

LAND PLEDGE FOR SECURED CREDIT FINANCING IN AFRICA: NIGERIA AND GHANA*

Introduction

The practice of securing credit by a pledge of land, or of land right, is common in all African countries¹ and forms an essential part of the customary laws of African communities. Compared to loans (and obligations) secured by common law mortgage, the loan sums secured by pledge are generally small and, due largely to the informality in its creation² and the fact that it is governed, generally, by customary law rather than by State law, it is mostly used by rural dwellers, small businessmen and petty traders to raise small credits for their businesses. The advantages of as well as the problems met with in the practice of land pledge are common to all the countries in Africa. However, the approaches of the different countries towards solving the problems inherent in the practice vary. While some of the countries adopt legislation that tend to prohibit the practice of land pledge, others are content with restricting its creation by, for instance, requiring the prior consent of a State agency. In this paper, it is proposed to use the practice in two countries - Nigeria and Ghana - as a microcosm.

Historically, thousands of businesses, especially small businesses, abound in Nigeria. By 1997, small businesses (both formal and informal) were believed to contribute about 20 per cent of the Gross Domestic Product and account for about 70 per cent of individual employment.³ The important role which financing the small businesses plays in Nigeria's economic development as a whole cannot therefore be overstated; and the pledge of land is the commonest means of securing the maximal repayment of such financing. In Ghana too, loans secured by land pledge have been used to make new farms, expand old ones and fund petty businesses. Indeed, the famous cocoa farmers in Ghana whose cocoa business is an admittedly meaningful private sector contribution to the country's economic development, have often raised loan by pledging their cocoa farms. This is why it has been feared that "a death knell of pledge in Ghana will have dire consequences for the national economy".⁴

This paper examines and compares certain aspects of the law governing the pledge of land in Africa, particularly in Nigeria and Ghana, and legislation which have been enacted in the two countries affecting land pledge. It shall be argued that the legislation in so far as they seek either to prohibit or constrain the creation of land pledges, do not offer any solution to the major problem attendant on pledges, namely, the inability of the pledgee to realize his security when the need arises. With this in mind, the paper recommends modifications to

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¹ Woodman, G. R.: "Fundamental Principles: Customary Law", particularly the sub-title, 'Secured Transactions: Customary Law', in a paper presented on the 28 February 1994 to the World Bank staff.

² The mode of creation of a pledge is discussed below.

³ Adegbite, O.: "SME development under the structural adjustment programme in Nigeria", *Small Enterprise Development (An International Journal)*, vol. 8 no. 4, Dec. 1997, pp. 4-17, at p. 5.

⁴ Dankwa, E.V.O.: "The End of Pledge in Ghana?" [1989] JAL 185 at 188.

the existing law in order to make land pledge a more effective method of securing credit and a more attractive real security to creditors.

The term 'land' as used here has the same meaning as under the English common law: it includes the fixtures on the land⁵, since the legal maxim that *quicquid plantator solo solo cedit*,⁶ is part of customary law.⁷ Thus, unless otherwise specifically stated or the context otherwise suggests, the term 'land' is used in this paper in the sense of 'landed property', so that it includes the house(s) or building(s) and other fixtures on the land.

The land-pledge idea

The idea of a pledge of land is an old one not only in Nigeria and Ghana, nor only in Africa as a whole, but all over the world.⁸ As practised in Nigeria, a pledge of land is a consensual customary law transaction by which possession of land is transferred and delivered by one party, called the pledgor, to the other party, called the pledgee, as security for the repayment of a debt or the performance of an obligation. It is most appropriate for small-scale security transactions.⁹ In Ghana, it was once described as "a kind of indigenous mortgage",¹⁰ though the propriety of the nomenclature - "indigenous mortgage" or the alternative, "African mortgage" - has been strongly and rightly questioned.¹¹

The pledge of land as security also existed in other countries outside Africa. In England, for instance, the pledge of land existed in the early days in the forms of *vadium vivum*, or live pledge, and *vadium mortuum*, or dead pledge.¹² Indeed, the word 'pledge' as

⁵ *Hulme v. Brigham* [1943] 1 K.B. 152 at 154; *Holland v. Hodgson* (1872) L.R. 7 C.P. 328.

⁶ Meaning, "whatever is planted in the land goes with it", or, "whatever is affixed to the soil belongs thereto": Theobald, H. S.: *The Law of Land*, 1929, at p. 215; Kersley, M. A.: *Broom's Legal Maxims*, 10th edn. at p. 262.

⁷ *Ezeani v. Ndjidike* (1965) NMLR 95 at 97, [1964] 1 All NLR 402 at 404. Cf.: Ezejiofor, G.: "Okonkwo v. Esadulue: Have the last word been said?" 9 NLJ 168 at 172-174.

⁸ Instances in other parts of the world are stated below.

