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DEBTS RECOVERY AND SECURITY INTERESTS IN THE BORROWERS AND LENDERS ACT, 2020 (ACT 1052): LEVERAGING ADR AND COMMERCIAL COURT RULES AS A LIFELINE FOR BORROWERS

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Debts Recovery and Security Interests in the Borrowers and Lenders Act, 2020 (Act 1052): Leveraging ADR and Commercial Court Rules as a Lifeline for Borrowers

Oswald K. Azumah*

ABSTRACT

A default in repaying loan entitles the lender to an action against the borrower. This everyday rule is reinforced when the loan is secured. In this circumstance, the lender is entitled not just to an action to recover the debt but may be entitled to other actions such as judicial sale of the security interest where it is regulated by the Mortgages Act, 1972 (NRCD 96) or to realization of the security interest under the Borrowers and Lenders Act, 2020 (Act 1052) or to the appointment of a receiver under the same legal framework. In this paper, the writer explores the broader framework of Ghanaian jurisprudence, arguing that, despite provisions in the law that security interests may be realized even without a court order, alternative dispute resolution and the High Court (Civil Procedure) Rules, 2004 (C.I. 47) may be explored as a lifeline for borrowers, rules under which security interests may be saved from judicial sale or other means of transfer.

INTRODUCTION

The rise in commercial transaction, no doubt causes a rise in loan transactions. This translates into debt for the borrowing party. For companies, the debt market serves as a major source of raising capital with Bondzi-Simpson, for instance writing that the long-term funding for companies comes mainly through debt.[1] This is achieved mainly through the issue of debentures.[2] Companies may also raise capital through the sale of shares through Initial Public Offers (IPOs) or private placement which involves "a direct offer or invitation to acquire the shares of the company".[3] Individuals also make use of debt as a means of raising money and this may be done by taking mortgages on immovable property or other security interests on immovable property or chattels. In times of default of these loans, lenders are naturally disposed to take all measures available to them to retrieve these monies, measures which include sale of mortgage property or security interests. The paper seeks to discuss a narrow means of salvation for borrowers when supervening or other like circumstances prevent them from meeting their debt obligations.

The paper is divided into five major sections, this introduction being the first and introduces the reader to the thesis while giving the breakdown of the paper. The next part briefly describes the relevant means of debt recovery through realization of security interests and judicial sale of mortgage property as well as other relevant means of recovering debt which leads to borrowers or guarantors to losing the security interest. The following section focuses on the mainstay of this paper by examining the legal framework of alternative dispute resolution in Ghana and how this can be used

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[1] Philip E Bondzi-Simpson, Company Law in Ghana (3rd edn, Avant Associates Ltd 2020)

[2] *Ibid*

[3] *Ferdinand D Adadzi, Modern Principles of Company Law in Ghana (Revised edn, Ghana Publishing Company Ltd 2022)*

alongside exploiting the High Court (Civil Procedure) Rules, 2004 (C.I. 47) to delay these statutory sales of security interests in a bid to redeem them. The subsequent section then gives a couple of recommendations to advocates and other drafters of debt financing documents and the final part concludes the essay.

Default and recovery of debt

The repayment and debt recovery part of the Borrowers and Lenders Act addresses what a lender ought to do in order to enforce a security interest or claim his money in court. The Act specifically provides three major means of such debt recovery.[4] It states:

Remedies of lender on default

Section 61 (1) Upon the satisfaction of the requirements under section 60, the lender may

a) *sue the borrower on any covenant to perform under the credit agreement;*
b) *where registered under this Act, realize the security interest in the collateral without initiating proceedings in court; or appoint a Receiver or Manager under subparagraph (iii) of paragraph (b) of section 74*
c) *Where the collateral is a document of title, the lender may proceed either against the document of title or the property covered by the document of title.*

Where the lender choses to proceed against a security interest, he may do so without initiating any court procedures. This process forecloses the right of the borrower to redeem the property without a full hearing.[5]

"Briefly put, foreclosure is the remedy available to a secured creditor. Relevant here, foreclosure is the process whereby a lender seizes and sell the real property of a non-paying debtor, with the proceeds therefrom going toward the satisfaction of the debt" writes Pomeroy.[6]

