



RESEARCH ARTICLE

Striking a Balance between Protecting the Matrimonial Home and the Mortgagee's Right of Sale in Nigeria: Lessons from England

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Abstract

This article evaluates statutory provisions and case law regarding a mortgagee's rights to exercise its statutory power of sale over the matrimonial home in Nigeria. It reveals that no statute protects the rights of family members, particularly wives and children, in the mortgaged home. The mortgagee must grapple with the reality of ownership, as wives often resort to litigation to set aside sales, on the ground that they are joint owners with their husbands. Ironically, some Supreme Court decisions, while protecting the interests of other family members (contrary to the established principles of property law), have tended to ignore the mortgagee's power of sale over the mortgaged matrimonial home, thus making it unattractive to lending institutions as collateral. This article recommends that all parties' interests should be set out in a legal framework, as in England, where a non-owning spouse's right of occupation must be registered with the land registry.

Keywords: property law; matrimonial home; mortgage; power of sale; Nigeria

Introduction

It is true that, to further trade and commerce, there is often the need to encourage people to embark on entrepreneurial activities. One incentive is to ensure that it is not too difficult for entrepreneurs to acquire capital through loans for the establishment or support of their businesses.¹ Through lending, banks and other lending institutions therefore provide the tonic for vigorous commercial activities. In practice, however, these institutions are only willing to offer loans to entrepreneurs where there is a degree of security. In Nigeria, the matrimonial home is the most valuable asset owned by some spouses. The matrimonial home has become an extremely important source of loan collateral for a spouse engaging in, or starting, a small or medium scale business. In advancing a loan, a mortgagee has two options to guarantee repayment: relying on the mortgagor's covenant to repay the loan;² or insisting that adequate security be made available before any funds are advanced.³ The former is not always a viable option, hence the latter.

A mortgage, whether legal or equitable, is a tentative transfer of an interest in specific movable or immovable property for the purpose of securing payment of money advanced or to be advanced by

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1 J Herring *Family Law* (2nd ed, 2004, Pearson Education) at 151.

2 IO Smith *Nigerian Law of Secured Credit* (2001, Ecovatch Publication) at 1.

3 Id at 2.

way of loan,⁴ with a proviso that the property will be re-transferred by the mortgagee to the mortgagor upon repayment of the sum of money, with interest, at a certain time. The legal consequence is that the owner of the mortgaged property becomes divested of the right to dispose of the property until he has secured its release from the mortgagee.⁵ The effect of using the matrimonial home as collateral or security for a loan is that, if the debtor fails to make the required payment, the bank or lending institution could sell the property to offset the loan. The consequences of this on mortgagors and their families could be severe. First, there is the likelihood that the mortgagor and his family members could be rendered homeless. Secondly, the sale of the matrimonial home may lead to a marital crisis between husband and wife, which could eventually lead to the breakdown of the marriage.

A major problem is that, if the law protects the interests of the mortgagor's family members too strongly, the matrimonial home will cease to be regarded as valuable security; this will discourage loans to entrepreneurs, which could have undesirable economic consequences. This difficulty was neatly summarized by Lord Browne-Wilkinson in *Barclays Bank v O'Brien*: "[i]t is essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions".⁶ On the other hand, is it fair that family members should lose their homes due to a spouse's business failure? This situation creates a conflict of interests, including the state's economic / commercial interests and concerns that could be described as a clash of two legal disciplines: property law and family law. The complexity in this area of the law is further compounded in Nigeria by cultural and religious beliefs that influence property acquisition behaviour by married persons. This is common in most parts of Africa, where the matrimonial home may be purchased by the joint contributions of both spouses, but the title documents are solely in the husband's name. This practice has grave consequences for the mortgagee, which may be surprised to know that its security is encumbered by the interests of another.

Nigeria does not appear to have any statutory provisions in place to protect family members, such as wives and children, when the matrimonial home is used by a spouse to create a mortgage. In the absence of a statutory provision, the Supreme Court of Nigeria has intervened in some cases, discussed below, to prevent the sale of the mortgaged home instead of protecting the mortgagee's interest. This, in fact, raises many challenges for mortgagees that seek to enforce their security upon default by the mortgagor.

Where the mortgagor fails to pay back his / her loan, the apparent trend for Nigerian courts to rule in favour of family members retaining a mortgaged matrimonial home, with the mortgagee's security or right undetermined or ignored, does not appear equitable. This is why a legal framework is necessary to aid judicial interpretation, which would cater for the interests of all parties in a mortgage transaction, including non-owning spouses and other family members. For instance, if legislation provided for the occupational right of a non-owning spouse to be registered in the land registry, as it is in England, that provision would help strike a balance between all likely contending interests in a mortgage transaction. With the requirement for registration, it would then become mandatory for the mortgagee or lending institution to investigate titles at the land registry and visit the properties for evidence of spousal occupation.

The failure by a lending institution or mortgagee to take the necessary precautionary steps as required by law would then be at its own risk, because its interest would be subject to the right of the non-owning spouse and other family members to continue to reside in the matrimonial

4 Mortgage and Property Law 2012 of Lagos State, sec 67. This law was amended in 2015.

5 *Atiba Iyalamu Savings and Loans Ltd v Suberu* [2018] 13 NWLR (pt 1637) 387 at 392; *Bank of the North Limited v Bello* [2000] 7 NWLR (pt 664) 244 at 257. These authorities (from the Supreme Court of Nigeria and Court of Appeal) explain clearly the nature and consequences of a legal mortgage. In Nigeria, this is also commonly the case with equitable mortgagees.

