PROMOTING CHATTEL MORTGAGES IN NIGERIA THROUGH THE SECURED TRANSACTIONS IN MOVABLE ASSETS (STMA)ACT 2017

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ABSTRACT

Mortgages remain credible tools of economic growth for businesses and invariably for personal, group and national wealth. Various businesses especially the small, micro and medium scale enterprises face the challenge of insufficient credit for actualization of their set organisational goals hence the need to source credit facilities outside their enterprises not only to continue in business but to increase the viability of their businesses for effective competition in both local and global markets. This article considered the necessity of chattel mortgages in boosting the economy of Nigeria and ensuring greater financial inclusion. It particularly examined how the Secured Transactions in Movable Assets (STMA) Act 2017 through its provisions encourage micro, small and medium- scaled enterprises in Nigeria by promoting chattel mortgages. It went further to examine chattel mortgages in other jurisdictions and challenges facing the chattel mortgages in Nigeria. The article found that chattel mortgages make it easier for small indigenous businesses who may not have real property which is more acceptable to financial institutions as collateral because of its nature of durability, accessibility for enforcement and continuous increase in value, to depend on personal properties such as their goods, machines and inflow accounts to attract additional credit to grow their businesses. The article discovered some challenges to chattel mortgages in Nigeria which discourage lenders especially Banks and other financial institutions from advancing credit to business organisations on the reliance of their goods as collateral; preferring and insisting on landed property as security for loans advanced. The article also highlighted some provisions of the STMA Act 2017 that make enforcement of chattel mortgages difficult and cumbersome and therefore suggested areas of reform of the STMA Act, new executive policies and guidelines to guide the registration of collaterals in the collateral registry amongst others to encourage chattel mortgages in Nigeria.

Keywords: *Chattel, Mortgage, Chattel Mortgage, Secured Credit, Secured Credit* Transactions.

INTRODUCTION

Chattel mortgages in Nigeria are protected by legislation.[1] Micro, Small and Medium Scale Enterprises (MSMEs) remain important and crucial in the fight against poverty through the systematic development of Nigeria's economy. The relevance of this group of businesses has been attributed to the fact that MSMEs which need a lot of financial support to survive and sustain their businesses actually constitute about 80% of businesses in Nigeria.[2]This fact therefore means that discussions on how they can be made more viable and productive remain germane and apposite against the background of global economic challenges.

Global economic needs of nations depend majorly on the availability of credits either through loan facilities or by their internally generated cash.[3] It is important to note however that personal or organisational credit may not always be sufficient for the many operations of a company hence the need to borrow funds or seek assistance in form of loans on agreed conditions from available and credible lenders. The question of credibility cannot be downplayed in a credit security transaction as it determines the extent to which an investor of credit is willing to lend recoverable credit to a Company which may be ailing and in dire need of resuscitation through the injection of fresh funds. It is trite that credit investments into businesses made by individuals and financial organisations kickstart and improve existing economic ventures which ultimately bring about

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Secured Transactions in Moveable Assets Act 2017; ss 3-9; S.63 (1).

[2] LEDAP, 'Review of the Secured Transaction in Movable Assets Act 2017: Challenges and Recommendations' available at <http://ledapnigeria.org/review-of-the-secured-transaction-in-movable-asset-act-2017-challenges-and-recommendations/148./05.251.16> Accessed on 16/4/2022.

[3] Sybil Prowse, Ray Dalio, 'The Role of Credit and The Economic Machine' *Market Realist*, <https://marketlialist.com> accessed on 16/4/2022.

economic development for nations in addition to the creation of personal, family and group wealth.[4]

Therefore, the creditor would be particularly concerned with the genuineness and value of the borrower's security for the loan commonly called collateral which enhances the creditor's assurances that he would recover his investment at the agreed date of repayment. The fact that financial institutions are in the business of investing funds on interests to make profit and the justifiable fear that a borrower with the best of intentions of repayment of a loan facility may actually not pay back the credit advanced, necessitates the demand and insistence for further security usually immovable property in addition to other personal assurances of repayment by the borrower.

