

> a company may issue perpetual debentures and a condition contained in any debentures, or in any deed for securing any debentures, shall not be invalid by reason only that the debentures are made irredeemable or redeemable on the happening of a contingency, however remote, or on the expiration of any period however long, any rule of equity to the contrary notwithstanding.

On the issuance and transfer of debentures, section 315 of the Investment and Securities Act[49] prescribes that all debentures shall be registered at the Securities and Exchange Commission. The Act prohibits the issuance, transfer, offer or sale of any class of debentures to the public without prior registration of same with the Commission[50].

Additionally, the implication of section 650 of Companies and Allied Matters Act (CAMA)[51] which sees debenture "a written acknowledgement of indebtedness by the company, setting out the terms and conditions for the indebtedness" is that, debenture can be classified as a securities transaction. Furthermore, going by section 315 of the Investment and Securities Act[52], debenture is usually issued or proposed to be issued in units to members of the public, or a specific class of creditors as stocks, bonds, shares,

---

[47] (1940) A.C. 613
[48] Op.cit.
[49] Cap I15, LFN 2004. The section actually says 'securities'; however securities has elsewhere in Section 315 been defined to include debentures.
[50] S. 54(6), op.cit.criminalizes the issuance transfer sale or offer for subscription of Debenture notes without prior registration. The offence is punishable with a term of imprisonment of three years with fine.
[51] Ibid.
[52] Op.cit.

notes or any right or option in respect of such stocks, shares, bonds or notes. These debt notes may be transferrable and in fact traded. It is in this sense that debenture is looked upon as a form of securities.[53]Thus, as used in the foregoing provision, the term 'securities' will include shares, debentures, debenture stock, bonds, notes (other than promissory notes) and perhaps units under a unit trust scheme. A formal approach to security is used to connote a proprietary interest over an asset. The principal reason for security is to enhance the certitude of repayment of the loan advanced, although security may be capable of performing other functions. This is achieved by giving the secured creditor a right of obligation property, which includes the right of pursuit and the right of preference or priority.[54]

However, while the above analysis describe have identified the possibility of a debenture being issued without security, in reality this seldom happens. The predominant practice is for debenture issued by companies to be secured with an asset belonging to the company. The legal right over asset pledged as security enables a secured creditor to enforce his security without having to go through the sometimes tumultuous journey of a court action. Even where the secured creditor requires the intervention of the court in order to enforce his security, the procedure is cheaper and less time consuming as he can proceed against the property directly in court. This is unlike an unsecured creditor who has no property right in the assets of the debtor and who can only enforce his claim by obtaining a judgment for a debt before proceeding to levy execution.[55] The right of preference or priority is the secured creditor's right to appropriate a specific property, which is the subject matter of the security interest, in satisfaction of his claim in the face of competing claims of third parties. This right is available whether or not the debtor is in liquidation since the secured creditor may exercise his right to dispose of the property in satisfaction of the outstanding debt.[56]

1.5 Challenges of the Legal Mechanism for Financing Mortgages in Nigeria

Despite the above legal Mechanism particularly of mortgage financing in Nigeria, provision of adequate housing still remains a serious challenge in the country. Some of these challenges may be attributed to the fact that, as a valuable investment vehicle and collateral for obtaining credit, property is a catalyst for growth. However, property-backed

[53]The CAMA recognizes debenture in the sense of securities when it defines securities in the same section 650 as follows: "*In this PART, that is, PART A of this Act, unless the context otherwise requires, - 'securities' include shares, debentures, debenture stock, bonds, notes (other than promissory notes) and units under a unit trust scheme*".

[54]Keke, O. V., and Emoh, F. I., 'Real Estate Investment Trusts and Mortgage Backed Securities as Emerging Trends For Financing Real Estate Development in the Nigerian Capital Market' (2015) (3)(2),*International Journal of Civil Engineering, Construction and Estate Management*, p.5.

[55] Ibid

[56]Oni A.O, Emoh, F.I., Ijagun, K.C. 'The impact of money market indicators on real estate finance in Nigeria' (2012) *Sri Lankan Journal of Real Estate*, ISN:1800-3524. http\\www.journals.sjp.ac.lk. 4:21. P.M.

investments and transactions (such as leases, mortgages, and assignments) can only be properly and securely concluded, where the relevant property transaction is appropriately registered, even though the above laws do not insist that they must be registered. The practice is that, commercial banks always insist that they must be registered.