[4] *See: Section 60 through to Section 75 of Act 1052*
[5] *See: Section 63 through to 67 of Act 1052.*
[6] Chad J Pomeroy, 'Well Enough Alone: Liability for Wrongful Foreclosure' (2011) 68 Ala L Rev 943, 954

See the process here.[7]

This process is so strict that should the borrower fail to vacate the premises being foreclosed, in the case of an immovable property, he or she commits and offense.[8] It is thus obvious that the lawmaker took serious exception to borrowers defaulting on their debts with subsequent unlawful acts of impeding foreclosure proceedings. It would appear *prima facie* that once the lender begins foreclosure

[7] *Right of lender to possession Section 63*

1) *Where a lender realizes a security interest in accordance with paragraph (b) of subsection (1) of section 61, the lender may take possession of the collateral or render the collateral unusable without removal.*
2) *Where a lender has a right to take possession of property that is subject to a security interest, that lender may enforce that right without initiating proceedings in court for that purpose.*
3) *A lender is not required to give notice to the borrower before repossessing or rendering a collateral unusable under this section.*

Warrant for police assistance

Section 64

1) *Where a lender is unable to enforce a right of possession in a peaceable manner, the lender may upon a warrant issued by a court use the services of the police to*
    a) *remove the collateral; or*
    b) *evict the borrower where the collateral is immovable property, subject to the rights of third parties or other persons in possession of the collateral.*
2) *Where a borrower receives notice of an application made by the lender to a court for a warrant to be issued for the purpose of removing collateral, evicting the borrower or any other person in possession, that borrower may within eight days after receipt of the notice, object to the request by giving evidence to the court that*
    a) *full payment of the amount owed has been made;*
    b) *the default has been cured; or*
    c) *the default has not occurred.*
3) *The court shall issue a warrant, if eight days after service of the notice of the request for a warrant on the borrower, the borrower does not file an objection to the request for a warrant.*

[8] *See: Section 64 (4) of Act 1052. A person who*

a) *fails without reasonable excuse, to vacate premises being foreclosed by a lender under subsection (1) when duly requested to do so; or*
b) *obstructs a lender in the lawful exercise of a right conferred on the lender by this section commits an offence and is liable on summary conviction to a fine of not more than five hundred penalty units and in the case of a continuing offence, to a further fine of not more than fifty penalty units for each day the offence continues.*

of a guarantee, there is very little the borrower can do. This notwithstanding, the lender is still expected to strictly follow the process outlined in Act 1052 lest the foreclosure risks being declared wrongful.

Wrongful foreclosure, per Pomeroy *supra*, "occurs anytime a lender forecloses when she is not entitled to do so, which includes situations where the lender has ***failed to follow or honor any of the technical, procedural protections discussed above***."[9] (Emphasis mine)

Notice of sale of collateral

In Ghana, one of the primary obligations the Act places on the lender who intends to foreclose the right of redemption is notice of sale. This is outlined in Section 67 of Ac 1052.

Section 67

1) *A lender who intends to realize collateral under this Act shall, not less than seven days before the sale, give notice in writing to the following persons:*
    a) *the borrower and the debtor;*
    b) *any person who has registered a security interest with respect to the interest in the same collateral, before the lender took possession of the collateral; and*
    c) *any other person that has given the lender notice that that person claims an interest in the collateral before the lender took possession of the collateral.*
2) *Subsection (1) does not apply if*
    a) *the collateral is likely to perish within ten days after possession of the collateral has been taken;*
    b) *the lender believes on reasonable grounds that the collateral will decline substantially in value if it is not disposed of immediately;*
    c) *the cost of care and storage of the collateral is disproportionately large in relation to the value of the collateral;*
    d) *after the lender takes possession of the collateral, every person entitled to receive notice under subsection (1) consents in writing to the immediate sale of the collateral; or*
    e) *a court grants leave to the lender to sell the collateral without complying with subsection (1)*

[9] See: Pomeroy supra at page 955

The foreclosure process, then, is a technical one with many requirements and procedures that must be followed carefully.[10]