6 [1994] 1 AC 180 at 188. A Kehinde "Perfecting securities for loan in the banking industry: Realisation of such securities and limitations therefore" (1989) *The Nigerian Business Law and Practice Journal* 65.

home until the marriage is dissolved or the court orders otherwise. Again, where a spouse, whose name is not on the face of the title document, claims he / she is a joint owner of a matrimonial home, he / she will be expected to register a caveat at the land registry, indicating the nature of his / her interest in the property, which will serve as notice to prospective mortgagees. It would also be useful to accommodate another balancing provision in any legislation, requiring a mortgagee to obtain the written consent of both spouses when a matrimonial home is offered as security in a mortgage transaction. The law could require that both spouses affirm in the consent document or letter that a solicitor has fully explained to them the nature of a mortgage transaction and its implications before they append their signatures to the appropriate documents. If this were done, the mortgagor's spouse could not dispute or deny that he / she is legally bound by the mortgage once he / she has signed such documents. The mortgage could be declared void if the mortgagee failed to carry out this procedure as stipulated by law.

This article contends that there has to be a legal framework that can strike a balance between the mortgagee's rights and the need to protect the interests of family members, as is the case in England. In the next section, this article explains the concept of the matrimonial home and its relevance to family law and marital stability. The article then evaluates the mortgagee's power of sale according to property law and available statutory provisions and case law, before interrogating the qualifying spouses' proprietary interest in a matrimonial home in Nigeria. It looks further at the legal imperatives of mortgaging a matrimonial home in a foreign jurisdiction that has made progress in this area of the law, focusing on the example of England. This is premised on the need for Nigeria to acquire some lessons from a much more progressive jurisdiction such as England's. The article concludes by summarizing the need to have a legal framework that would balance protecting affected interests in the matrimonial home and the mortgagee's right of sale, as the English law provisions reveal below, and suggesting possible steps that Nigeria could adopt in that direction.

Concept of the matrimonial home

The matrimonial home is the dwelling home of a married couple acquired by either or both spouses. It has a significant symbolic role in family life and, for most spouses, is the most valuable capital asset they acquire during their lifetime and there is a strong desire to pass it on to their descendants.⁷ The precise definition of the matrimonial home differs from jurisdiction to jurisdiction. Although the matrimonial home is generally referred to as the dwelling home that a married couple acquires and in which the couple ordinarily reside, in Nigeria the concept of the matrimonial home is not defined by statute. There are therefore no statutory provisions restricting the transfer or mortgage of the matrimonial home in the real sense. Ordinarily, the mortgagee should not encounter difficulty in enforcing its security.

The matrimonial home is one of the components of matrimonial property in many jurisdictions. In Kenya, for instance, the matrimonial home is succinctly described as the property owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.⁸ Tanzania also has the matrimonial home embedded in her matrimonial property regimes, as discussed below. In Nova Scotia, Canada, the Matrimonial Property Act (Revised Statute) 1989 defines "matrimonial asset" in section 4(1) "as the matrimonial home or homes ...". In Nigeria, the matrimonial home is not defined in any available statute, probably because there is no clear concept of matrimonial property. What exist are pieces of legislation like the Married Women Property Act 1881 and Matrimonial Causes Act 1970, which do not

7 G Douglas *An Introduction to Family Law* (2nd ed, 2004, Oxford University Press) at 96; H Lesser "The acquisition of inter vivos matrimonial property rights in English law: A doctrinal melting pot" (1973) 23/2 *The University of Toronto Law Journal* 150.

8 Matrimonial Property Act 2013 (Kenya), sec 2.

address the inequality suffered by the less privileged spouse in terms of property sharing or occupational rights of the non-owning spouse. However, the concept of matrimonial property is loosely defined in case law to include property purchased in the course of marriage.⁹ It also extends to property acquired before marriage that has been improved in the course of the marriage.¹⁰ In the last four decades, judicial attitudes to matrimonial property claims in Nigeria have tilted towards favouring spouses who were able to show documentary evidence of making a substantial financial contribution to the acquisition or development of matrimonial property, which is a common law principle espoused in *Pettit v Pettit*.¹¹

Judging by decided cases, female spouses are often victims of injustice in the current system in Nigeria because they are unable to show evidence of contributing financially to matrimonial property. The earliest Supreme Court decision in this area of the law was the case of *Amadi v Nwosu*,¹² where, in dismissing the appeal, the Supreme Court held that there was no evidence of joint ownership of the property in dispute because the appellant (wife) failed to show proof of how she had contributed sand and labour to the development of the property and to whom such payments had been made. Although this decision was based on a marriage celebrated under customary law, for several decades it was often cited in matrimonial property disputes relating to statutory marriages, leading judges to ignore section 72 of the Matrimonial Causes Act, which gives them wide discretion to settle matrimonial property on the basis of what is just and equitable. For example, In *Akinboni v Akinboni*,¹³ *Esiem v Esiem*,¹⁴ *Onwuchekwu v Onwuchekwu*¹⁵ and several other cases, wives' claims to joint ownership of matrimonial property failed because they could not tender documentary evidence to support their claim.