1.5.1 Difficulty of Obtaining, Perfection and Transfer of a title documents

In its June 2019 Doing Business Report, the World Bank ranked Nigeria as 146thin a pool of 190 economies on the ease of registering a property. According to the statistics, it takes, on the average, 1.6 years to obtain title documents in Nigeria, owing to the encumbrances of seeking for Governor's consent, and registration of title documents. Local studies have indicated that the processing time varies across regions and could take as long as 3 years in some regions of the Country, although, in cities like Lagos, the registration process can last average of 105 days, taking an average of 12 procedures, and costing about 11.1% of value of the property.[57] Compared to neighbouring Ghana, 6 procedures, 47 days and 6.1% of the property's value is only required. It also cost 0.04 and 0.08 per cent (of the property's value) in Canada and New Zealand, respectively. The factors responsible for such delays include bureaucratic bottlenecks (arising from delays from the time of submission of an application and when it is approved) and corruption evidenced in the form of private financial charges imposed by staff of land registries on people trying to perfect their title documents when applying for Governor's consent. These bottlenecks limit the possibility of using the land or property in question as collateral for mortgage. If mortgage lenders cannot exercise their right to collateral, mortgage lending will be constrained.[58]

Section 15(1-3)of NHF Act[59]requires that any loan obtained from a mortgage institution shall be secured by the first mortgage, while any loan granted by the bank to a mortgage institution shall be secured by a block of existing mortgages under cover of Sales and Administration agreement to be executed between the bank and mortgage institution. However, the Sales and Administration Agreement shall be registrable in the Land Registry along with the Deed of Assignment of mortgages to which the Agreement relates. The challenge, however, is the cost associated with the perfection of title by such banks or prospective investors. These costs could be as high as 15% of the value of the property.[60] In Lagos, the government reduced requisite perfection costs to about 3% in January of 2015

[57]Delmendo, C. L., 'Nigeria's Housing Market Stabilizing, Amidst Improving Economic Conditions' (2019). Available at https://www.globalpropertyguide.com/Africa/Nigeria/Price-Historyaccessed on 12 September, 2019.
[58] Kama, Op. Cit, 43
[59]Op.cit.
[60]Akporji, C., Growing the Mortgage Market to enable broader access to Home Ownership in Nigeria, Nigerian Mortgage Refinancing Company (2016) p.2.

and this has helped with the increase with compliance with the LUA and investments in real properties.[61]

Furthermore, as at April, 2017, the total NHF contributions received was N9, 694,650,100.67[62], taking the total contribution from 4.14 million registered contributors (the number of contributors to the NHF has increased by 224, 752 as at December, 2018), to N192bnThough, over 70% of the cumulative collection was recorded in the last five years. Out of this fund, the FMBN disbursed 5.4bn as mortgage loans through Primary Mortgage Banks to 736 beneficiaries who are contributors of the NHF. FMBN also refunded the sum of 2bn to contributors who were eligible for refund due to retirement.[63] The disbursement in general, is meant to finance the construction of about 25, 606 housing units.[64]The Federal Government in 2017 budget approved N9bn for the creation of 1, 244 mortgage loans across the country.[65]Given the housing deficit in the country, it is doubtful if this sum can make any serious impact. The Federal Ministry of Works and Housing projected that by the year 2020, eight million units of houses would be needed before housing could be provided for all. This amounted to five million housing units in the urban areas and three million units in the rural areas. This projection had tripled in 2016, i.e 6,000. Even the parastatals complained that the Federal Government would need about N50 trillion to provide housing for all citizens at a minimum housing unit cost of N200, 000.With 2019 budget of the country pecked at about 8.826 trillion, with only 408.028 billion (i.e., 5% of the budget) allocated to Federal Ministry of Power, Housing and Works, it would take more than ten years to raise N50 trillion needed for housing. With this scenario, the ultimate goal of the National Housing Policy to ensure that all Nigerians own or have access to decent accommodation at affordable cost was dashed and even up till now.

