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NIGERIA CUSTOMARY LAND PLEDGE AND IT INHERENT CHALLENGES: ANYWAY FORWARD?

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Abstract

This article examined the doctrine of pledge under customary land law and the contemporary challenges facing the practice in Nigeria. This article was informed by the fact that despite the important role land pledges play in the Nigerian society, it seems to have lost it relevancy and unable to flourish well like its counterpart known as English mortgage. The objectives of the article, are to examine the nature and character of pledge under customary law in Nigeria, ascertain the implications of oral evidence and the principle of redeemability in pledged land. Also the article examines what happens to the pledge land where all witnesses to the parties are dead. And the article went further to state what modifications could be done to make the venture attractive to prospective investors. Consequently, some modifications suggested in this article are proper documentation of the pledged transaction, time-bound on the pledgor to redeem the pledge land and chargeable interest as the pledged years runs.

KEYWORD: *Pledge, Redeemability, Customary Land & Nigeria*

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1. Introduction

Customary land pledge in Nigeria is basically a transaction involving the transfer of possession of land by the pledgor to the person of the pledgee and it is regulated by the customary land laws applicable to the reference society/community as the case maybe. Customary pledge has been variously described by scholars among who are Olawoye[1] who asserted that pledge is created when an owner of land transfers possession of his land to his creditor as security until the debit is fully repaid and the land will be returned to the pledgor. Meanwhile, Onuoha[2] opines that customary pledge is better understood as a relatively simple security transaction which is devoid of all technicalities of legal and equitable estate of the received legal institution and to him, the justice of the institution of customary pledge lies in the fact that it is indigenous to the people and accommodating their way of life, giving them happiness and liberating them from the clog of documentary legal complexities. Still Umezulike[3] shared his thought on the concept of customary pledge and stated that, customary pledge is a peculiar indigenous credit transaction, exhibiting incidents known and unknown to English laws of property where a person wishing to borrow money goes to another and surrender his possessory rights over the property for the latter's economic or agricultural use.

For Fekumo[4], he linked customary pledge to an indigenous kind of mortgage by which the owner occupier of land in order to secure an advancement of money or money's worth gives possession and use of the land to the pledge creditor until the debt is fully discharged. Also, Nwabueze[5] describe customary pledge as a practice of exchange in substance among people with same customary belief system. He went on to say that dealings in land cannot all be described as pledge until the parties (pledgor and pledgee) manifest same in the conduct (orally agreeing to customary pledge in the presence of witnesses). The Nigerian courts is not left out in the description of the concept of customary pledge as per Edozie, JCA[6] stated in his ruling that, a pledge transaction only vest in the pledgee a right to possession of land and the enjoyment of profits therefore while title to the customary pledge remains in the pledgor. Macaulary JCA[7] stated per obiter that customary land pledge is classified as a possessory security because it is out of the possession granted under agreement that the pledgee's rights springs. Thus, computing from the foregoing, it is summed that actual possession of the property is the whole gist of the creditor's security. And before a transaction is qualify as a pledge, possession and use of the land in question must be given over to the pledgee. Hence, dealings in land which do not incorporate the basic element of transfer of possession amid regulated by customary laws can never be called a customary pledge. In totality therefore Customary land pledge is a "possessory security because the radical title is still in the pledgee while only possession is transfer. This is in sharp opposition to the English Mortgage wherein title is transfer and the Mortgagor retains only the title to the land therefore.

2. Conceptual Framework

From the subject matter under discuss, we shall highlight three (3) keywords or concepts as follows:

[1] C.O. Olawoye, *Title to land in Nigeria* (Evans brother Ltd 1974) 49
[2] R.A Onucha, *Basic principle of Nigeria land law* (Anon publisher, 2012) 12
[3] I. A Umezulike, *ABC of contemporary land law in Nigeria, Revised and Enlarged ed*. (snap press Nigeria ltd,2023)
[4] J.F.Fekumo, *Principles of Nigerian Customary land law* (F&F publishers (Nig Ltd, 2002)
[5] B.O Nwabueze, *Nigeria land law* (New life publishers limited, 1982) 273
[6] *Ogbonna v Onyenwe*-(unreported)-appeal No. CA/PH:/9/9/ od 16/3/195 court of appeal, Port Harcourt, esp.at pp.10-11
[7] *Diyelpwan v Golok* (1986)6 CA (PH.11) 267 at P.286