The court's decision in *Mueller v Mueller*¹⁶ appears to be a step towards recognizing marriage as an equal partnership, but the extent to which it provides workable guidance for lower courts is questionable, as the judgment did not dig as deep as would have been expected of an appellate court. The appellant's wife succeeded partly because the property was purchased in her name and due to the magnanimity of her husband (a German citizen) who prayed for an equitable equal partitioning of the property jointly acquired. It is, however, important to state that the courts are slowly beginning to embrace the fact that section 72 of the Matrimonial Causes Act gives courts the discretion to settle matrimonial property on the basis of what is just and equitable; evidence of joint ownership or contribution to the acquisition of matrimonial property should not be the sole factor in considering the settlement of matrimonial property. Where there is evidence that the wife contributed to her husband's business, which yielded the money with which a property was acquired, the courts have held that such properties were jointly owned.¹⁷

In many jurisdictions, some of which are discussed below, the matrimonial home is protected by an act of Parliament and there are always provisions restricting the sale, lease or mortgage of such property. The need to protect the home becomes more significant when it is shared with children. However, the nature and degree of protection conferred on home occupiers against creditors or mortgagees varies significantly from jurisdiction to jurisdiction, although the desire to safeguard the home because it is not the same as other types of property is a common feature. For instance, in Ireland, section 3(1) of the Family Home Protection Act 1960 provides: "[w]here a spouse without the prior consent in writing of the other spouse, purports to convey any interest in the family

9 *Ibeabuchi v Ibeabuchi* [2016] LPELR 41268 (CA); *Sunmonu v Sunmonu* [2021] LPELR 5600 (CA).

10 *Ogunnubi v Ogunnubi* [2021] LPELR 53493 (CA).

11 [1970] AC 777.

12 [1992] 5 NWLR (pt 241) 273.

13 [2002] 5 NWLR (pt 761) 564.

14 [2009] 9 NWLR (pt 1146) 311.

15 [1991] 5 NWLR (pt 94) 739.

16 [2006] 6 NWLR (pt 977) 632 at 643.

17 *Iiyasu v Iiyasu* [2011] 13 NWLR (pt 1264) 236; *Anieto v Anieto* [2019] LPELR-47223 9 (CA).

home to any person except the other spouse ... the purported conveyance shall be void". Similarly, section 59(1) of the Law of Marriage Act 1971 of Tanzania provides: "[w]here any estate or interest in the matrimonial home is held by the husband or wife, he or she shall not while the marriage subsists and without the consent of the other spouse alienate by way of sale, gift, lease, mortgage or otherwise". This act also provides that a spouse who has no proprietary interest in a matrimonial home has an occupational right that should be protected and, where such property is sold or mortgaged without the consent of the non-owning spouse, the interest so transferred or created shall be subject to the right of the non-owning spouse until the dissolution of the marriage or until the court, on a decree of separation or an order for maintenance, declares otherwise.¹⁸ The need to protect the family home was emphasized by Lord Millet in *Harrow LBC v Qazi*, where he described a person's home as "the place where the head and his family are entitled to be left in peace free from interference by the state or agents of the state. It is an important aspect of his dignity as a human being and it is protected as such and not as an item of property".¹⁹

Mortgagee's power of sale: When does it arise and become exercisable?

The sale of a mortgaged property depends on the type of mortgage created, whether it is legal or equitable. A mortgage instrument may provide for the mortgagee's power of sale and stipulate conditions for the exercise of that power, so that, unless the mortgagee complies strictly, a sale will be ineffective. Smith posits that a legal mortgagee's power to sell the mortgaged property when the mortgagor defaults is statutory and need not be expressly stated in the mortgage deed.²⁰ The Conveyancing and Law of Property Act 1881 (CLPA),²¹ Property and Conveyancing Law 1959 (PCL)²² and Mortgage and Property Law 2010 (MPL) of Lagos State,²³ confer the power of sale on any person for the time being entitled to receive a discharge of the legal mortgage money.

The statutory power of sale is limited to legal mortgages. Where a mortgage is equitable, a court order is required before the mortgagee can sell. Thus in *Adjei v Dabank*, where the mortgage was by deposit of the title deed coupled with an informal document, Michelin J said that "it was essential ... for the mortgagee ... to have come to court to obtain an order of foreclosure before a sale of the mortgaged property could have been legally affected. Not having done so ... the sale ... was an invalid sale, and amounts in law to a nullity".²⁴ The reason for this, according to Chianu, is that an equitable mortgagee only has an equitable interest in the mortgaged property and that, where an equitable mortgage evidenced in writing confers power of sale on the mortgagee, a court order of sale will no longer be necessary.²⁵ When the matrimonial home is used to create a mortgage by lease and sub-lease in states using the PCL and MPL, the implication is that the matrimonial home operates by assignment. This is made possible by section 112(1)(a) of the PCL and section 20(1)(a) of the MPL. By these statutory provisions, where the mortgagor defaults in paying the mortgage sum and the mortgagee sells the mortgaged property under his statutory power of sale, he conveys to the purchaser not only the mortgage terms but also the mortgagor's reversionary interest.

Qualifying spouse's proprietary interest in a matrimonial home in Nigeria

The matrimonial home represents the most substantive tangible asset for most households. Nevertheless, it is surprisingly common for very little thought to be given to the arrangements

18 Law of Marriage Act 1971 (Tanzania), sec 59(2).

19 [2003] UKHL 43, para 89.

20 Smith *Nigerian Law of Secured Credit*, above at note 2 at 78.

21 CLPA, sec 19(1) (only applicable to eastern and northern states).

22 PCL, sec 123(1) (applicable to the western states).

23 MPL (amended in 2015), sec 40(1).

24 [1930] 1 WACA 63 at 67.

25 E Chianu *Law of Securities for Bank Advances* (2nd ed, 2004, Ambik Press) at 111–12.

for its ownership or for any arrangement to be informal and unrecorded.²⁶ This can give rise to a myriad of problems where a mortgagee seeks to exercise his power of sale over the matrimonial home upon the mortgagor's default to repay his loan.

Title to a matrimonial home may be held in different ways. Usually, it is solely owned by a spouse or jointly held by spouses as tenants in common or as joint tenants. These types of ownership have varying legal implications in respect of the mortgaged home because a spouse's ability to prevent or set aside a sale of the matrimonial home would depend on his / her ability to prove whether he / she has a proprietary interest in the mortgaged home that was not protected in the sale. These two types of ownership are discussed next.