⁹ See footnote no. 1 above.

¹⁰ *per* Michelin, J. in *Adjei v. Dabanka* (1930) 1 WACA 63 at 66-67.

¹¹ Ollennu, N. A. and Woodman, G. R.: *Ollennu's Principles of Customary Land Law in Ghana*, 2nd edn. Birmingham: CAL Press, 1985 at p. 103; Kludze, A. K. P.: *Modern Principles of Equity*. USA: Foris Publications, 1988, at pp. 449-450; Bentsi-Enchill, K.: "Do African Systems of Land Tenure Require a special Terminology?" (1965) JAL at pp.114-139.

¹² Vol. 21 ER 1067: "The *vadium vivum* is where a man borrows £100 of another, and makes an estate of lands to him, till he hath received the sum of the Issues and Profits of the lands; and it is called *vadium vivum*, because neither the land nor the debt dieth; for the lands are constantly paying off the money, and they are not left as a dead pledge, in case the money be not paid; and this seems to have been the most ancient way of pledging. The *vadium mortuum* is so called, because it is doubtful whether the feoffer [pledgor] will pay the money at the day limited, or not; and if he do not pay, the land which is but in pledge, upon condition for the payment of the money, is taken from him for ever, and so dead to him; and if he do pay it, then the pledge is dead to the tenant [pledgee] of the land..." The first use of the terms *vadium vivum* and *vadium mortuum* is credited to Littleton: Co. Lit. 205.

applied to land was not unknown to early common law in England.¹³ In England today only chattel can be pledged; pledge of land has been replaced by the mortgage, with the result that the pledge of land is now hardly ever met with in practice; it is now only ‘theoretically possible’¹⁴ and any attempt now to pledge land would possibly be treated as a mortgage.¹⁵ However, some jurisdictions, including Ireland, still recognise the possibility of creating what is known as a Welsh mortgage, which is in effect a form of pledge of land.¹⁶ With the Welsh mortgage, the borrower agrees that the lender may take possession of land belonging to the borrower until the loan is repaid. Instead of the borrower paying interest to the lender, the lender is entitled to retain the income or profits from the land. This is certainly a pledge of land but in another name.

In the United States of America, the pledge of land appears to be excluded by definition in most States. A pledge is defined as “a contract for delivery of *personalty* to be retained by the pledgee as security for the performance of some obligation due from the pledgor, legal title remaining in the pledgor and possession only passing to the pledgee, who has a special property in the thing pledged until the obligation secured is satisfied”.¹⁷ However, it appears that land pledge is recognised in certain States.¹⁸

In civil law countries too, the land-pledge idea is neither unknown nor new: “a multitude of ancient Acts indicate the form in which immovables were, for a long time, used as a means of credit: it was by the constitution of pledges”.¹⁹ The idea of land pledge is therefore a world-wide phenomenon though some countries no longer make use of it.

The essence of land pledge

Central to the idea of land pledge is the present transfer of possession of the pledged land to the pledgee and the prospective re-transfer of the same to the pledgor upon redemption. In Nigeria as well as in Ghana, the giving of possession of the land to the pledgee must take place at the time of the pledge transaction between the parties. Until possession is given, there is no pledge but only a contract to pledge - which passes merely

¹³ Wigmore, J. H.: “The Pledge-Idea: A Study in Comparative Legal Ideas” *Harvard Law Review*, vol. x (1896-1897) pp. 321-350; Hezeltine: “The Gage of Land”, vol. 3, *Essays in Anglo-American Legal History*, p. 636; Barton, J. L.: “The Common Law Mortgage” (1967) 83 LQR 229 at 229; Holdsworth, W. S.: *A History of English Law*, vols. 2 and 3. London: Methuen & Co. Ltd., 1923, at pp. 25 and 128 respectively.

¹⁴ Goode, R. M.: *The Legal Problems of Credit and Security*, 2nd edn. London: Sweet and Maxwell, 1988, at p. 11; Sheridan, L. A.: *Rights in Security*. London: Collins, 1974, at p. 145.

¹⁵ John Stevens and Robert Pearce: *Land Law*. London: Sweet and Maxwell, 1998 at p. 373.

¹⁶ Welsh mortgages are statutorily recognised in Ireland. See s. 34 of the Statute of Limitations Act 1957 (RI).

¹⁷ *US. - Nelson v. Commissioner of Internal Revenue*, C.C.A.8, 101 F.2d (emphasis mine); *Corpus Juris Secundum*, vol. 72. (Emphasis mine)

¹⁸ See, e.g., *Humble Oil & Refining Co. v. Atwood* 150 Tex 617 (1951).