In Nigeria, financial institutions do not just insist on collaterals but on real estate as adequate collaterals.[5]It is trite therefore that financial institutions are generally unwilling to grant credit facilities to a borrower who has no collateral to secure the loan or whose collateral may be inadequate to serve as security for the loan in event of the borrower's inability to repay the loan with the agreed interests. It is also true that effective borrowing and lending of credits to grow the economy can only be achieved through the provision of adequate security/collateral which is affordable by the borrower to encourage and reassure the lender that it was safe to part with his credit on terms.

Many times, in credit financing, issues of reliability of security for credit arise as creditors as prudent men of business painstakingly choose who to grant credit or otherwise based on the assurance received of repayment or in the event of default, the assurance of access to a credible property of the borrower that can be impounded to make good the loan. This is especially so because no prudent business man or financial institution will lend money to a borrower without

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[4] F J Oniekoro, *Mortgages in Nigeria: Law and Practice* (Chenglo Limited, 2007)1.

[5] LEDAP, 'Review of the Secured Transaction in Movable Assets Act 2017: Challenges and Recommendations' available at <http://ledapnigeria.org/review-of-the-secured-transaction-in-movable-asset-act-2017-challenges-and-recommendations/148./05.251.16> Accessed on 16/4/2022.

adequate controls by insisting on security for repayment of the loans advanced.[6] This scenario of course leads to frequent rejection of loan applications by needy micro, small and medium scale enterprises who may not be able to proffer securities considered adequate and valuable for the risk of advancing credit. The situation described above negatively affects the operations of the micro, small and medium scale enterprises in Nigeria do not have immovable properties with certificate of occupancy titles readily accepted by banks as security for credit. It is against this background that the article which has an introduction, clarifies relevant concepts and discusses pertinent legal framework, examines chattel mortgages in Nigeria and analyses the specific role of the STMA Act, 2017 in promoting access to credits for micro, small and medium enterprises to do business in Nigeria. It exposed gaps in the law and some extant provisions that remain a challenge to chattel mortgages in Nigeria. The practice of chattel mortgages in other countries such as the Ghana and Kenya was also examined. This article made a conclusion of the various issues and suggestions for reform in this area of law.

CLARIFICATION OF RELEVANT CONCEPTS

A chattel is a thing. It is a tangible personal property that is movable. Chattel Mortgages concern the use of property other than land as security for loans advanced to a borrower such as mortgage of goods, farm products, machinery, roving assets such as ships and aircrafts etcetera. A chattel mortgage is described as 'a loan used to purchase an item of movable personal property such as a manufactured home or a piece of construction equipment… which is secured with the movable item or chattel that is used to purchase the loan. The lender holds an ownership interest on the chattel.'[7] To the writer, chattel loans and mortgages are usually low interest and government -

[6]R M Goode, *Legal Problems of Credit and Security* (2nd edition, Sweet & Maxwell, 1988) 14;

F J Oniekoro, *Mortgages in Nigeria: Law and Practice* (Chenglo Limited, Enugu, 2007) 1.

[7] Carol M. Kopp, 'What is Chattel Mortgage' available at https://www.investopedia.com>terms accessed 11/06/22

backed loans available to borrowers.[8] The Economic Times on the other hand defines a chattel mortgage as 'a loan extended to an individual or company on a movable …the chattel or the movable personal property which could be a car… can be used as security to extend the loan.'[9]

Secured credits concern the processes of assuring the creditor that his loan advances will be recovered. So, it addresses the safety of advanced loans in favour of the creditor. It refers to the property, or right to property used as collateral and given by a borrower to secure credit advanced to him by the creditor.[10] Akolokwu has explained secured credit transactions to concern borrowing and lending of credit backed by collateral owned by the borrower who without coercion grants proprietary interests in the property and on agreed terms to the creditor as a further assurance of the repayment of his advanced sum and interest beyond verbal guarantees.[11]To Pedrazzini and Simpson, credit security concerns transactions in which the creditor obtains security for any loan he gives to have a greater assurance of control over the debtor.[12] It is a transaction that concerns the transfer of property rights in a collateral by the agreement of parties which secures payment or the performance of other obligations.[13]

So, any credit advance transaction would be described as secured where a buyer or borrower guarantees payment of an obligation by giving an interest in his property as security to

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[8] Ibid.

