COMPARATIVE ANALYSIS ON THE CONCEPT OF MORTGAGE UNDER ENGLISH AND ISLAMIC LAW

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1.0 INTRODUCTION

It is common practice that people resort to mortgage institutions for raising money to finance projects such as the purchase of house or improvement on existing ones, commercial transactions and development of agricultural sector by pledging their property as collateral (i.e. Security for the loan). This type of loan is usually referred to as mortgage.

Mortgage therefore can simply be described as an arrangement where by valuable asset are placed as collateral for loan. This form of transaction is widely practiced under Muslim and non-Muslim communities, since it serves as one of the financial instrument available to people, to obtain quick and have easy acces to cash[1].

The concept as pointed out above, is neither foreign to English law nor Islamic law. In Islam, this type of transaction dated back to time of the prophet Muhammad (PBUH) when the prophet on a journey pledged his sword in exchange for grains. The concept derives its authority from the Holy Quran and Sunnah of the prophet (Pbuh).

The Holy Quran in chapter[2] provides thus;

> "If ye are on a journey and cannot find a scribe, then a pledge with possessions may serve the purpose"

And in the saying of Prophet Muhammad (may the blessings and peace of Allah be upon him).

"The mortgage property is not closed from its owner, when he mortgaged, for his reward are on his credit"[3]

The cumulative effect of these provisions is that mortgage transaction is permitted under Islamic law.

The transaction can take place either on a journey or at home

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[1] Bambale Y.Y. –Islamic law of Commercial and Industrial Transaction 1st Edition, malthouse press Limited Zaria 2007 pg 105

[2] 2v 283

[3] Sahil A. Bukhari No. 680 Called from Bambale Y.Y. Supra.

The English law on mortgage on the other hand is contained in the conveyancing Act[4] and the property and conveyancing law[5]. This in effect means that under English law mortgage transaction dates back to the 17th century.

The importance of mortgage transaction is not far fetched. This is because the world has been reduced to a global village, this has enhanced commercial transactions and people want to participate in international trade, build modern mansions and finance Agricultural activities. Mortgage is one way to raise capital to furnish this stated project. However, uninformed Muslims are not conversant with the position of mortgage under Islamic law as they see Islamic law as only applicable to marriage and inheritance. It is against this background that this work attempts to make a comparative analysis on the concept of mortgage under Islamic law and English law, so as to highlight the rules governing the rights and obligations of the parties to a mortgage transaction.

This is with the sole intent that it will be beneficial to all Muslims and non Muslims, legal practitioners, academicians, law students and the society in general.

2.0 DEFINITION OF TERMS

The Word Mortgage, under English law is defined by Prof. Oluyele[6] as conveyance of land or assignment of chattels as security for the payment of debt or the discharge of some other obligations for which it is given. While Professor Y. Aboki[7] simply defined mortgage as a formal security for the repayment of money lent.

From the Islamic law perspective Dr. Y.Y. Bambale[8] advanced various definitions of mortgage. These include;

A. Mortgage technically means the detention of a thing on account of a claim which may be satisfied by means of that thing in case of default.

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[4] Conveyance Act 1881
[5] Property and Conveyance Law 1925
[6] Oluyele P.A.O. –Nigerian Conveyance Practice, Drafting -1 Edition, Oyeleke ed preceding Industrial Prints (Nig. Ltd. Ibadan 1994 Pg 141
[7] Aboki Y. –Lecture Notes on the land use Act. 1978, 2nd Edition, 2001 Pg. 52
[8] Bambale Y.Y. Supra at Pg 105

B. An agreement between two parties of sound mind on a particular security for a particular loan and for a particular period

C. The placing of a property under detention and supervision as a security in consideration of a right available against its owner and which may be satisfied out of this property etc.

Flowing from the foregoing definitions, it can rightly be said that mortgage under Islamic and English law amounts to the same thing. It simply means the giving of valuable property to serve as security upon which the mortgagee will fall back in case of failure by the mortgagor to honour the debt.

2.2 Mortgagor/Rahn – the person who takes the loan

2.3 Mortgagee Murtahin money lender

2.4 Mortgage debt/Marhum Bihi – money borrowed

3.0 CREATION OF MORTGAGE

To make it easy for the mortgagor, mortgage is generally created in two ways i.e. legal mortgage or equitable mortgage. A mortgagor creates a legal mortgage where he has estate in the land e.g. Fee simple and an equitable mortgage where he has only an equitable interest. Under Islamic law a legal mortgage is one that is created by law as provided in the Holy Quran while an equitable mortgage is commonly referred to as a pledge.