¹⁹ Planiol, M. & Ripert, G.: *Treatise on The Civil Law (Security Interests in Land)*, vol.2, Part 2, 11th edn. 1939, para 2675.

contractual rights until possession is given.²⁰ This distinguishes a pledge of land under customary law from a pledge of chattel under common law or under Anglo-American law, where a symbolic, constructive or token delivery of possession would suffice.²¹

The pledgee's entry into possession of the pledged land is not without reasons. The first reason is so that the pledgee can put the land to his own use and enjoy the profits of the land. The second is that the pledgee's physical and factual possession of the land assures him that the security is not insecure as in the case where there is an adverse claim to possession. The third reason is to ensure that the pledgor does not subsequently re-pledge the land or otherwise alienate it to a third party without the pledgee's knowledge. These reasons are summarily captured by Ollennu and Woodman²² when they said:

Its purpose [i.e., pledge] essentially is not so much to hold the pledged property as security, as to have its use as interest on the amount borrowed ... Therefore, when land ... is pledged, the legal implication is that the pledgee may use it.

A fourth reason for the pledgee taking possession is so that by seeing the pledgee use and enjoy the profits of the land, the pledgor may be impelled to make effort to redeem it. This explains why it is that in practice, the pledgee normally takes an expanse of land, or a strategically located landed property, which is, by far, of a greater value than the money lent to the pledgor. Despite this practice, however, where the debtor/pledgor has no (immediate) need for the land, especially where the land is not developed, he would still not bother to redeem it, with the result that the pledgee holds unto the land virtually *ad infinitum*. This is particularly so in the case of perpetual pledge which is discussed below.

While still the law in Nigeria that possession of the land must be delivered to the pledgee before the pledge can be said to have been created, this no longer represents the law in Ghana with respect to farmlands. The Mortgages (Amendment) Decree 1979 in Ghana has now expressly denied the pledgee possession of the farmland except in the event of default by the pledgor. The Decree provides,²³ *inter alia*:

s.1 Every customary loan transaction in respect of which any *farmland* stands as security for a loan shall be made in accordance with the Mortgages Decree, 1972 (N.R.C.D. 96)

s.2 Where at the commencement of this Decree any *agricultural farmland* stands as security for a loan under any customary loan transaction whether or not recorded in writing, such transaction shall forthwith be and is converted into a mortgage under the Mortgages Decree, 1972 (N.R.C.D.

²⁰ *per* Michelin, J. in *Adjei v. Dabanka*, *op cit.*, at p. 66.

²¹ *Dublin City Distillery Ltd. v. Doherty* [1914] AC 823 at 843; *Ogunbona v. Sunmonu*, vol. xix NLR 25

²² Ollennu, N. A. and Woodman, G. R., *op. cit.*, at p. 103.

²³ All emphasis are mine.

96) and accordingly all the provisions of that Decree shall apply to that transaction as far as may be necessary

Though the statutory provisions concern only farmlands in express terms, it has nonetheless been argued that when read along with the original statute, the Mortgages Decree 1972, particularly section 1 thereof, the cumulative effect is that of converting all pledges to mortgages.²⁴ S.1 of the original statute defines a mortgage for the purposes of the statute as “*a contract charging immovable property as security for the due repayment of debt and any interest accruing thereon or for the performance of some other obligation for which it is given*”.²⁵ This section does not specifically mention a pledge, but it has been contended that the effect of the emphasised part of the section quoted is to include pledges, thus converting all pledges to mortgage.²⁶ This argument appears supportable on the reasoning that, by the fact of pledge, the land is no longer free; it is encumbered or charged as security for the repayment of the debt. Obviously, this conclusion can only be reached when the word “charge” is construed broadly to include, e.g., a mortgage, a charge and a pledge. By definitional construction therefore, a pledge is turned into a mortgage. In other words, there is no pledge any longer. So far, there is no judicial pronouncement on this point. However, the question which the proponents of this view have not bothered raise, let alone answer, is: If the original Decree of 1972 had included pledge in the definition of mortgage, why was it necessary to specifically stipulate in the amendment of 1979 that any *pledge* of farmland was thenceforth converted to mortgages? By this view, one may say that it is equally arguable that a pledge of land can still be made in Ghana in the customary way, except in the case of farmlands of which only a mortgage may be made.

Against the pledgee’s present right to take and retain possession of the pledged land is the pledgor’s prospective right to re-take that possession, i. e., his right to redeem the land. Under Nigerian law, the pledgor’s right to redeem the land is perpetual.²⁷

²⁴ Dankwa, E. V. O.: “The End of Pledge in Ghana?” [1989] JAL 185; Kludze, A. K. P.: “The Modern Ghanaian Law of Mortgages” (1974) 11 U.G.L.J. 1 at 5-7; Woodman, G. R.: *Customary Land Law in the Ghanaian Courts*. Legon: University of Ghana Press, 1994, at pp. 166-168.

²⁵ Emphasis mine.