1.5.2 Interest Rate

For commercial banks, despite the provisions of Section 16 (1) of NHF Act[66] requiring that the loans made by the bank should be at interest rates lower than the prevailing commercial rates, in practice, this has made the bargaining power of customers to rank low as the industry is characterized by high demand for housing. This implies that the banks are

---

[61]Aluko, O., 'Housing Provision and Development in Nigeria: The Dashed Hope of the poor' (2015) paper presented at the *National Conference and Exhibition on Challenges of Sheller and Environment for Nigeria inthe coming Decades* (CEENACON) organized by College of Engineering and Environmental Sciences, Imo State University, Owerri, 6th-9th April, 2015, p.9.

[62]Central Bank of Nigeria (CBN) and National Bureau of Statistics, (Q1 2015 – Q3 2016), p.3.

[63] Mustapha, S., 'FMBN disbursed 5.4BN TO 736 in 2016,' (2017) *Daily Trust Newspaper,* (Abuja June 15 2017) , p.13.

[64] Ibid.

[65]Layomi, U., 'FMBN, Approves N9bn Mortgage Loans, (2017) available at httpps://www.tolet.com.ng accessed on 18th June, 2017. 4:19. P.M.

[66]Op.cit.

in position of strength when negotiating interest rates and repayment terms and conditions with customers.[67]In fact, interest rate on mortgage loan charged by some commercial banks in Nigeria range between 17-24 per cent as June 2018. It reflects the cost of borrowings and also includes all charges and commissions levied by banks.[68]Given that mortgage by its very nature is a long term investment, the implication of such high interest rate is, if for instance, you borrow N10,000,000.00 over 25 years to purchase a property, you have to pay a minimum of N100,000.00 every month for the next 25 years to pay off the loan. It is natural in such circumstance to guess that anyone who can afford that sort of money would not need loan in the first place. In addition, some of these commercial banks and insurance companies commit relatively small parts of their funds to property development. They are so selective in their chosen securities and their lending terms so prohibitive that only a negligent percentage of the population can benefit. In this circumstance, the Federal Housing Authority and State Housing Corporations would have serve as important alternatives.

Unfortunately however, their operations are limited to housing constructions. They are not allowed to have mortgage operations for their housing construction projects. They are not given the authority to combine their existing function of housing construction with savings mobilization, loan origination and loan servicing.

1.5.3 Non Existence of Laws regulating securitization of debentures

Furthermore, the Nigerian Stock Exchange is yet to be fully developed and only supports the equities market. This is due largely to the fact that, there is non-existence of laws regulating securitization[69]of such security. This thus hampers the value of debentures as tradable instruments. Debenture holders in Nigeria are yet unable to freely transfer their interest to third parties on the floor of the exchange. Though, Section 189 of the CAMA declares debentures to be freely transferrable[70] however, this has fallen short of establishing comprehensive legal framework for securitization of such security. Thus, Nigerian financial market is not yet sufficiently mature to rise to the trade platform of these securities.[71]Estate developers may prefer such mortgage backed securities (MBS) because they may have more funds made available outside the traditional channels such as the commercial banks; enjoy lower interest rate charges, long term finance and spread of housing development round the nation. Other benefits of MBS introduction are delivery of affordable housing, wealth creation for investors; expansion of the capital market with a

[67]Akporji, C., op. cit. p.2.
[68]CBN: Average Deposit and Lending Rates as at 30-09-2016, p.3.
[69]Securitization entails the conversion of assets (illiquid assets i.e. bank loans) into readily tradeable financial assets i.e. securities.
[70]Op.cit.
[71]Keke, O. V., and Emoh, F. I., op.cit.p.6.

multiplier effect of reinvigorating economic growth and stability; and will reduce employment problem by creating more jobs.[72]

1.5.4 Non Remittance of Contributions

The National Housing Fund Act stipulates that every Nigerian worker earning three thousand Naira and above should contribute 2.5 per cent of his monthly income to the Fund. Furthermore, the act also provided that the commercial and merchants banks shall invest 10 per cent of its loans and advances in the National Housing Fund. Not only commercial banks, but Insurance companies are also expected to contribute certain percentage of its life fund to the NHF. But, the main challenge faced by the National Housing Fund is the non-compliance with the law by both eligible Nigerians and the Financial Institutions.