[9] Economic Times, 'What is Chattel Mortgage? Definition of Chattel' available at https://economictimes.indiatimes.com>.

[10] G O Akolokwu, *Law of Mortgages and Charges: A Learning Guide* (Ledum Press, 2019)2.

[11] G O Akolokwu, 'Interrogating the Challenges of Real Estate Development and Secured Credit Financing in Nigeria' [2019] (6)(1) *NAU.JCPL*, 88;https://Journals.unizik.edu.ng/index.php/jcpL/article/view/365> accessed 16/5/2022.

[12] Pedrazzini and JL Simpson, 'The Legal Framework for Secured Credit: A Suitable Case for Treatment' (1999) in Smith I O, *Nigerian Law of Secured Credit* (Ecowatch Publications Limited, 2006)2.

[13] STMA Act, s.63(1).

the lender who becomes the secured party.[14] A secured transaction described above can be in form of mortgages, charges, and pledges which concern real or immovable property or bills of sales and other forms of mortgages of personal property. [15] The use of personal property as security for loans is considered not-viable by the credit and financial institutions in Nigeria.

Movable Assets are generally personal properties as opposed to real estate and can be moved from one place to another. They have the characteristic of being physically transferred from one location to the other. It is thus the entirety of non-real estate assets including inventory, machinery and accounts receivable.[16]

LEGAL FRAMEWORK FOR CHATTEL MORTGAGES IN NIGERIA

This article examines only the Secured Transactions in Movable Assets Act 2017(hereinafter called the STMA Act) which was enacted to encourage the Micro, Small and Medium - scale Enterprises (MSMEs) in Nigeria through the provision of better and easier access to loans facilities and credit using their registered personal or moveable assets as security rather than real estate although other legislation such as the Central Bank Act, the Merchant Shipping Act, the Bills of Sale of each State remain apposite. For instance, the Central Bank Act[17]creates the apex bank in Nigeria which in exercise of its functions led to the creation of the CBN Regulations of 2014 on Collateral Registry which sought to encourage potential borrowers to secure loans with movable property which owners could register at the registry and ensure better guarantees of repayment to the creditor. This regulation became a precursor to the National Collateral Registry under the

[14] Cornell Law School, 'Secured Transaction' available at < https://www.Law.cornell.edu/wax/secured-transaction > Accessed 16/4/2022.

[15] Ibid.

[16] C W Calomiris & Ors, 'How Collateral Laws Shape Lending and Sectoral Activity,' (2016) *Journal of Financial Economics* https://papers.ssrn.comso13>papers accessed 5/5/2022.

[17] Central Bank of Nigeria Act; No7, 2007.

STMA that is legally empowered to receive, register and store information on the security interests of individuals in movable assets as well as provide credible information to would-be creditors on the status of any registered asset.

The Act[18] applies to all security interests in movable assets created by agreement of parties which secures payment or the performance of an obligation; it applies to a person who is a creditor, borrower and grantor under the Act and to every public registry established by any Act of the National Assembly to co-ordinate or warehouse or oversee transactions in movable assets in Nigeria. The Act which helps to stimulate responsible lending to micro, small and medium organisations to boost the nation's economy through its stated objectives,[19] sought to enhance financial inclusion of MSMEs in Nigeria, stimulate responsible lending to MSMEs, facilitate access to credit secured with movable assets, perfect security interest in movable assets, facilitate the realization of security interest in movable asset and finally to establish a collateral registry.[20]

The Act was the Nigerian legislature's response to the Central Bank of Nigeria's effort to strengthen and encourage MSMEs through the introduction of the Central Collateral Registry Regulations which permit flexible lending to business organisations by encouraging credit and financial institutions to accept moveable properties as securities for loans.[21]The Bills of Sale laws of States also concern chattel mortgages in Nigeria.