²⁶ See footnote no. 24 above.

²⁷ Mention may be made here of a practice in some parts of Northern Nigeria in respect of ‘manured farms’: the creditor/pledgee is entitled to claim the farm failing repayment of the sum borrowed on the due date and there are no subsequent rights of redemption: Hill, P.: *Rural Hausa*. London: Cambridge University Press, 1972, at p. 273. This resembles closely the *mortuum vadum* in the early English law discussed above. Also, under Islamic law (which applies as ‘customary law’ in most of the States of Northern Nigeria), where a person has been in undisturbed possession of a landed property for a period of ten years or more and the true owner stands by and does nothing to claim his property, the person in possession acquires title by limitation of action. This is known as the principle of *Hauzi* in Islamic law: *Hada v. Malumfashi* (1993) 7 NWLR (Pt. 303) 1, held no. 10. However, even under Islamic law, it appears that a pledgee cannot claim title by lapse of time because his possession is regarded as a “permissive occupancy only”: *ibid*, held no. 11.

Thus, in analogy to the common law mortgage, the court said in *Olekanma v. Njoku*²⁸ that “once a mortgage or pledge, always a mortgage or pledge in native customary law”.²⁹ Until recently, the same rule applied in Ghana. Thus, in *Kofi v. Kofi*,³⁰ for instance, redemption was allowed after a period of about sixty years had elapsed. The main hurdle, however, is to prove that the transaction was a pledge,³¹ and once that is done the rule of perpetual redeemability follows naturally.

It appears that in Ghana the rule of perpetual redeemability is now affected by the Limitation Decree 1972³² which prescribes twelve years for claims by a mortgagor to redeem land.³³ This certainly covers the redemption of pledged farmlands since, as stated earlier, the Mortgages Decree in Ghana has transformed all such pledges to mortgages, and probably covers pledges of land generally. In any case, the Limitation Decree is expressly stated to be applicable even to “actions in respect of matters regulated by customary law”,³⁴ so that there is no doubt that it covers the redemption of all pledges whether of farmland or not.

Types of land pledge

There appear to be three distinguishable types of pledge of land today. There is the *traditional pledge* (‘traditional’ probably because it is the oldest type) which is perpetual in nature. It remains a pledge so long as it not redeemed and remains redeemable no matter how long it lasts. The pledgee keeps and enjoys the fruits of the land (i.e., the whole of the income and profits from the land) unconditionally until redemption, and this is so even if such income and profits exceed what would be a reasonable return on the capital invested.³⁵ It has been suggested that in this kind of

²⁸ (1975) 5 UILR (Pt.111) 332. Also: *Ikeanyi v. Adighogu* (1957) 2 ERNLR 38 at 39, where the court said: “once a pledge always a pledge”; *Leragun v. Funlayo* (1955-56) WRNLR 167.

²⁹ (1975) 5 UILR (Pt. 111) 332 at 337. However, the maxim appears to be given a meaning different from that in a common law mortgage: in a pledge, it is used to emphasise that a pledge is perpetually redeemable, whereas in a mortgage it means that there must be no clogs or fetters on redemption.

³⁰ (1933) 1 WACA 284.

³¹ Such proof may be difficult where the pledge has lasted for a long time and the original parties and witnesses may have died, especially as the pledge transaction is normally oral. In such cases the claimant may be ordered to swear to the truth of his statement (that the transaction was a pledge) on juju produced by the defendant and such juju are at times of renowned potency: Chubb, L. T.: *Ibo Land Tenure*. Ibadan: Ibadan University Press, 1966, para 65 at p. 33. However, it is now an offence to swear or cause somebody to swear to juju: ss. 207-208 of the Criminal Code Act, Cap. 77, vol. 5 Laws of the Federation of Nigeria 1990.

³² N.R.C.D. 54

³³ *Ibid.*, s. 12(3).

³⁴ S. 30(3) of the Decree.

³⁵ This is analogous to the Welsh mortgage discussed above, under which, in some cases, the mortgage will continue for as long as the loan remains outstanding: *Conway v. Shrimpton* (1710) 5 Bro. P.C. 187, vol. 2 ER 167; cf.: *Hartpole v. Walsh* (1740) 5 Bro. PC 267, vol. 2 ER 670.

pledge sometimes the pledgor/debtor has no intention of redeeming the land.³⁶ Even so, however, the pledgee may not waste the land.³⁷

The second type is the *term pledge*. Here, the pledge lasts for a fixed, agreed, defined period after which it effluxes, subject, of course, to the pledgor's right to redeem at any time even before the term effluxes, but with reasonable prior notice to the pledgee.³⁸ The term may be a number of calendar years, a number of farming seasons³⁹ or flood seasons⁴⁰ or some other mutually agreed period.