According to Arch. Ahmed Musa Dangiwa, Managing Director/Chief Executive Officer, Federal Mortgage Bank of Nigeria, in an interview with Financial Nigeria Magazine[73], said the main challenge faced by the scheme is the willingness by those expected to contribute to the scheme to do so. Since there is no government worker that does not earn N3, 000 per annum, which means that, every Nigerian worker should be a contributor to the National Housing Fund but unfortunately, there are only 4.6 million out of working population of about 60 million workers that contribute.

The fault of non-compliance did not only reign on the part of the individual workers, but also the commercial banks and insurance companies. According to Executive Partner, Mod Consult, Mr. Mohammad Khalil, since the enactment of the Act, deposit banks and insurance companies had not invested in the National Housing Fund.[74] The Managing Director of the FBMN while speaking on the commercial banks and Insurance Companies contribution to the National Housing Fund says, “We are trying to actualize this”.

Section 11 of the NHF act entrust the Central Bank of Nigeria with the responsibility of collecting these contributions from commercial and Merchant Banks at the end of every year and not later than one month after. But they are accused of not compliance with the law.[75]

---

[72]Ibid.
[73]Akintunde, J. ‘All Workers Should Be Contributors to the NHF’ (2018). Available at https://www.financialnigeria.com/all-workers-should-be-contributors-to-the-nhf-interview-93.html accessed on 24th April, 2019.
[74] Dada, A. ‘Nigerian Govt urged to penalise National Housing Fund Act violators’ PM News (2017). Available https://www.pmnewsnigeria.com/2017/12/nigerian-govt-urged-penalise-national-housing-fund-act-violators/ Accessed 24th April, 2019.
[75] Ibid

Figures of loans and advances by Nigerian banks from 2011 to 2016 from the Central Bank of Nigeria amount to N67 trillion for the six years period. At 10 per cent investments of their loans and advances into the National Housing Fund, about 6.7 trillion should have been invested in the NHF by the banks over the period. While the analysis of total loans and advances by the commercial and merchant banks in 2016 was N15 Trillion and at the rate of 10 per cent, the CBN pursuant to Section 11 of the NHF Act is supposed to have credited the National Housing Fund with the sum of N1.5 trillion by the March, 2017 which they have not done.[76]

1.5.5 Refusal by Banks to Accept Communal Title to Property

Another major challenge in mortgage financing in Nigeria is the persistent refusal by banks to accept communal title to property, i.e., customary title or ownership, as security for loan. This is worrisome especially taken into account the fact that the percentage of lands held under customary law (communal title) vis-a-vis the percentage of land held under statutory law. Practically, it could be seen that almost all lands in Nigeria are held under statutory law. Practically, it could be seen that almost all lands in Nigeria are held under customary law as only a small percentage particularly in urban centers that are held under statutory title. Then if we see mortgage financing as a way of generating wealth for the improvement of the economic well being of the teeming populace of this country, the neglect or refusal by banks to accept customary title, is surely a clog in the wheel of economic development of the people who hold customary title in this country.

1.6 Conclusion and Recommendations

This paper has examined the legal Mechanism for financing of mortgages in Nigeria. It has shown that the Mortgage industry is a super structure of laws, institutions, relationship between institutions, and relationship between institutional and non institutional unit which is suppose to facilitate the process of financial intermediation and capital formation in the housing sector. The government has made commitment to enact laws, establish agencies to create Mechanisms for effective Mortgage financing. However, despite this legal Mechanisms the provision of adequate Housing still remain a problem due to challenges bedeviling the Mortgage industries in Nigeria. The paper makes the following findings:

Firstly, there is a long delay and difficulty in the process of obtaining, perfecting and registration of title to property. In Nigeria, cities like Lagos the registration process can last average of 105 days, taking an average of 12 procedure and costing about 11% of value of the property, this is cumbersome when compared to what is obtainable in other jurisdictions, e.g., it takes only 6 procedure, costing 6.1% of the property's value and average of 47 days to register property in Ghana. It is discovered that the factors

[76] Ibid,

responsible for the delay includes bottlenecks (arising from delay between the time of submission of application and when it is approved) and corruption evidenced in the form of private financial charges impose by staff of land registries on people trying to perfect their title documents when applying for governors consent. These bottlenecks limit the possibility of using the property as collateral for mortgage.