[18] STMA Act 2017; s.2(1).

[19] Ibid; s.1.

[20] Tejumade Adetona, 'Enabling Access to Credit in Nigeria: The Secured Transaction in Movable Asset Act 2017' Available at < www.aelex.com> accessed 16/9/2022.

[21] LEDAP, 'Review of the secured transaction in moveable assets Act 2017:challenges and recommendations' available at <http://LedapNigeria.org/review-of-the-secured-transaction-in-moveable-asset-act-2017-challenges-and-recommendation/148.105.251.16> accessed on 16/4/2022.

THE ROLE OF THE SECURED TRANSACTIONS IN MOVABLE ASSETS (STMA) ACT 2017 IN PROMOTING CHATTEL MORTGAGES

Different provisions of the Act promote chattel mortgages. For instance, the Act[22] provides for creation of a security interest through a security agreement between the grantor and the creditor. The security interest so created is the yielding of property rights in the property of the grantor used as collateral which secures payment or the performance of any other obligation.[23] It is important to note that this security interest created does not include any personal rights against a grantor or other person who may be liable for the performance of a secured obligation[24]but may be futuristic in its effects over any assets acquired by the grantor after the execution of the security agreement where the newly acquired interest falls within the collateral description in the security agreement.

This fact widens the scope of assets of the grantor that forms the security for the loan advanced so that the grantor cannot exclude such assets acquired after the agreement but conforming to his collateral description from being encumbered as security. This fact reduces conflicts and disputes over the status of grantor's future assets and the right of the creditor to attach to them in cases of default of payment. Also, the fact that a security interest created over a chattel, for instance funds and other receivables, which become commingled in a mass[25] continues in that mass removes the problem of ascertainment of interest which is the subject matter of the mortgage.

The security agreement[26]which results from a security interest under the STMA Act reflects the intention of the grantor and creditor to create a security interest; it must identify the grantor and creditor; describe the secured obligation including the maximum amount for which the security interest is enforceable; describe the collateral adequately and indicate the tenure of the

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[22] STMA Act 2017; ss 3-9; S.63 (1).

[23] Ibid s. 63.

[24] Ibid.

[25]Ibid, s.7(2).

[26] Ibid, S.5.

obligation secured while confirming the agreement by parties to submit to arbitration as a first option in cases of civil disputes.

Furthermore, the STMA Act 2017 promotes chattel mortgages in Nigeria through the establishment of the National Collateral Registry (NCR).[27] It is true that though this registry was created by CBN regulations in 2014 as part of its measures to stimulate responsible lending to the MSMEs by financial institutions on the security of their movable properties,[28] its inclusion under the STMA Act expanded its scope and functions to make access to finance easier for small businesses. Some of the expanded functions of the NCR[29]include, to receive, register and store information about security interest in moveable Assets; provide access to persons who may seek information on available security interests from the collateral Registry and to perform such other functions as may be prescribed by regulations made under this Act. So, the NCR is concerned with the registration of moveable assets[30]and is open to the public to conduct searches targeted at determining the status of any given Asset. The National Collateral registry therefore is a biometric identifier of the grantor of a collateral interest as well as serial number of the collateral.[31]

The Act furthermore made provisions for a financial statement[32] which is a form containing the particulars of the transaction between the creditor, the grantor as well as detailed descriptions of the assets to be used as security and to be registered with the NCR. The information to be provided in the Financial Statement[33] includes a description of the grantor, that is, whether it is an individual or an organisation whether micro, small or large business and the proceeds whether

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[27] STMA Act 2017*;* s.10(1).

[28]G O Akolokwu, *Law of Mortgages and Charges: A Learning Guide* (Ledum Publishers 2019) 7.

[29] STMA Act 2017; s.11

[30] Ibid; s.1(c)

[31] Ibid

[32] Ibid; S.63

[33]Ibid; S.14(1)

in form of money, bank accounts, receivables and others.[34] It should be noted the registration of the financial statement containing the stated proceeds with the collateral registry amounts to the perfection of the security interest although where the collateral proceeds are not within those contemplated in the STMA, such security interest may still be perfected where the grantor seeks an amendment of the register.