Sole ownership

The best protection for a family member, particularly a wife, seeking to protect their interest in the matrimonial home is to ensure that their name is written on the legal title so that no disposition can be made without their consent. The contentious issue here is whether a spouse whose name is not on the title document has an interest in the mortgaged home where no express trust has been created to indicate a beneficiary's co-ownership in equity. The law in Nigeria has tilted towards the application of strict property law principles in assessing the legal ownership of a property. Thus, a non-owning spouse has no interest in a property that is purchased solely by one spouse and where there is no evidence of a substantial financial contribution by the other spouse to the property. For instance in *Essien v Essien*,²⁷ the appellant (wife) sought a declaration through a writ of summons that the building and premises situated at 12 MCC Road, Calabar, contained in a certificate of occupancy registered as no 35, volume 199 at page 35 at the Land Registry office in Calabar, was the joint property of the appellant and respondent, and that the property in dispute, which was their matrimonial home and bought in the name of the respondent, should not be sold or transferred without her consent. Owaode JCA held that direct monetary assistance from one spouse towards the acquisition of a matrimonial home or the defrayment of the mortgage sum in respect of the property is sacrosanct before joint ownership can be inferred. The Court of Appeal upheld the decision of the trial court and affirmed that it was right not to have inferred joint ownership of the property in issue in favour of the appellant.

In Nigeria, the inconsistency in this trend as revealed in *Essien v Essien* is that, during the dissolution of a marriage, the courts can conveniently declare sole ownership of a matrimonial home when one of the spouses produces proof of sole acquisition of the property and the other spouse cannot prove a substantial financial contribution to sustain their claim of joint ownership. Contrarily, in cases involving mortgaged transactions, the Nigerian courts tend to de-emphasize proof of substantial financial contribution and rule in favour of a spouse claiming joint ownership of a matrimonial home after the mortgagor has failed to defray his loan. This has made using a matrimonial home to secure a loan a potential problem for lending institutions in Nigeria.

Joint ownership

In Nigeria, there is no presumption of joint ownership of the matrimonial home as a result of marriage. Joint ownership arises where spouses jointly contribute to the purchase or development of the matrimonial home. Where spouses as joint owners seek to convey their interest in the matrimonial home, disputes rarely arise. For instance, if a husband seeks to mortgage his interest in a matrimonial home and the other spouse objects, the law allows him to execute a deed of severance whereby the joint owners consensually sever the joint tenancy and each person goes his or her separate ways. Section 63(2) of the PCL provides:

²⁶ R Pearce and W Barr *Pearce and Stevens' Trusts and Equitable Obligations* (6th ed, 2015, Oxford University Press) at 277.
²⁷ [2009] 9 NWLR (pt 1146) 311.

“[W]here a legal estate is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, as in the case of personal estate, have been effectual to sever the tenancy in equity.”

One of the most contentious issues in this area of the law, however, arises where a spouse conveys a matrimonial home titled solely in his name but there is evidence that the other spouse made substantial contributions towards its purchase and development. In this situation, there is ordinarily a presumption of joint ownership. The questions therefore are: how is the mortgagee supposed to know that the property is jointly owned when the document on the face of it is in one of the parties' names; and whose interest (between the spouse who is a beneficial owner and the mortgagee) takes priority? The answer to these two questions should reside in the doctrine of priority as it relates to a bona fide purchaser for value without notice, which explains that, when there is the intervention of an innocent, unsuspecting third party's interest such as the mortgagee (or the purchaser from him), the beneficial owner whose name is not on the title document would have his or her interest postponed to the third party's interest.²⁸ The mortgagee's "innocence" in this context means that the lending institution has convincingly inspected and investigated the property before the mortgage transaction, and found no notice of any prior interest. In *Animashaun v Olojo*, Obaseki JSC held that a purchaser of a legal interest in property will only take priority if he had no notice of the existence of any prior equitable interest in the property.²⁹ "Notice" is interpreted to mean "actual" (notice of prior knowledge of interest), "constructive" (notice of prior interest in any form written or oral) or "implied" (notice of prior interest acquired by any of the purchaser's agents such as the bank or solicitor).³⁰

This principle has been applied to cases involving mortgage transactions. For example, the Court of Appeal in *Yaro v Manu*³¹ dismissed the claim of a bona fide purchaser for value without notice, because both the mortgagee and purchaser (from the mortgagee) failed to carry out a physical inspection of the property. The Court of Appeal held that a purchaser would be able to plead absence of notice only if he had made all the usual and proper enquiries and found nothing to indicate the existence of an equitable interest and that, where the mortgagee had notice of a prior equitable interest, that interest is imputed to the purchaser.³² Another way around the problem, as Chianu has advised, is that, for a matrimonial home, a spouse who is unable to have his / her name included in the title document should endeavour to register a caveat in the land registry.³³ This would serve as actual notice to the world, including a prospective mortgagee.³⁴

An essential socio-cultural reality among most tribal cultures in Nigeria is that couples or spouses do not enter into agreements before acquiring matrimonial property. The common attitude of women in most marriages in the southern states of Nigeria is that they see themselves and their husbands as one. Real property including the matrimonial home is usually purchased in the husband's name. It is one of the ways a woman respects her husband as the patriarch of the home. This is a reality that even modernity has not changed. For instance, in *Ilyasu v Ahmadu*, the issue of joint ownership arose between divorced spouses; the Court of Appeal held that, although the property was in the husband's name, it is a common cultural practice for a joint property to be held solely in the name of the husband.³⁵

28 E Chianu *Law of Securities for Bank Advances* (3rd ed, 2017, Ambik Press) at 177–78.

29 [1990] 6 NWLR (pt 154) 111 at 121.

30 Ibid.

31 [2014] LPELR-2418 (CA).