Effect of sale of collateral

The Borrowers and Lenders Act, 2020 brought about perhaps the most sweeping reforms in judicial sale of security interests, other forms of realizations of same, foreclosure or however-so-descried. Whereas in previous regimes, a sale may not extinguish superior mortgages or security interests, what happens in a sale under Act 1052 is that any other *"security interest in that collateral and the proceeds of the security interest in that collateral shall be extinguished."*[11]

Difficulty in repaying the loan

[10] These processes continue even after the sale of the document and include accounting for the sale and distribution of proceeds. See: Pomeroy supra

Accounting for sale

Section 69: Where collateral is sold, the lender shall, within fifteen days after the sale of the collateral, give the persons referred to in subsection (1) of section 67 a statement of account in writing, showing

a) the reasonable cost and expenses of the sale incurred by the lender;
b) reasonable legal expenses; and
c) the balance owing by the lender to the borrower, or the borrower to the lender, as the case may be.

Distribution of proceeds of sale

70. (1) A lender who realizes collateral under section 66 shall apply he proceeds of the sale in the following order towards:

a) the reasonable costs and expenses of the sale incurred by
b) reasonable legal expenses; and
c) the satisfaction of the debt of any prior interest registered under this Act or lien arising by operation of law before applying the net proceeds of the sale towards the satisfaction of the debt or other obligation secured by the security interest of the lender.

[11] See: Section 67 of Act 1052

Writing on the so-called Great Recession[12], Pomeroy highlights the economic downturn as one of the factors that affected American homeowners' ability to service their mortgages. Continuing, the author observed that *each of those debtors who could not pay their mortgages—whose defaults, in total, triggered the collective write-downs on banks' balance sheets so catastrophic that the entire financial system nearly collapsed—was a person who could no longer afford her home. And, every time that happened, the bank had a choice to make: to foreclose or not to foreclose.*

The next section of the paper addresses a narrow stopgap measure for borrowers which can buy time against the seemingly stringent foreclosure provisions in Act 1052.

A lifeline for the borrower

Alternative Dispute Resolution (ADR) in the Ghanaian usage, refers to all lawful means of resolving disputes outside of the courtroom and generally refer to the three major ones discussed by the Alternative Dispute Resolution Act, 2010 (Act 798) (i.e.) Negotiation, Mediation and Arbitration. Indeed, it is not uncommon to see dispute resolution clauses as part of the boilerplate terms which defer the jurisdiction of the courts until such alternative means of resolving them have failed— (to the exclusion of arbitration which is final[13] unless on special terms provided by law.)[14]

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[12] The Great Recession is the largest economic downturn since the Great Depression and has had an unprecedented effect upon global economic progress and prosperity. "From 2007 to 2009, real GDP fell by 3.1 percentage points, real personal income per capita fell by 8.3 percentage points, and the national unemployment rate rose from 4.6 percent to 9.3 percent." Robert A. Moffitt, The Great Recession and the Social Safety Net, 650 ANNALS AM. ACAD. POL. & SOC. SCI. 143, 143 (2013)

[13] See: Section 52 of the ADR Act, 2010 (Act 798)

[14] ***Challenge of award***

Section 58

1) An arbitral award may subject to this Act be set aside on an application by a party to the arbitration.
2) The application shall be made to the High Court and the award may be set aside by the Court only where the applicant satisfies the Court that
    a) a party to the arbitration was under some disability or incapacity:
    b) the law applicable to the arbitration agreement is not valid;

With ADR, the parties own the decision.[15] They are thus entitled to keep the courts out of resolution of their dispute to the extent that the dispute bothers on matters of fact and not law.[16] The parties are also entitled to keep the courts out of their business to the extent that they do not in fact waive the right to ADR.[17] A waiver of the rights to ADR include responding to a court action filed by the other party without drawing the attention of the court to ADR clauses in the parent agreement. Using non-adverse alternative dispute resolution mechanisms ensure that parties get a tailor-made solution that works for both parties instead of a binding decision from an adjudicator which may likely result in a lose-lose.[18]

In the context of foreclosure, the security interest may be so dissipated that, selling it may not offset the loan and where the borrower is bankrupt, the rest of the debt becomes unrecoverable while the borrower also loses his property, lose-lose.