A financing statement can be amended upon registration,[35] to allow for additional collateral or a new grantor. The STMA Act requires that such an amendment becomes effective when the amended financial statement becomes registered. Where an additional collateral is so added as described above, and two different interests concerning a collateral are perfected; priority would be based on the order of registration[36]although a creditor who has priority may by agreement subordinate his priority to the interest of another party. Under the Act, such subordination of priority shall be effective whether or not the amended financing statement is registered with the registry.[37] Although the agreement to subordinate can only be binding on persons who are parties to it; such an agreement shall not adversely affect the right of a person who is not a party to it.[38]

The STMA Act provides rights of enforcement of the transaction in favour of the creditor in the event of the borrower's default but requires such a creditor to issue a notice of default and intention to repossess collateral to both the grantor and the borrower before exercising any of the rights. Where he chooses to take possession of the chattel upon the borrower's default; he can only validly do so upon the expiration of 10 days of notice[39]and by either taking possession through a judicial process or with the consent of the grantor through a clause expressly inserted in

[34] Ibid; S. 9(1)(a-b)

[35]n34; S.19(1)

[36] STMA Act 2017; S.23

[37] Note 34; S.26(1) & (2)

[38] Note 34; S.26(1) & (2); s. 26 (3) .

[39] Ibid; s.40.

the security agreement. A creditor upon the presentation of a copy of the security agreement and duly certified confirmation statement by the creditor[40]is also permitted by the Act to request police assistance from the jurisdiction where the collateral is located to forestall any breakdown of law and order in taking possession of the collateral.

The creditor who has possessed the collateral upon the borrower's default, can exercise the right of sale.[41] In exercising this power of sale, the creditor is required within 10 working days before the sale to give notice of sale to the borrower and those who may have registered the financial statement in respect of that collateral before such a creditor can validly re-possess the collateral,[42]although by the provisions of s.45(2) such a notice may be dispensed with in certain circumstances. The circumstances where the creditor can proceed with the sale without notice are where the collateral or security is perishable and may perish within 10 working days of the re-possession; or he has cause to believe on reasonable grounds that the collateral will decline substantially in value if it is not immediately disposed of; or the cost of care and storage of the collateral is disproportionality large in relation to its value or that the collateral consist of inventory or farm products. The existence of one of these conditions is sufficient to make a valid sale.

Furthermore, after the sale the creditor is required to give notice of such sales and statement of account to the persons entitled to such notice within 15 working days after such sale stating the amount realised from the sale; the cost or expenses incurred from the sale and the balance due to the grantor or the creditor. A creditor who has successfully sold the re-possessed collateral is obligated to settle all reasonable sale expenses, settle the borrower's indebtedness to him and to other creditors who have subordinate security interest perfected by registration in other of their priority; and payment of the balance to the grantor.[43]It is important to state that the

[40] Ibid; S.40(5) & (6).

[41] Ibid; S.44 .

[42] Ibid; S.45(1).

[43] Where there are disputes among other creditors as to who is entitled to receive payment, the creditor may pay any surplus into the court pending the settlement of the dispute emanating therefrom.

borrower, grantor or other creditors may however redeem the collateral before its sale by the creditor by fulfilling all obligations secured by the collateral and the payment of any other reasonable expenses incurred by the creditor.[44]

The Act supports the business growth of MSMEs in Nigeria by insulating them from the rigours of registration and stamping of mortgage instruments as required for other credit security transactions. The Act excludes the application of the provisions of the Stamp Duties Act thereby saving parties from the payment of additional costs of stamping before registration. This exclusion does not however preclude grantors that are companies who are still required to register such charges with the Corporate Affairs Commission as provided under the Companies and Allied Matters Act.