32 Ibid.

33 Chianu *Law of Securities*, above at note 28 at 178.

34 Ibid.

35 [2011] 13 NWLR (pt 1264) 236 at 258.

Nigerian courts have often ignored the reality that matrimonial property is often in the name of the husband because of cultural and religious beliefs, even in situations where both parties contributed towards its purchase and development. Judicial attitudes always emphatically stress substantial financial contribution, which should be proved with the production of receipts or other physical evidence. In the case of *Iliyasu v Ahmadu* cited above, the trial court dismissed the wife's claim of joint ownership of the matrimonial home in dispute on the ground that the title document bore solely her husband's name. On appeal, the Court of Appeal took a different and uncommon direction to recognize a cultural and religious reality in marital relationships in Nigeria when it considered the convincing evidence adduced by the appellant (the wife) that proceeds from the couple's joint restaurant business during their marriage were used in developing the property in dispute. The appeal succeeded.

It is necessary that a prospective mortgagee exercises significant caution when creating a mortgage over a matrimonial home, especially when the title document is in the mortgagor's sole name. The practice of acquiring joint property solely in the husband's name poses grave consequences for lending institutions. One of the disadvantages with this practice is that a wife who may not have contributed to the purchase or development of the matrimonial home may connive with her husband to defeat the mortgagee's right of sale, under the guise that she is a joint owner. Again, will it be in the interest of justice and fairness for a wife, who has benefitted from a family business that thrived on a loan secured with the collateral of her matrimonial home, to set aside a sale of the mortgaged property on the ground that she is a joint owner?

The Supreme Court's decisions have not really helped in mitigating the seeming injustice arising from the conflict of interests between the sudden emergence of a beneficial owner of a mortgaged property and the mortgagee seeking to recover his loan. The apex court's decisions have tended to favour the interests of family members against their creditors. In *African Continental Bank Ltd v Awogboro*,³⁶ the borrower, a company in which husband and wife were shareholders and directors, was in default and the mortgagee attempted to exercise its power of sale under the mortgage. In her affidavit, the applicant deposed that the mortgaged property was jointly owned and a sale would cause her children hardship as they attended school in the neighbourhood where the house was situated. Her application found favour with all the judges in the High Court through to the Supreme Court because, it appeared, the courts were protecting the rights of family members, particularly the rights of the children, to reside in the home, not joint ownership per se. In the apex court's judgment, Ogwuegbu JSC stated:

"The subject matter of the suit is a family house which is said to be jointly owned by the plaintiffs. It is the intention of the defendants to sell the house. The courts below took into account the probability that the apprehended breach of the rights of the [wife] will take place. They also weighted the respective hardship and inconvenience to the parties which could be caused in granting or refusing the relief. I am therefore unable to see where the two courts went wrong to warrant the interference by this court. This is a proper case where the court will intervene and preserve the property in status quo during the pendency of the suit until the rights to it are decided."³⁷

Reviewing this judgment, the facts do not state the nature of the wife's interest that entitled her to an interlocutory injunction setting aside a sale of the mortgaged property. For instance, was there a

36 [1996] 3 NWLR (pt 437) 383. There is no evidence on record to show that the substantive case was continued. In many cases in Nigeria, the interlocutory action usually terminates the substantive suit, as the parties do not see the need to waste further time and resources pursuing the substantive case. This case was peculiar because the interlocutory action lasted for over ten years, until shortly after the mortgagee went into liquidation.

37 Id at 392.

supporting document to show that she was a joint owner with her husband? Or was her claim for joint ownership based on the fact that she contributed to the purchase of the matrimonial home, the title of which was solely in her husband name? The circumstances supporting her claim for joint ownership were not shown. The wife also contested the fact that her share of the joint property was not subject to the mortgage.³⁸ The wife's contention is obviously doubtful considering the fact that she was a director of the company that secured a loan from the bank, with the matrimonial home as collateral. Also, no case of fraud on the part of either the mortgagor (husband) or mortgagee in the mortgage transaction was canvassed. Assuming that the wife was correct to contend joint ownership, if both parties have their names on the title document and one spouse fooled a third party to grant a loan on the security of the document, the court in *Ipaye v Aribisala*³⁹ decided that the mortgagee would be a tenant in common with the innocent party. The innocent party then has to buy out the mortgagee's interest or either party could sell, with the proceeds shared between both owners.⁴⁰ In *African Continental Bank v Awogboro*⁴¹ cited earlier, another salient issue canvassed in the wife's affidavit was the fact that the mortgagee's power of sale had not become exercisable at the time the mortgaged property was sold, because the mortgagee failed and neglected to issue and serve on the mortgagor the requisite notice pointing out the latter's default. The law is that the purchaser of a mortgaged property is only obliged to verify if the power of sale of a mortgaged property has arisen. He does not need to bother himself with whether or not the power has become exercisable. The purchaser enjoys statutory protection by virtue of section 21(2) of the CLPA and section 126(2) of the PCL.