A. Concept of Customary Pledge: Customary pledge is a native kind of mortgage practice mostly in our rural communities hence it is a practice in antiquity as stated per Muntaka-Coomassie, JCA[8]. Basically, customary pledge is a transaction between two parties called the pledgor (borrower) and pledge (lender) and it is usually created when an owner of land transfers possession of his land to a creditor in return for money or money's worth[9]. It creation takes the form of trade-by-Barter wherein considerations are furnished by each party to the transaction while the pledgor furnishes his land as consideration, the pledgee furnishes his money as consideration but it is the duty of the pledgor to redeemed his land upon the repayment of the exact amount of money borrowed. However, in customary pledge, the pledge is let into immediate possession of the land and has the right to put the land into economic and social use until the pledgor paid off the money advance to him[10] Customary pledge is often resorted to where people have no other means of wealth save pledging their land or in community where the outright sale of land is forbidden by native custom.

B. The Concept of Customary Law: law from a general point of view can be seen as a set rules and regulations which governs interpersonal relationship. Obilade[11] sees law as that which constitutes a body of rules of human conduct which every member of the society will regard as the standard of behavior and as such, it is obligatory in ensuring clear rights cum duties and responsibilities of persons for peaceful and harmonious coexistence within a defined settings/society/community etc. custom has been defined by Black's law Dictionary[12] as "a practice that by its common adoptions and long unvarying habit has come to have the force of law". Kolajo[13] described customary law as a usage or practice of the people which by common adoption and acquiescence become compulsory and has acquired the force of law. Moreso, the Nigeria Evidence Act, did not define customary law but it did defined custom as a rule, which in a particular district, has from long usage obtained the force of law[14]. The Supreme Court[15] defined customary law to mean a set of rules of conduct applying to persons and things in a particular locality. Continuing, the court[16] sees customary law as a mirror of acceptable usage. Whereas, the above definition of customary law are acceptable, that offered by the supreme court in Okere[17] case is instructive and commands wider acceptance as it state that;

> *…Customary law generally relates to custom usage of a given people in a given community…*
>
> It emerges from the tradition usage and practice of a people in a given community which by common adoption and acquiescence has acquired the force of law…

Umoh[18] summarized this by stating that "any rule that resolves conflict and stabilizes society is law, however crude until when expunged by the people. Thus, drawing from the foregoing, the basic characteristics of customary law includes;

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[8] *Ahaneku v Iheaturu* (1995)2 NWLR (pt.380), 758 at p.770.
[9] C.O. Olawoye, *Title to land in Nigeria* (Evans Brother Ltd. 1974) 49.
[10] C.K.Meek, *Land law and custom in the colonies* (1949, 2nd Ed. Impression Frank class, London) P. 256.
[11] A.O. Obilade, *Nigeria legal system* (spectrum Book Ltd, 1996) 36.
[12] B.A. Garner, *black's law Dictionary* 10th Edn. (Thompson Reuters, 2014).
[13] A.A.Kolajo, *Customary law in Nigeria through the cases* (spectrum Books Ltd, 2001) 56 .
[14] Evidence Act 2011, *S.258(1)*; Okafor v Okafor (2005) 25 MC 416 ratio 5.
[15] Olubodun v Lawal (2009) 35 NSCQR 570.
[16] Owoniyin v Omotosho (1961) ALLNLR 304; Zaiden v Mohssen (1973) 11 SC.
[17] Nwaigwe v Okere (2008)13 NWLR (P7.1105)476 (SC).
[18] P.U Umoh, "Law in African context" cited in M.E. Nwocha, Human right and criminal justice in Nigeria (CE Darrols publishers, 2013).