The third type of pledge is the *self-liquidating* or *self-redeeming pledge*. In this case, the pledgee is to recover his debt and the interest thereon by using the proceeds from the land and thereafter vacate the land for the owner. In other words, he retains the income from the land not only in lieu of interest but also to get a repayment of the loan sum: he utilizes the proceeds from the land to extinguish the pledge. This brings in the question of (un)accountability by the pledgee. It is not clear if there is any general duty on the pledgee to account for his use and enjoyment of the pledged land, although there is one case where it was held that a duty to account exists in "proper cases".⁴¹ The orthodox view is that the use of the pledged land is the interest on the money borrowed⁴² and so the pledgee is not to account for the interest which is his. It is our view, however, that where the pledge is self-redeeming so that the profits from the land is expected to repay the debt in dribbles, it may be reasonably expected that the pledgee has a duty to account for his use of the land since his profits from such use have to be balanced against the pledge price so as to know when the pledge money is liquidated and when the pledgor may resume possession. Self-redeeming pledge should therefore fall within the "proper cases" where account should be rendered by the pledgee. Indeed, apart from the fact that a term pledge has a defined period, it is this aspect of accountability which should distinguish a self-liquidating pledge from a term pledge.

Are all the types of pledge helpful in the growth of businesses and the national economy? Should all or any of them be abolished or modified? Before addressing these questions it is proposed to first examine the mode of creating a pledge because, as shall soon become clear, the mode of creation of a pledge has always been and still remains a main attraction not only to the borrowers - who are mostly rural and unschooled in and afraid of the legal niceties of the common law mortgage - but also to the highly literate

³⁶ Hill, P.: *The Migrant Cocoa Farmers in Southern Ghana*. London: Cambridge University Press, 1963, at p. 187.

³⁷ *Ashon v. Barn* (1981) Sar. F.C.L. 153.

³⁸ Ford, D.: *The Yoruba-Speaking Peoples of South-Western Nigeria*. London: International African Institute, 1950, at p. 69; Ford, D. and Jones, G. I.: *The Ibo and Ibibio-Speaking Peoples of South Eastern Nigeria*. London: International African Institute, 1950, at p. 22.

³⁹ Kludze, A.K.P., *op. cit.*, at p. 471.

⁴⁰ Ollenu, N. A. and Woodman, G.R., *op. cit.*, at p. 111.

⁴¹ *Okoiko v. Esedalue* (1974) NMLR 337.

⁴² See: Olawoye, C. O.: "The Question of Accountability in the Customary Law of Pledge" [1978] JAL pp. 125-132, at p. 128.

borrowers (and lenders) who intend to conclude a quick, short-term loan transaction which is devoid of undue forms and formalities.⁴³

Creation of pledge

The point has already been made above that land pledge is a customary law transaction. A pledge of land in Nigeria is therefore governed by customary law. Accordingly, a pledge of land does not require any particular form for its creation. However, it must take place in the presence of witnesses who share in the “thank offering” (e.g., sheep, goat, drinks, etc.) given by the pledgee during the pledge transaction. The requirement of witnesses derives from the fact that customary law, generally,⁴⁴ knows no writing and so since there is no written document to prove the pledge, witnesses are required⁴⁵ so that they can testify to the fact that the pledge did actually take place. The value of witnesses is therefore chiefly evidentiary. However, the presence of witnesses also ensures that the pledge transaction is not kept secret but rather, is given the widest publicity in case there is any person who would object to its creation. Witnesses may thus be regarded as playing the role which registration does in a registered charge or in a common law mortgage, viz, giving notice to all interested parties and determining the order of priority.

The witnesses to a pledge transaction are of two kinds: *impartial* and *partial*; and, interestingly - unlike in judicial proceedings - partial witnesses are more important here than the impartial ones. Impartial witnesses merely testify to the fact that the transaction did take place in fact. Partial witnesses are those who are themselves interested in the subject matter of the transaction (e.g., by being joint owners or successors in title) and are therefore subsidiary parties in the transaction; their interest is bound by their presence at and participation without protest in the transaction, and by their acceptance of part of the “thank offering”, which signify their consent to the transaction.⁴⁶ This is an important practical consideration in view of the frequent law suits by some members of the family, or some joint owners of landed property, to annul a pledge on the ground that their consent was not sought (or obtained) or that the pledge transaction was done behind their back.

⁴³ This was also one of the underlying considerations in the creation of equitable mortgage by mere deposit of title documents, a practice which is now abolished in England. See further: Enefiok Essien: “*Union Bank of Kuwait v. Sahib*: The rise and fall of mortgage by deposit of title documents” *Journal of International Banking Law*, vol. 13, Issue no. 2, 1998, at p. 80.