Similarly, in *Taiwo v Adegboro*⁴² a widow sued to set aside the sale of a house that her husband had mortgaged. A loan had been granted to a company in which her husband apparently held a controlling share. To secure the loan, the house in dispute was mortgaged to the lender. She resided in the house along with her husband and children. The property was sold after the mortgagor had died, whereupon his widow sued to set the sale aside. The purchaser from the mortgagee challenged her standing to sue, but all the courts ruled against him. The Supreme Court held in her favour, even though it was not evident from the judgment what the actual reason was. Reading the lead judgment, Rhodes-Vivour JSC said that it was because the widow was a member of the mortgagor's family and had a right to protect the family property. His lordship stated:

"In evidence, it was established that the [widow] ... was the only wife. She lived in the property with her children. My Lords, a member of a family can sue to protect the family property. The rights of the [widow] to her home was [sic] infringed by the sale of the home at an auction. She had every right to sue to rectify the action of the defendants. She, in the circumstances, had locus standi to institute the suit. She had sufficient interest in the subject matter of the dispute. By the sale of her home at an auction, her civil rights and obligations were infringed, and there would have been disastrous consequences if she was denied access to the court to seek redress."⁴³

Mukhtar JSC also relied on the widow's testimony that she built the house jointly with her husband and it was the only property the mortgagor left for her and her children.⁴⁴

In the declaration by Rhodes-Vivour JSC quoted above, it is obvious that, while protecting the rights of the widow and her children to reside in the mortgaged home, the Supreme Court did

38 Id at 390.

39 [1930] 10 NLR 10.

40 Chianu *Law of Securities*, above at note 28 at 180.

41 Above at note 36.

42 [2011] 11 NWLR (pt 1259) 562.

43 Id at 580.

44 Id at 587.

not draw a distinction between the matrimonial home and family property. The judgment appears contradictory, because it confuses the matrimonial home with family property. The matrimonial home is a property where a married couple resides and is acquired by both or either of them; a family property on the other hand is a property in which title is vested in the family as a unit. One of the basic characteristics of a family property is that no transaction affecting any interest in it is valid, unless done with the consent of the family itself. The widow could not have been claiming joint ownership of the matrimonial home, with the court at the same time deducing it to be family property. In the judgment, the court could not provide answers to the following questions. First, how did the woman become a joint owner? Secondly, was she an heiress to the mortgagor's will or through intestate succession by statutory marriage? The second question is also relevant because the widow claimed, *inter alia*, that the property was left to her by her deceased husband. Although some salient questions were left unanswered in the judgment, it is clear that the main concern of the court in this case was a compelling need to protect the rights of family members against the mortgagee under the guise of joint ownership. For justice and fairness, there is a need for legislation to guide the Nigerian courts properly on cases involving mortgage transactions, so that the mortgagee's rights to exercise its power of sale over the matrimonial home would not also be infringed by court decisions sympathetic towards the plight of the mortgagor's wife and children or other family members.

While the Supreme Court's decisions to provide protection for the vulnerable, particularly wives and children, are quite commendable, it has not been able to fill a vacuum in this area of the law, including by answering the following questions. Should justice be overlooked for the mortgagee each time he seeks to exercise his power of sale over a matrimonial home? What principles or procedure should guide mortgagees in accepting mortgages over a matrimonial home? How can the law guide against possible fraudulent practices of a spouse who has not contributed to the purchase of the matrimonial home but falsely claims joint ownership in order to defraud the mortgagee? The effect of the Supreme Court's decisions noted above altered the requirements of property law with which lawyers are familiar. This has created uncertainty in this area of the law.

The Supreme Court's overriding decisions in this area of the law make the matrimonial home unattractive as collateral to lending institutions. This can reduce investment opportunities and in turn impact negatively on the economy, because small and medium scale businesses depend for their survival on borrowing secured over the matrimonial home. Within a broader socio-economic context, the mortgagee's rights to enforce its security should not be kept in abeyance; rather, these respective interests should be evaluated within a legal framework that provides for procedures or measures for creating mortgages over the matrimonial home, as the example of England illustrates.

Mortgage of the matrimonial home: The example of England

The law relating to the matrimonial home in England developed in a haphazard and piecemeal fashion. While in some cases the special position of the home was recognized, in others the home was simply treated as any kind of property.⁴⁵ For instance, the couple in *Caunce v Caunce* agreed to purchase a matrimonial home in their joint names; in furtherance of this, the wife contributed a substantial sum.⁴⁶ However, when the home was purchased, the husband ensured that the conveyance was in his sole name. Without the wife's knowledge, he mortgaged the property to secure loans. When he defaulted, he left the matrimonial home. The wife who continued to live in the house commenced this action against her husband and the mortgagee claiming, *inter alia*, a declaration that her (the wife's) beneficial interest in the property had priority over the mortgagee's interest. Her action was dismissed as it was her duty to ensure that her husband vested the property in

45 DA Nevitt and J Levin "Social policy and the matrimonial home" (1973) 36/4 *The Modern Law Review* 345.

46 [1969] 1 WLR 286 at 293–94.

their joint names; her failure in this regard led the mortgagee to believe that her husband was the sole owner of the property.⁴⁷

With the rise in home ownership in the post-war era and the drive since the 1980s to set up small businesses and raise credit for spending, more people have taken the opportunity to raise loans on the security of their house.⁴⁸ The majority of matrimonial homes are co-owned and the agreement of both spouses is therefore required before the home can be used as collateral.⁴⁹ Where loans cannot be repaid and the creditors seek possession of the property, the question arises whether the wife (in most cases) consented to the mortgage agreement; if not, the transaction may be liable to be set aside. Within the past four decades, the English courts have played distinctive and remarkable roles developing legal principles that guide the creation of mortgages over the matrimonial home. In this regard, they have been ahead of Parliament and have treated the matrimonial home as distinct from other assets.⁵⁰

This article now examines both judicial and statutory interventions on the creation of mortgages over the matrimonial home in England.

Judicial interventions in England

The courts have developed the following principles in respect of mortgages over the matrimonial home.

Protection of the beneficial interest of a wife: In England, the courts have, over the years, imposed a duty on lending institutions to investigate title by visiting the property to check for traces of spousal occupation in order to protect the rights of third parties whose claim may not be apparent from the face of the title documents. In *Williams and Glyn's Bank Ltd v Boland*,⁵¹ two parties brought consolidated appeals to the Court of Appeal. They argued that they had both been living in their respective matrimonial homes when their husbands, each of whom was acting as a single statutory trustee for sale, had charged their matrimonial homes to the plaintiff bank to be able to raise loans for various businesses. The bank had made no enquiry as to the possibility that either wife may have a beneficial interest in the property so charged. The bank claimed possession of the charged properties when the husbands' respective businesses went into liquidation and each wife claimed an adverse interest in her respective matrimonial home.