i. It must be an existing law[19]
ii. it is largely unwritten
iii. it is flexible[20]
iv. it must be acceptable

Worthy of note is that customary law has no uniform body hence the above stated characteristics stands as a yardstick to assess any custom in Nigeria as identified by the Court[21] in a judicial decision. However, for any customary law to be valid, it must pass the validity test follows;

a. The customary law must not be repugnant to the principles of natural justice, equity and good conscience.
b. it must not be incompatible with the existing laws
c. it must not be contrary to public policy

All the above characteristics of customary law demonstrate that customary law in Nigeria have no uniform body occasioned by diversities of people/ethnic groups in Nigeria. They are only established lenses which the court uses to view issues that concerns customary.

C. The Concept Of Land Under Customary Law

Land is a fundamental necessity of life. It remains the foundation and framework within which the social, political and economic activities of a society must function effectively. However, what constitutes land under customary law differs from the nation of land under English law.

James[22] opined that "…land under customary law simply means the soil and soil only"….

The concept of customary land was also stated by the court[23] where it stated that "land in its ordinary meaning means any ground, soil or earth or the solid part of the earth surface as distinguished from the sea.

According to Fekumo[24] who stated that the natural view of land is of little assistance in legally elucidating the concept of land rather land should be conceived in terms of the English common law, status and the maxim *quic quid plantatur Solo Solo Cedit* which means what is affixed to the land forms part of the land and he concluded that the maxim applies to customary land.

Meanwhile, Onwuamegbu[25] argued that customary land is associated with spiritualism because land does not belong to anybody but owned by God and that what humans have is the used of the land. Thus he attributed land to the Sovereign God of the Universe.

2.1 Some Basic Elements in Customary Pledge Creation

Customary pledge has peculiar features as follows,

i. It is created orally

ii. It is created in the presence of human witnesses

[19] Eleko U. Government of Nigeria (1931) A.C.662673.
[20] Lewis U. Bankole (1999) NLR 100.
[21] Ajesua U. Aiyebelehen (2001) (60) 70.
[22] Cited in J.F.Fekumo, *Principles of Nigeria Customary land law* (F & F Publishers Port Harcourt, 2002) 2-3

[23] Salami v Gbodoolu (1997) 4 NWLR (Pt.499)277 P. 287.
[24] Fekumo (n 4).
[25] O.Onwuameagbu, "*Nigerian Indigenous land law*", in T.O Ellias,and others (Eds), African Indigenous laws (1975- Government printer, Enugu), 340.

iii. It is perpetually redeemable

iv. It is interest free

Oral creation is the foremost element of customary pledge which has been judicially acknowledge in the Court of Appeal[26]. It was adopted in dealing with land when documentation was not known to our native laws and customs and people relied heavily on what is agreed on verbally. However, the oral creation of customary pledge in done in the presence of witnesses[27] to further strengthen the transaction. And of course, the element of redeemability is a very strong factor which has been universally recognized throughout Nigeria and in indeed Africa as Mbanefo J.[28] observed in a judicial decision. It is this singular element of redeemability that inform the maximum, "*once a pledge always a pledge"* – meaning a pledge is redeemable no matter how long it takes the pledgor to redeem it. In fact in the case of Leragun,[29] it was held that the lapse of time, which was over thirty years (30 years) is not a bar to recover possession of land which has been pledged. Again, it is interest free in the sense that, the pledge is redeem at the erect amount it was pledge save that the pledgee is be to allow to exploit the land agriculturally or economically which may make for his interest.

2.2 Challenges with Customary Pledge

The very elements/features of customary pledge as discuss above, have turned out be the bane and difficulties associated with customary pledge that makes the contract not attractive in comparison to the English Mortgage. For instance, since it is orally created, it is usually denied by the pledge where they will unscrupulously convert it to an outright sale as some cases over the years have revealed. In fact, in the case of Onobruchere[30], the pledge denied that no customary pledge was entered into between him and the pledgor but that it was an outright sale to him. Also, in the case of Okpowagha[31] the real question for determination before the lower court was as to the nature of the transaction which took place between the plaintiff's father and the defendant's father. Further, situation could arise that witnesses to the pledge may die and then posing the problem as to who is to testify for and against the pledge transaction. Still the elements of perpetual redeemability and interest free mark customary pledge transaction as a no go area for modern day business people who venture into business for the sole aim of maximizing profits. As no business man will wants his capital to be locked up in perpetuity as God knows when. Hence these features stands as clog for people to go into pledge transactions this days. They rather prefer the English mortgage system where time limits and interest are it basic features.