⁴⁴ Muslim law (regarded as part of customary law) which is applied in most States of northern Nigeria is written. For a discussion of whether Islamic (or Moslem) law which operates in most of the States of Northern Nigeria should be included in “customary law” or “native law and custom”, see: Anderson, J. N. D.: *Islamic Law in Africa*. London: H.M.S.O., 1954 at pp.171 *et seq.*

⁴⁵ The requirement for witnesses applies to both pledge and to customary sale of land: *Taiwo v. Ogunsanya* (1967) NMLR 375.

⁴⁶ See further: Allott, A.: *Essays in African Law*. London: Butterworths, 1960 at pp. 243-244.

There is no precise number of witnesses in the States of Southern Nigeria as well as in the non-moslem parts of Northern Nigeria, and the witnesses may be all males or all females, though at least one senior male witness is desirable since land transaction generally is traditionally seen as a male affair. In the moslem States of Northern Nigeria, the witnesses are as prescribed by the Koran: two male witnesses or one male and two females for, under moslem law, two women are equal to one man.⁴⁷

A further requirement for the creation of a pledge is that the pledgee should be conducted around the boundaries of the land in the presence of witnesses. This is normally followed by the possession of the land being handed over to him.⁴⁸ Apart from the presence of witnesses and the showing of the pledgee around the boundaries of the land (which takes the place of a survey plan), the necessary customary consents must be obtained where the land is family or communal land. A pledge of family land requires the consent of the head and all the principal members⁴⁹ of the family.⁵⁰ Where only the consent of the head of the family, or that of the head and some important members of the family is obtained without the consent of some principal members, the pledge is voidable at the instance of the members whose consents were not obtained.⁵¹ Where only a member, who is not the head of the family, consented to the pledge, the pledge is not only voidable but void *ab initio*.⁵² It is therefore advisable that when a pledge is to be created of a family or communal property it is ensured that the requisite consents are obtained from the proper persons.⁵³ It is also necessary to ensure that where the property is that of the family or community it is properly described as such, rather than as the sole and personal property of the person consenting. Where the property is described as that of the person consenting when in fact it is not, the transaction will be void even if the individual is the head of the family.⁵⁴ Even where family or communal

⁴⁷ See the Koran verse of the Almudayana, cited in Ohonbamu, O.: "Current Trends in the Nigerian Law of Mortgage" (1964) vol. 1 NLJ 1.

⁴⁸ *Ajadi v. Olarenwaju* [1960] 1 All NLR 382 at 387; *Ajikobi v. Akomolafe* (1995) 7 NWLR (Pt.405) 461. The surrender of possession may, on the other hand, be regarded as an incident of pledge rather than a requirement for its creation. It is on this view that it has been discussed under "the essence of pledge", above.

⁴⁹ "Principal members" includes the head of the family (or community) and other representatives of the constituent branches of the family or community. In *Esan v. Faro* (1947) 12 WACA 135, a member who had been the secretary of the family and had played an active part in the affairs of the family was held to be a principal member. Indeed, "principal members" may be broadly interpreted to include the "senior members of each branch of the family": Harvey, B. W.: "The conversion of land held under customary law to English tenure - with precedent" (1967) 2 Nig. L.J. 16 at 17.

⁵⁰ *Aganran v. Olushi* (1907) 1 NLR 66; *Mogaji v. Nuga* (1960) 5 FSC 107; *Ekpendu v. Erika* (1959) 4 FSC 79; *Soloman & Ors. v. Mogaji* (1982) 11 SC 1; *Archibong v. Archibong* (1947) 18 NLR 117.

⁵¹ *Adejumo & Ors. v. Ayantegbe* (1989) 3 NWLR (Pt. 110) 417, held nos. 1, 2.

⁵² *Ekpendu v. Erika*, *op. cit.*

⁵³ There is often the practical problem of identifying who are the proper persons whose consents are necessary. The problem calls for caution in dealing with those who claim to be the principal members.

⁵⁴ *Adejumo & Ors. v. Ayantegbe*, *op. cit.*, held no. 4.

land has been allotted to a member, it appears that family consent is still necessary before the member can pledge the allotted portion of land. This is because under customary law, an allotment of family property means no more than a mere permission from the family to make use of the family land and the title remains with the family.⁵⁵

Since the “transfer of possession” is pivotal to the validity of a pledge, it appears that the pledge is now caught by the statutory requirement for the approval of the Local Government or consent of the State Governor, as the case may be, under the Land use Act 1978.⁵⁶ There is as yet no judicial pronouncement in this regard. Sections 21 and 22 of the Act provide⁵⁷:

21. It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever -
- (a) without the consent of the Military Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable Sheriffs and Civil Process Law; or
- (b) in other cases without the approval of the appropriate Local Government.
22. It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor first had and obtained...