At first instance, Templeman J held that a beneficiary, such as a wife, behind a trust for sale, having failed to protect her interest on the land register could not fall back on the protection afforded by the general category of overriding interests in the Land Registry Act 1925. Templeman J pointed out that, where the interest could be registered, it should be registered as either a beneficial interest or a statutory right of protection under the Matrimonial Act 1967. The Court of Appeal and the House of Lords set aside Templeman J's decision. The Court of Appeal, presided by Lord Denning, had no difficulty in concluding that the Matrimonial Homes Act 1967 had no relevance to the matter in question. In examining the question, the courts clearly had to mediate between the social interest of the family and the economic interest of the lending institution, particularly as the latter should have made enquiries of the former but was unable to discover the latent beneficial interest behind the statutory trust for sale. In the Court of Appeal, Lord Denning had little sympathy for the idea that judicial concern with social justice would imperil commercial life, as he opined that anyone who lends money on the security of a matrimonial home ought to make enquiries to ascertain the wife's interest and whether she occupies the property. The House of Lords agreed with the Court of Appeal and upheld its decision.

47 Ibid.

48 Douglas *An Introduction to Family Law*, above at note 7 at 99.

49 Ibid.

50 *McFarlane v McFarlane* [2006] UKHL 24.

51 [1981] AC 487.

However, in seeking to attain social justice, Juss observes that the House of Lords perhaps went too far.⁵² He contends that, in the quest to protect the vulnerable third party's interest in the matrimonial home, the court over-looked justice for the bank.⁵³ However, the commendable policy objectives that both Court of Appeal and the House of Lords diligently sought to attain cannot be forgotten. Indeed, the effect of the decision was primarily to alter conveyancing and lending practices, to ensure that potential beneficiaries consent to transactions affecting their interests and agree to postpone them to the third party.⁵⁴

Undue influence and misrepresentation in mortgage transactions: The English courts have set precise guidelines for handling transactions involving a wife offering security for her husband's debt. In *Barclays Bank Plc v O'Brien*,⁵⁵ Mr and Mrs O'Brien were joint owners of a matrimonial home. Mr O'Brien was a shareholder in a company that was experiencing financial difficulty. He sought a loan from the bank and decided to use the matrimonial home as collateral, after informing his wife that the property would only be subject of a charge of GBP 60,000 for a few weeks. Initially, the wife refused to sign as guarantor but was later persuaded to do so by her husband, who told her the company would go under without the loan. Before she signed the mortgage document as guarantor, a bank official was instructed to explain to her the consequence of the mortgage and the need for her to seek independent legal advice, but he failed to do so. Upon the company's failure to repay the loan, the bank sought to enforce the charge. The wife went to court to stop the bank. She raised as her defence her husband's undue influence and misrepresentation in order to have the charge set aside. The court held that the defence based on undue influence failed because the wife was known to exercise independent thought on financial matters and was used to dealing with family finances whenever her husband was away. However, the wife was successful with the defence of misrepresentation, because she later discovered that the amount of the actual charge exceeded GBP 60,000 and was not for the duration she had been told by her husband; the bank knew all this and chose to be silent. The charge was set aside, as the bank had constructive notice of the misrepresentations made by the husband to his wife and failed to take reasonable steps to ensure that Mrs O'Brien was aware of the full extent of liability.

The effect of *Barclays v O'Brien* is that a bank or lender is put on notice when a wife offers to stand as surety for her husband's debt in any financial transaction that is not beneficial to her. Where a creditor or lender is put on inquiry, it behoves him to ensure that the wife's consent to act as surety has been properly obtained; otherwise, he would be deemed to have constructive notice of the wife's right to have the surety agreement set aside on the basis of either undue influence or misrepresentation. The principle espoused in *Barclays v O'Brien* does not apply only to married couples, but also extends to cohabitees, as shown in *Massey v Midland Bank Plc*.⁵⁶ The decision in *Barclays v O'Brien* was further refined and expanded by the House of Lords in *Scotland v Etridge (No 2)*⁵⁷ to include the fact that banks will always be put on notice in all cases where there is a non-commercial relationship between the surety and debtor. Lord Nicholls laid down precise guidelines as to how any transaction involving a wife's offer of security should be handled. He stated that, as soon as the wife offers security, the bank is put on notice. He set out obligations that the bank and the wife's solicitor should fulfil. The bank's obligation is to see that the spouse, usually

52 SS Juss *Judicial Discretion and the Right to Property* (1998, Printer) at 25.

53 Ibid.

54 Douglas *An Introduction to Family Law*, above at note 7 at 210.

55 [1994] 1 AC 180. P Giliker "Barclays Bank v O'Brien revisited: What a difference five years can make" (1999) 62/4 *The Modern Law Review* 609; NP Gravells "Undue influence and substitute mortgages" (2005) 64/1 *The Cambridge Law Journal* 42.

56 [1994] 2 FLR 18.

57 [2001] 4 All ER 449. D Morris "Surety wives in the House of Lords: Time for solicitors to 'get real'?" (2003) 11 *Feminist Legal Studies* 57.

the wife, receives independent advice from a solicitor before offering security and does not proceed until she has done so. The solicitor's obligation is not restricted to explaining the content of the document, but extends to explaining the nature and seriousness of the transaction, and the possibility that the home may be lost should the debtor fail to repay the loan. The solicitor should further explain to the wife that the decision to proceed with the transaction lies with her and to confirm with her if the solicitor may write to the bank to inform them that the transaction has been explained to her.