Secondly, it has also been observed that commercial banks charge high interest rate on mortgage loans. In fact, interest rate charges by banks in Nigeria range between 17 to 25 per cent. This reflects the cost of borrowing and also includes all charges and commissions levied by the bank. However, it also appears that, charging low interest rate would encourage hawks and other financial institutions to invest in the mortgage sector especially, considering that there are more and better profitable investment avenues.

Thirdly, despite the sanctions provided under s. 20 of the NHF Act for the institution that fails to comply with the provisions of the Act, it was discovered that there is noncompliance with Ss.4, 5 and 6of the National Housing Fund Act which provided for contribution to National Housing Fund by Nigerian workers, financial institutions and the Federal government. The capital base of the Federal Mortgage Bank which is 2.5 Billion is very low. So also, commercial banks and insurance companies commit relatively small part of their funds to property development. They are selective in their security and their lending terms are so prohibitive that only negligent percentage can benefit. This act of non compliance creates scarcity for development funds thereby defeating efforts to address the housing deficit in the country. In the same vein, the sanction provided under S.20 does not include the Bank, if it fails to refund to the NHF contributors their money after retirement.

Fourthly, The Nigerian Stock Exchange only supports the equities market. Despite the fact that, Section 189 of the CAMA provides that debenture are transferrable, debenture holders in Nigeria are yet to freely transfer their interest as security on the floor of the exchange due to non-existence of laws regulating securitization of this type of security. The market is not yet mature to rise to the trade platform of these securities despite their importance.

And finally, the work discovered despite the fact that section 21 of the Land Use Act makes the customary title legal, the banks persistently refuse to accept communal title to property, i.e., customary title or ownership, as security for loan. This is worrisome in view of the fact most land in Nigeria are held under customary title. This hinders the housing developments in the rural areas of the country.

Sequel to the findings above, the paper makes the underneath recommendations:
Firstly, the process of obtaining, perfecting and registration of title to property is rigorous. It is therefore recommended that the procedures and days for registration should be made less rigorous so that land transaction can be conducted without much delay. The cost

should also be reduced to 2 to 3% of the total value of the property. Moreso, strict enforcement of penalties for corrupt staff should be observed.

Secondly, the government should subsidized interest rates on Mortgage Loans to make them affordable in terms of guaranteeing Long Term Loans to be utilized for funding Mortgages, especially for the Private Sector. Furthermore, the Banks and Other Financial Institution Act (BOFIA) allowed the creation of the non-interest banks in Nigeria. Government through the CBN should encourage the participation of these non-interest banks in provision of housing finance. This would make mortgage more accessible to average Nigerians. The immense contribution of these banks to housing finance could be seen from other jurisdictions like Bangladesh and UK, which is considered to be the hub of non-interest banking (otherwise known as Islamic Banking).

Thirdly, the Government should create avenues for the enforcement of sanctions provided under s.20 of the National Housing Fund Act for Institutions that fail to comply with the provisions of the Act on deduction and remittance. The provision of s.20 should be altered to include sanction for banks that fail to make available funds to contributors that have met all the necessary conditions at retirement. All stakeholders should also be compelled to register their employees for the National Housing Fund. This can be achieved by liaison with all in house unions and the Nigerian Labour Congress. The Federal Government should also endeavour to recapitalize the FMBN to at least 500 Billion Naira to enable it overcome challenges of Mortgage Financing.

Fourthly, there is need to amend Section 189 of CAMA to provide detail framework for the regulation of mortgage backed-security in Nigeria. This framework can guide the Capital Market in mobilizing long-term funds for housing development through debenture stocks as well as purchase of shares in property companies. This would also enable investors to know their rights and obligation in the system.

Lastly, Banks should be encouraged to be accepting customary title to land to make the mortgage finance affordable to those reside in the rural area. Furthermore, financial institutions should be mandated to be providing percentage of their mortgage loans to rural settlers. This will enhance housing developments in the country.