The point has been made earlier that, except in the moslem States of Northern Nigeria, a pledge in Nigeria does not require any writing for its creation. This appears to represent the law up to 1978, and the practice from 1978 to today. It is not very clear what the law is as from the inception of the Land Use Act 1978.⁵⁸ The Act does not mention the word “pledge”, but it certainly recognizes the pledge of land by its recognition of “any encumbrance or interest valid in law”⁵⁹ and by its references to “transfer of possession of land”⁶⁰ (as in the sections reproduced above) which, indeed, is characteristic of and peculiar to a pledge as against other secured credit transactions. It is arguable that the effect of the statutory requirement for Local Government approval or Governor’s consent to a pledge is that as from the inception of the Act in 1978, the pledge has to be in writing. This is because if the approval or consent is to be obtained,

⁵⁵ *Bamgbose (for himself and on behalf of Samuel Olaogun family of Adiyari) v. Oshoko & Anor.* (1988) 2 NWLR (Pt. 78) 509, held no. 1.

⁵⁶ Cap. 202, Laws of the Federal Republic of Nigeria 1990. As to the requirement for approval or consent in any case of “transfer of possession” after the coming into force of the Land Use Act, see sections 21, 22, 28(1)(a), 28(3)(d), 34(7) and 36(5) of the Act.

⁵⁷ All emphases are mine.

⁵⁸ The commencement date of the Act is 29 March 1978.

⁵⁹ S. 34(4). Also: *Kasali v. Lawal* (1986) NWLR 306, *per* Ogundare, JCA at p. 307.

⁶⁰ See foot note 48 above.

the pledge agreement has to be in writing so that the approving or consenting authority, as the case may be, may read and endorse the approval or consent thereon. This is without doubt a statutory constraint on the creation of pledges. In practice, however, pledges are still oral and the statutory approval or consent is neither sought nor obtained. This is obviously done in ignorance of the law - hardly an excuse, if the validity of the pledge is challenged in court.

In Ghana, unlike in Nigeria, pledge of farmland is no longer governed by customary law, but by statute⁶¹ which also stipulates the mode of creation. Under the Mortgages (Amendment) Decree 1979, the "customary loan transaction involving the giving of land as security,"⁶² i.e., the pledge, has to be in accordance with the provisions of the Mortgages Decree 1972. This requires writing and all the forms and formalities for the creation of a mortgage. In the case of pledge of land other than farmland, the position is not very clear. It turns on whether all pledges are converted to mortgages or whether it is only the pledge of farmland which has been so converted. If it is the latter, then pledges of non-farmland will be effected in the same way as under Nigeria law. However, this is an area which requires clarification.

In Nigeria, the informality and general simplicity in the creation of a land pledge is the main attraction for its use not only in the rural areas but also by city dwellers⁶³ and businessmen. It is recommended therefore that the informality that characterize the creation of a pledge should be maintained. To introduce mortgage-like formalities into it would be to wish away the pledge and a veritable source of small business financing. However, to enable the pledge play an even greater role in secured credit financing, some fine-tuning is required in certain areas. Two such areas are the types of pledge and the rights of the pledgor and pledgee *inter se*.

On the types of pledge, it may be said that the self-redeeming pledge and the term pledge are equitable to the pledgor (without being inequitable to the pledgee) and more likely to greatly enhance small business and, ultimately, national economic development: redemption is automatic in the case of self-redeeming pledge, and by the effluxion of the stipulated time in the case of the term pledge. The two types of pledge thus ensure that the land is used only as security rather than the pledgee using the pledge as a subterfuge for take-over and thus permanently depriving the pledgor of his land (right) while not having a sufficiently secure title to lead him to improve the land himself.⁶⁴ The same cannot be said of the perpetual pledge.

⁶¹ The statute, and the relevant provisions thereof, are discussed under "the essence of land pledge", above.

⁶² s. 2.

⁶³ There is, for instance, a recent case where rooms in a building in a city were pledged for credit. See the averment in paragraph 8 (and the Exhibit D thereto) of the Motion *ex parte* filed on 25/11/94 at the Uyo High Court (Akwa Ibom State, Nigeria), in suit no. HU/303/94: *Edet Effiong Udo-Odung v. Okon Effiong Udo & Allied Bank (Nigeria) plc*.

⁶⁴ The lack of sufficiently secure title is as a result of the pledgor's right of perpetual redeemability which makes the pledgee's possessory right terminable at any time.