A person who wants to create a legal mortgage can do so by conveying his legal title to the mortgagee with provision for redemption. That is a right to reconveyance or the payment of the mortgage money. Aside from conveyance on the law also allow for a mortgage to be created out of leasehold or by way of charge[9].

In the case of an equitable mortgage, it is usually created where the mortgagor has an equitable interest. For example if he is a beneficiary of a trust property he can only get equitable mortgage with such property, but not a legal mortgage since he has no legal title to convey. An equitable mortgagor also carries some of the right of a legal mortgage. Specific performance of an agreement which is a right accorded legal mortgage could be granted also to an equitable mortgagee. However; certain right accrue only to legal mortgage for instance the right to appoint a receiver or

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[9] Oluyede P.A.O. – Supra at pg 141

Though the power to sell arises as soon as the redemption date is not exercisable until when the mortgagor has been put on notice and he fails to honour his duty of payment within the period of three months, or where any interest[17] in arrears within two months, or where the mortgagee has been in breach of some covenants to repay the loan plus interest.

In Nigeria, a legal mortgage must be duly registered before the power of sale become exercisable. In Onashile v Idowu[18] the plaintiff mortgage certain property to the defendant who later purported to sell the legal estate to purchasers under the power of sale conferred by the conveyance Act. The Supreme Court held that the mortgage was void for want of registration under the law, and therefore subsequent sale was void.

Furthermore, under English law, unlike Islamic law, where the mortgagee sells the mortgaged property for less than the mortgage money, he is free to sue the mortgagor upon the personal covenant for payment of the balance[19]. But even under English law, foreclosure brings in a different consideration i.e. it puts an end to other remedies. That is because if the mortgagee takes the whole security, he can no longer claim payment.

Under English law, a mortgagee is not bound to get the highest price obtainable in the case of sale. All that is required is for him to act in good faith, where he sale at a lower price than expected he would not be liable to the mortgagor.

5.2 Right to Benefit From Property

Under Islamic law, the mortgagee has the right to make use of mortgage property that is to benefit from it. However, it has to be in proportion to the debt. He must be just and fair, he is generally accountable to the mortgagor and does not take undue advantage or unnecessary benefit[20]. This position is similar to what is obtainable under English law, whereby the mortgagee has the right to go into possession and make use of the property. This is by collecting rents and profits from the property and applies them to pay loan plus interest. Here also he is not expected to take unnecessary benefit as

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[17] Aboki Y. –Opcit Pg. 52
[18] Ibid
[19] Ibid
[20] Aboki Y. –Opcit pg 52

such he is strictly accountable to the mortgagor not only for what he receives but also to pay the balance to the mortgagor.

Although the mortgagee under English law is also expected to be accountable to the mortgagor and not to take more than his money, yet he is allowed to remove his interest before remitting what is remaining to the mortgagor.

The requirement for interest on the debt is not applicable under Islamic Law. This is another area where the concept of mortgage under English Law differs from Islamic law. It is a trite law that interest is not permissible under Islamic law and Muslims are enjoined to be lenient to one another and to avoid Riba (Usury) i.e. interest on loaned money.

The import of this provision is to curtail the hardship interest will create for the mortgagor. It goes without saying that interest has created untoldable hardship to the extent of causing the winding up of companies, insolvency and Bankruptcy of persons. A good example is what happened in the United States of America where a business conglomerate, the Lehman Brothers collapsed due to some reasons which includes a loss of N3 billion dollars as collateral to mortgage houses.

"A pledge to benefit from mortgage is in line with the prophetic statement thus;

"A pledge does not become the property of the mortgagee, it's owner the mortgagor is entitled for his expenses."

5.3 RIGHT TO FORECLOSURE

The mortgagee has the rights to keep the property until the debt is liquidated under Islamic Law. However, he does not have the right of fore closure. The rights applicable under English Law, foreclosure here means that the mortgagor's legal fee simple is freezed by the mortgagee. A foreclosure automatically vests the legal fee simple held by the mortgagor in the mortgagee, thereby making the mortgagor loose completely his legal rights to the mortgage. Foreclosure proceedings are usually administered by a high court and before it is finally granted, the court may order, he will loose his rights to redeem. The court has the discretion to refuse the mortgagee's request for foreclosure and rather order the sale of the land.

The mortgagee has the rights to get back his debts regardless of whether the mortgagor is alive or not. This position is applicable both under English or