The STMA Act was a response to reform of the country's security laws on personal property following calls by the United Nations Commission on International Trade Law (UNCITRAL).[45] And from the above review of some provisions of the STMA Act, the legislative effort to guarantee financial inclusion for micro, small and medium-scale enterprises and the poor who lack immovable assets to secure credits from banks and whose credit demands may be considered negligible by financial institutions especially where they do not run into millions of naira would appear to be on course. The Act ensures that the small loans required by road side marketers as well as small organisations receive attention through the deposit of their chattels as security for loans. Particularly, the STMA Act provides framework for the Micro, Small and Medium Scale Enterprises to register their movable assets in the National Collateral Registry (NCR) which is open to the public and creditors to carryout search to help them determine loans and terms for such loan.[46] The Act helps creditors to confirm the status of a potential borrower and

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[44] STMA Act 2017; S.49(1).

[45] 'Receivership and Reform of Personal Property Security Law in Nigeria' [2019] (45)(1) *Commonwealth Law Bulletin*, Available at <Www.Tandfonline.com> accessed 16/9/2020.

[46] Folajimi Olamide Akinla, Nigeria Report on Ease of Doing Business, C f l.co, 13th sept. 2018 Available at <https://cfI.Co/africa/2018/09/Pwc-nigeria-report-on-ease-of-doind-business> Accessed on 16/5/2022.

his chattel security through the NCR to ascertain possible existing security interests in the collateral and their priorities.

CHALLENGES OF CHATTEL MORTGAGES IN NIGERIA

One of the major challenges of chattel mortgages in Nigeria and elsewhere is the continuous depreciating nature as well as the easy mobility of personal properties which makes it easier for debtors to secretly move the property/collateral out of the reach of the creditors among others. Creditors generally do not have as much confidence in chattels as security compared to immoveable property which rather than depreciate in value like some chattels actually increases in value and are readily accessible. Also, some chattel mortgages may involve farm products and other agricultural products which are perishable and so by their nature may not be durable assets to encourage a lender to grant the credit facility sought by the borrower.

Secondly, inspection and valuation of chattels for a mortgage transaction appear to be difficult as registration of a poultry farm in the national collateral registry in May 2022 for instance may not be an adequate guarantee that the farm would still be in existence in July 2022 when a loan given on the basis of the registered farm would have matured because the value of the poultry farm can in a matter of days become eroded by a bird flu leaving the creditor at a loss. The possibility of such a loss, of course makes insurance of the chattel collateral a necessary requirement under the Act. Despite this insurance cover however, most creditors remain discouraged by the rigorous processes to be satisfied by the insured in cases of loss before the insurer would pay any claim. The issues of establishing valid claims may take a very long time that would negatively affect the business of both the borrower and the creditor. Furthermore, it is true that although insuring the collateral protects the borrower’s interest in the property, it actually increases his overall cost thereby reducing the benefits he would have garnered from the lender’s advance of credit.

Another major challenge to the promotion of chattel mortgages in Nigeria through the STMA Act is the relative newness of the instrument which aims for financial inclusion of MSMEs. The practice of the Act remains largely obscure especially with the one national collateral registry far removed from small businesses in the rural areas where they are located. Monitoring the collateral which has become registered by a borrower may prove very difficult thus creating the vacuum needed by a fraudulent borrower to sell such a collateral to an unsuspecting third party without notice of the chattel mortgage. Although the STMA makes it an offence for a borrower/grantor to sell the secured collateral in his possession, an unconscionable grantor can make such a sale for gain making the security impotent and a disaster to the creditor.

Also, chattels depending on their nature may be open to multiple ownership at the same time. This multiplicity of ownership of a chattel does not preclude an owner from creating a mortgage over his interest[47] which may eventually make enforcement of the chattel mortgage difficult for the creditor where all the parties are not involved in the mortgage transaction and so did not sign the security agreement; except where the debtor exercises his right under the Act to assign his interest including receivables jointly owned with others to the creditor who receives the payment from the third party.

The enforcement of chattel mortgages under the STMA Act which permits the deployment of the police to assist the creditor in the recovery of the collateral security has its own challenges. This provision has made the possibilities of committing other offences assault, grievous harm, extortion and others in the bid of recovering the said asset very real. In fact this role of the Nigerian Police in debt recovery has been condemned by the courts. In *Theophilus Kure* v. *Commissioner of Police*[48]the Supreme Court roundly condemned the practice of using the Police as debt recovery agents.