3. The Way Forward to Modifying Pledge Transaction

It has been observed this article customary pledge has become unattractive and is losing it shinning shine to modern day business people. Thus, some modifications can be introduced to restore pledge transaction to an enviable enterprise. These suggested modifications are as follows;

- **Documentation:** Formally introducing written documentation in customary pledge transaction has the potential of promoting the trade as documentation could serve some useful purpose when witnesses to the transaction are all death. Scholars such as

[26] (n 7)
[27] Sule v Abdullahi (1979) 7 CA 1 at Pp. 2-3.
[28] Ikeanyi v Adighogu (1958) 2 ERNLR 38 at P. 39.
[29] Leragun v Funlayo (1955) WRNLR 167
[30]Onobruchere v Esegine (1986) 1 NWLR (Pt. 19) 799.
[31] Okpowagha v Ewhedoma (1971) 1 UILR (Pt.11) 226.

Omotola[32] has suggested that pledge should be documented. Infact, in the case of Ayishetu[33] the court upon verify the documents presented before it, establishes that the transaction was a pledge one and not an outright sale. This case have shown that documentation should be an integral part of customary pledge as relying on oral agreement and witnesses has created difficulties in pledge transaction.

- **Time Bound:** It is now imperative to place a time limit on the pledgor to redeem his pledge land or forfeit it after due considerations as it is in English Mortgage. This is because, no modern day business man would want to tied up his capital in the name of "perpetual redeemability".
- **Chargeable Interest:** Since it is typical that people loan out money in a bid to maximize profit, pledge transaction can be made attractive when interest rate are chargeable on the money advance other than returning the exact amount after many years.

4. Conclusion

Customary pledge transaction is an age-long practice where in land were pledge out for the advancement of money or money worth. The two main parties to customary pledge are the pledgor (the owner of land) and the pledgee (lender) who is let into immediate possession for the purpose of developing the land agriculturally or otherwise until the pledgor redeems the land upon repayment of the borrowed sum. It is created orally in the presence of witnesses and it is in the nature of been perpetually redeemable informing the maxim, once a pledge always a pledge. However, the above nature in its formation has become the bane in customary pledge as the pledgee later claimed it is an outright sale. Moreso, all the witnesses may even die before the pledgor redeem the land. Hence, this article have suggested the above modifications as a way of removing all difficulties usually encountered after the creation of customary pledge.

5. Recommendations

Following the discuss in this article, the study recommends following;

1. There is need to modify the nature and character of customary land pledge to accommodate contemporary challenges and suit the test of time. This becomes necessary as flexibility is one of the elements of customary law
2. The issue of perpetual redeemability should be made to be time-bound. This will address the problem of long-possession and equity.
3. There is need to address the issue of accountability with respect to land or property used for banking, industry, etc.
4. Since oath-taking is part of measures of fact-finding under customary law and the subsequent abrogation of same by the criminal Act, the need to amend the criminal Act to include customary arbitration in the form of oath taking.
5. There is need to formalize the use of written documents in customary land pledge as it would cure the gap usually created when all the witness to the pledge transaction are dead.
6. Pledgee overtime build permanent structures or even grow cash crops such as cocoa, rubbers, palm trees on the pledged, it is recommended that pledged should be created without necessarily transfer of possession like English Mortgage.
7. It is also recommended that equitable defence of long possession should be applicable to pledge transaction

[32] J. Omotola, *The law of secured credit* (Evans Brother Nigeria Publisher Ltd, 2006) 26
[33] Ayishetu v Abdullahi (1979) 7 CA 1