The significance of the principle espoused in *Barclays v O'Brien* and further expanded in *Scotland v Etridge* is to ensure that spouses, particularly wives, who execute charges over their matrimonial home are allowed to make free and informed choices, devoid of undue influence or misrepresentation from their husbands. Where there is proof that a wife was induced into executing a charge by misrepresentation, the transaction will be set aside and the question of whether the wife would still have signed the charge in the absence of her husband's misrepresentations or undue influence will be irrelevant, as the Court of Appeal decided in *UCB Services Ltd v William*.⁵⁸

It is however pertinent to state that the interest of creditors or lending institutions over the matrimonial home may outweigh the interest of family members when a marriage is over and the spouses no longer live together in the matrimonial home, as shown in *First National Bank v Achampong*.⁵⁹ In this case, husband and wife agreed to stand as surety by mortgaging their joint matrimonial home for the benefit of a third party. The bank sought to sell the matrimonial home for non-payment of the mortgage loan. The wife resisted the sale on the ground that she was unduly influenced by her husband, a co-surety, to enter into the transaction. The court held that the wife was unduly influenced and that the bank failed to take appropriate steps to avoid being fixed with constructive notice of the wife's claim. The court declared the mortgage void against her share of the property. However, the court ordered that the property should be sold, on the ground that the marriage was effectively over despite the absence of divorce, as the couple had lived apart for many years and the possibility of them using the property as a matrimonial home was remote. The court affirmed that the mortgagee's interest should take priority over that of family members.

Statutory interventions in England

One of the statutory interventions in this area of the law in England is quite noticeable in the matrimonial home rights provided by section 30(1) of the Family Law Act 1996 (FLA). The matrimonial home rights are a bundle of rights that entitle the holder to some privileges in the matrimonial home. One of the advantages of these rights is that a spouse who has no proprietary interest in respect of the matrimonial home cannot be evicted without leave of the court.⁶⁰ In other words, a spouse who has no proprietary interest in the matrimonial home has a right of occupation.

However, there is no protection under the FLA unless the matrimonial home rights have been registered in the land registry.⁶¹ Once the rights have been registered, they act as a charge on the property and the property cannot be sold or mortgaged unless written consent has been received from the spouse in whose favour the rights are registered. In the event that the property is sold or mortgaged to a third party by the owning spouse, without the requisite consent of the holder of the matrimonial home rights, the third party must permit the holder of those rights to continue to occupy the property.⁶² Another significance of the matrimonial home rights is that payments made in settlement of the loan or debt by the spouse with the rights would be treated by the

58 [2002] EWCA Civ 55 CA.

59 [2003] EWCA Civ 487.

60 FLA, sec 33.

61 Herring *Family Law*, above at note 1 at 149.

62 *Ibid.*

recipient as if they had been made by the owner of the property.⁶³ The matrimonial home rights cease on divorce or the death of either spouse,⁶⁴ unless the court orders otherwise.⁶⁵

Summary of lessons from England

The English statutory and case law provisions are laudable for recognizing and protecting the sanctity of the matrimonial home as not just any kind of asset but a special class of asset. England has provisions for spousal consent before a mortgage can be created over the matrimonial home. English law imposes stringent conditions on mortgages in respect of the matrimonial home. This is premised on the fact that lending institutions cannot gloss over the social realities of life while carrying on business for profit. However, the legal provisions in England have introduced strict procedures and measures with which a mortgagee must comply at the onset of a loan transaction, in order to avoid the difficulties that a mortgagee could encounter while trying to enforce its mortgaged security, as the example of Nigeria has shown.

The Supreme Court of Nigeria's decisions to protect the interest of wives and children in the matrimonial home may be commendable from the standpoint of social justice, but the danger of solely adopting this perspective is that it could adversely affect the investment potential of small and medium businesses if banks or other lending institutions no longer consider matrimonial homes to be credible collateral. While both statutory and case law provisions in England have clearly articulated guiding principles to serve as a precedent in future mortgage transactions using the matrimonial home as collateral, the dominant decisions of Nigeria's Supreme Court in this area of the law have tended to make it unattractive to lending institutions.

Conclusion

Nigeria patently needs a law to provide for procedures for creating mortgages over the matrimonial home, as the provisions in England illustrate. One of the procedures described in the article is that, when a mortgagor applies to create a mortgage over a matrimonial home, the mortgagee should communicate directly with the mortgagor's spouse requesting written consent from the spouse and also requiring that a solicitor has fully explained to them the nature of the transaction and its practical implications before he / she appends his / her signature to the appropriate documents. The purpose of the requirement is that the spouse will not then be able to dispute or deny that he / she is not legally bound by the documents once he or she has signed them. Where the mortgagee fails to follow this procedure, the mortgage should be declared void. The matrimonial home is usually the main family asset and a vital source of working capital for small businesses, which depend for their existence on borrowing. This article has shown some of the challenges encountered by the mortgagee while enforcing its security over the matrimonial home. The Supreme Court of Nigeria, amid these challenges and contrary to the established principles of property law, often elects to protect the interests of family members against the rights of a mortgagee to enforce its security. This article has affirmed that, within a broader socio-economic context, the mortgagee's rights to enforce its security should not be kept in abeyance; rather, the respective interests in a mortgage transaction should be evaluated within a legal framework that provides for comprehensive procedures or measures catering for the competing interests of parties in the creation of mortgages over matrimonial homes, as is evident in England.

Competing interests. None

⁶³ FLA, sec 30(3).

⁶⁴ Id, sec 30(8).

⁶⁵ Id, sec 33(5).

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