[47] STMA Act 2017, s.4(1).

[48] (2020) LPLER – 49378.

HIGHLIGHTS OF CHATTEL MORTGAGES IN KENYA AND GHANA

This article examined chattel mortgages in two other African countries namely Ghana and Kenya. According to Cohen, the legal regimes governing chattel mortgages in these countries show that whilst some laws provide unified treatment for security interests in a country, other laws present provisions for particular types of collateral and security transactions.[49] The principal legislation for the protection and enforcement of chattel security in Nigeria, Ghana and Kenya are the Secured Transactions in Moveable Assets Act;[50]The Borrowers & Lenders Act[51] and The Moveable Property Security Rights[52]respectively.

In the Moveable Property Security Rights Act of Kenya[53] a moveable asset can be used as security collateral for a loan which becomes enforceable upon the default of repayment by the debtor.[54]Upon the default of a borrower, the creditor who chooses to exercise his enforcement rights has two options; namely to apply to the court to recover his interests or recover same in accordance with the law but without an application to the court.[55] Where there is a payment default, the secured creditor shall serve on the borrower a notification in writing or in any other

[49] Neil B. Cohen, 'Harmonizing the Law Governing Secured Credit: The Next Frontier' (1998) 33 Tex. 173 *International Law Journal* 176.

[50]STMA Act, 2017 No.3 A53.

[51] BLA Act 1052.

[52] MPSRA Act No.13, 2017.

[53] Note 53, s. 2(a).

[54] Ibid; Part VII.

[55] Ibid; s. 66.

form agreed between the parties to pay the money owed or to carry out his obligations under the agreement[56]before exercising the right to sue.

This right to sue under the Movable Property Security Rights Act of Kenya[57]becomes exercisable where the borrower/ grantor does not comply within the time period indicated in the notification for payment of the loan after the date of service of the notification. It is further required that to validly exercise this right to sue, three conditions must be present namely; where the grantor is personally bound to satisfy the secured obligation;[58] where the collateral is insufficient to fully satisfy the secured obligation and the secured creditor has given the grantor a reasonable opportunity to provide additional sufficient security but the grantor has failed to do so[59] and where the secured creditor is deprived of the whole or part of the security right through or in consequence of, or a wrongful act or default of the grantor or the debtor.[60] The law also empowers the court in enforcing the chattel mortgage to order parties to resort to alternative forms of dispute resolution including reconciliation, mediation, and arbitration, among others.[61]

In exploring the option of enforcement of post default rights through non application to the court, the creditor is empowered by the Act to obtain possession of the collateral under two conditions namely; that the grantor has consented to the secured creditor obtaining possession in the security agreement which renders resort to court application unnecessary; or that although the grantor had not consented to the secured creditor obtaining possession in the security agreement,

[56] Ibid; s. 67(1).

[57] Ibid; s. 67(3).

[58] Ibid, s. 68(1)(a).

[59] Ibid; s. 68(1)(b).

[60] Ibid, s. 68(1)(c).

[61] Ibid, s. 68(3).

he or any other person in possession of the collateral did not raise objections when the secured creditor attempts to obtain possession of the collateral.[62]

The Kenyan law recognises the borrower's right of redemption of his chattel upon the repayment of the loan and this right remains exercisable until the asset is sold or otherwise disposed of, acquired or collected by the secured creditor.[63] And any person whose rights are affected by the enforcement process is entitled to redeem the collateral by paying or otherwise performing the secured obligation in full, including the reasonable cost of enforcement.[64] Also, the Kenyan Act,[65] provides that despite the fact that another secured creditor or non-consensual creditor has commenced enforcement, a secured creditor whose security right has priority over that of the enforcing secured creditor or non-consensual creditor is entitled to take over the enforcement process and this right may be invoked at any time before the asset is sold or otherwise disposed of, or acquired by a secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.[66]

The Ghanaian Borrowers & Lenders Act[67]on the other hand provides that the lender may enforce the right to possession without initiating a proceeding in court for that purpose and does not need to give notice to the borrower before repossessing or rendering the collateral unusable under this section.[68]It also provides the exclusive right of a creditor to appoint an independent valuer in the exercise of his post default remedies of sale of mortgaged assets although this may

[62]MPSRA Act No.13, 2017; s. 71(1).