Perpetual pledge is inextricably interlocked with the pledgor's perpetual right to redeem the pledged property. In this type of pledge, the pledgor has to repay the full loan sum to the pledgee in order to redeem the land. It is certainly not fair that the pledgor still has to repay the entire sum borrowed in order to redeem the property even when the pledgee may have recovered the money many times over by his long usage of the pledged property. Indeed, when closely examined, it turns out that the perpetual pledge is in the long run not beneficial to the pledgor, to the pledgee, nor to the country. The pledgee cannot maximally develop the pledged property because of fear that the pledgor may turn up at any time to redeem.⁶⁵ The pledgor himself runs the risk that when the land has remained too long in the hands of the pledgee, proof of the pledge becomes impossible as all the original parties and witnesses would have died and even when they are still alive, their memory of the pledge transaction may become faint and distorted after the passage of so many years, especially as the pledge is generally unwritten. Little wonder therefore that in most suits for redemption of long-standing pledges there have been adverse claims for title by the persons who are supposed to be the pledgees.⁶⁶ There is therefore a need for legislation abolishing perpetual pledge but not abolishing pledge entirely or unnecessarily constraining its creation.

Another area for legislative intervention, this time on behalf of the creditor/pledgee, is that of redeemability. It has been said that the perpetual redeemability of a pledge is now trite law.⁶⁷ This means that unlike the mortgagor who is barred after twelve years in possession by the mortgagee⁶⁸ so that the mortgagee acquires an absolute title to the property,⁶⁹ a pledgor is never so barred. Also, the perpetual redeemability of a pledge means that the pledgee cannot realize the security by sale, for to do so would put the land beyond redemption by the pledgor. This restriction deprives the (perpetual) pledge of much use as security, for the essence of security lies in the ability of the creditor to turn the security into money when he needs it and when the money for which the security was given has become due.

Indeed, it is difficult to say that the money ever becomes due since, in a perpetual pledge, the debtor simply tells the creditor to "hold" the land until he (the debtor) is able to repay; no time is fixed for the repayment. True has it been said that

⁶⁵ Occasionally, the pledgee may lend the pledgor an amount of money which, in comparison with the pledged land, is disproportionately high. This may be in order that the pledgor will be disinterested in or financially unable to refund the money and reclaim the land. Or, it may well be that the pledgor needed the huge amount of loan.

⁶⁶ See, e.g., *Orisharinu v. Mefun* (1937) 13 NLR 187, where such denial of pledge was made by the defendant but the court found a pledge in favour of the plaintiff and therefore held that he was entitled to redeem.

⁶⁷ In *Nwagwu v. Okonkwo* (1987) 3 NWLR (Pt. 60) 314 at 319, the Supreme Court stated that "It is trite law that if the transaction was a pledge of land *per se* in return for a loan of money, the land is redeemable however long it may be in the possession of the pledgee".

⁶⁸ S. 7 of the Real Property Limitation Act 1874, a statute of general application in Nigeria; *Federal Administrator-General & Ors. v. Cardoso & Ors.* [1973] 1 All NLR (Pt. 2) 169 at 171, 180.

⁶⁹ *Ibid.*

perpetual pledge is not “in keeping with the concepts of ‘reasonableness’ and for contract to be performed ‘within reasonable time’ when it [i.e., a particular time] is not stated, a pledge being essentially a contract”.⁷⁰ As aptly noted by the Court of Appeal,⁷¹ “a firm decision on this point by the highest tribunal of this country is overdue. Some legislative action or review [is] necessary”.

It has already been noted earlier that a limitation period of twelve years for the redemption of pledges has now been set in Ghana.⁷² It is submitted that a limitation period for the redemption of pledges, similar to that in Ghana, is necessary in Nigeria for two reasons. Firstly, it would give the pledgee certainty of tenure after the limitation period has elapsed. This would allow him to develop the land in a way that would better contribute to business and national development, rather than keep the land undeveloped and unutilized (or under-utilized) for fear of unexpected redemption by the pledgee. Secondly, it would prevent fraudulent claims whereby a piece or parcel of land which was sold outright is later claimed to have been pledged and therefore redeemable, and vice versa, after the original parties would have long died. In some cases, the witnesses may even be suborned to back such claims.

In both Nigeria and Ghana, the pledge of land has proved a useful tool for the growth of small businesses and a significant contribution by the private sector to national development. It should therefore not be wished away. What is needed is the blunting of the rough edges and trimming the sharp ends of this security device along the lines suggested in this paper. In Ghana, the full ambit of the Mortgages Decrees needs clarification, i.e., whether it extends beyond the pledge of farmlands. In Nigeria, there is need for a categorical statement whether the ubiquitous consent requirements for a mortgage under the Land Use Act also applies to pledges. A clarification is needed now that there is as yet no reported victim of lack of consent.⁷³

⁷⁰ *Iwuchukwu v. Anyanwu & Anor.* (1993) 8 NWLR (Pt.311) 397 at 319 (CA).

⁷¹ *Ibid.*

⁷² Under the Limitation Decree 1972, s. 12(3).

⁷³ The cases that abound so far are on the need for consent in the case of a mortgage. See, e.g., *Savannah Bank (Nig.) Ltd. v. Ajilo* (1989) 1 NWLR (Pt. 97) 305.