[63] Note 65, s. 69(2).

[64] Ibid, s.69(1).

[65] Ibid, s. 70(1).

[66] Ibid, s. 70(2).

[67] Ibid, s. 61.

[68] Ibid;s. 63(1).

encourage collusion on the part of the creditor and his appointed independent valuer who may undervalue the property.[69]

Under the Ghanaian Act, the secured creditor is expected to send notification of his intention to dispose of the collateral to the grantor or any other secured creditor that registered a notice with respect to the collateral,[70] although there was no condition precedent the creditor must satisfy before exercising his right to sue. Also, in issuing the notice of sale of the mortgaged asset, the law provides that not less than 7 days' notice be given before the sale.[71]The provision of Section 64(1)[72] allows the creditor to deploy the use of the Ghanaian Police Force to assist in taking possession of the security so long as a warrant of the court to do this is obtained first.

CONCLUDING REMARKS AND RECOMMENDATIONS

Chattel mortgages remain very necessary for global economic growth; and especially important for a developing economy like the Nigerian economy. This need was apparent to the financial managers of the country's economy especially the Central Bank of Nigeria which developed policies and regulations to assist small businesses access needed additional funds to survive and increase their productivity and eventually culminated in the enactment of the Secured Transactions in Movable Assets Act 2017 to guarantee the financial inclusion of micro, small and medium enterprises. The STMA Act remains very relevant in the facilitation of easy access to credit facilities by MSMEs without immovable assets. It is true that before the STMA Act, small businesses encountered considerable difficulties in obtaining loans for their operations as most financial institutions were either not interested in granting what they considered small loans which

[69]*Intercity Bank Plc.* v. *Feed & Food Farms Nig. Ltd* [2002] FWLR (pt. 128) 1289.

[70] BALA, s.67(1) & 73; STMA, S. 40.

[71](n 70).

[72] Borrowers and Lenders Act of Ghana.

were not attractive to them or the creditors were reluctant to accept moveable assets as collateral. So, the promotion of chattel mortgages by this Act cannot be under estimated as it has created increased confidence in borrowing and lending of credits between potential lenders and borrowers as their loans given on movable assets are more secured and confidence of restored chattel upon repayment of loans better guaranteed. This increased access to funding according to Elliot and Mantey means healthier competition among companies which may lead to increased productivity[73] and economic development.

The provisions of the STMA Act, despite the positions stated above, have not made financial inclusion and access to needed credits for business seamless. As previously acknowledged in this article provisions such as the centralised collateral registry make attainment of purpose elusive since many micro, small and medium enterprises outside the nation's capital may lack the funds to travel to accomplish such registrations. Also, the necessary inspection of registered collaterals located in different places by a potential creditor to ascertain viability and condition especially for organic products may be too tedious and discouraging.

This article therefore recommends the following as panacea for identified challenges in the promotion of chattel mortgages in Nigeria through the STMA Act. It is recommended that the STMA Act should be amended to make the interest of a creditor in possession of movable assets used as collateral and registered with the Collateral Registry a perfect security interest.

There should be an aggressive sensitization of the public on the STMA Act and its requirements on transactions secured by movable assets. And a web-based platform should be made active for purposes of search and registration of transactions made under the Act with the Collateral Registry. The Act should also be amended to provide for time limit within which all suits instituted under the Act should be heard and determined including appeals.

[73] David Elliott and Adenike Mantey, 'The Enable (Nigeria) Programme-Learning Output' National Assembly Business Environment Roundtables (NASSBER) Case Study Value Chains, October, 2017. Available at <www.value-chains.org> .