Be that as it may, where both parties are able to find a middle ground after default by the borrower, a foreclosure can be avoided. This can be done through direct negotiation which involves a back

c) the applicant was not given notice of the appointment of the arbitrator or of the proceedings or was unable to present the applicant's case;
d) the award deals with a dispute not within the scope of the arbitration agreement or outside the agreement except that the Court shall not set aside any part of the award that falls within the agreement:
e) there has been failure to conform to the agreed procedure by the parties;
f) the arbitrator has an interest in the subject matter of arbitration which the arbitrator failed to disclose.

[15] Peter Apuko-Awuni, 'Mediation as an Option under Alternative Dispute Resolution: The Case of Ghana' (2022) 2(1) UCC Law Journal 157
[16] Scott v Avery (1855) 5 HL Cas 811. See also: Essilfie and Another v Tetteh and Others 1995-96] 1 GLR 297 - 309
[17] See: Desimone v Olam CIVIL APPEAL NO. J4/03/2018
[18] Albert Fiadjoe, Alternative Dispute Resolution: A Developing World Perspective (Cavendish Publishing 2004)

and forth conversation by both parties or their representatives—done by themselves or an assisted negotiation guided by a neutral third party, otherwise known as Mediation.[19]

The question as regards the propriety of ADR is how it can serve as a buffer against foreclosure where the lender shows an initial unwillingness to engage with a borrower who has defaulted on his debt. It is the submission of the present writer that the High Court rules provide enough measures to force an adamant lender bent on foreclosing the right to redemption (through judicial sale or other means) to the negotiating table and the answer lies in Order 58 of C.I. 47.

What is a commercial action?

The high court is mandated to encourage amicable settlement of all commercial disputes before it. Commercial claims, as defined by Order 58 of C.I. 47, includes the payment and restructuring of commercial debts by or to a business or commercial organization or person.[20] Other forms of commercial claims listed under the Rule are: winding up or bankruptcy, business document or contract applications under the Companies Act among others.

How ADR can intervene

Rule 4 of Order 58 compels the Court to entreat parties before it to explore amicable settlement and this serves as the safety net for a defaulting borrower. It is settled that reclaiming of debt is a commercial action, thus, a borrower who stares foreclosure in the face, has been handed a lifeline by Order 58, a process under which he can initiate an action in court, seeking relief against foreclosure and to restructure the debt. With such an action having commenced, the lender will be forced to the negotiating table, though the said lender still wields the better chips due to an existing default by the would-be plaintiff.

[19] Roger Fisher, William Ury and Bruce Patton, Getting to Yes: Negotiating an Agreement without Giving In (3rd edn, Random House Business Books 2012)
[20] See: Order 58 Rule 2 (c) C.I. 47

This fact notwithstanding, it is not novel to Ghanaian jurisprudence that a party can secure deferment of a legal obligation such as a loan or even secure a reduction in the liability owed without consideration moving from the receiving party.[21]

Prof. Dowuona-Hammond observes that this however not mean recalcitrant debtors can now extort releases from creditors in a weak bargaining position.[22] She recounts the English case of *D. & C. Builders Ltd. v Rees*[23]. The case illustrates the kind of unconscionable exercise of economic duress which should not be permitted to succeed.

> *the plaintiffs were a small building company who did work for the defendants to the tune of about £700. After some payments, the defendants' debt to the plaintiffs was reduced to about £480. The plaintiffs pressed for payment of this amount for months without success. To the knowledge of the defendants, the plaintiff company was in desperate financial straits. Taking advantage of this weak position of the plaintiffs, the defendants offered them £300 full satisfaction. At the trial, evidence was given as follows: "If I did not have the £300 the company would have gone bankrupt".*

Based on this, the court allowed the lender to recover the full fee. Commenting on same, Prof. Dowuona notes that "*it would thus not constitute any remarkable judicial innovation for the Ghanaian courts to hold that agreements procured through such tortious conduct are against public policy and are not enforceable, even though the requirement of consideration has been abolished in Ghana as far as modification agreements are concerned.*"[24]

It thus cannot be the case that because the High Court rules allow commercial claims to be settled out of court and in fact, enjoins the court to recommend same to parties, a notorious defaulter of debt can simply hide under Order 58 to frustrate a lender aiming to recover his money. As advanced earlier, however, it also cannot be the case that once foreclosure begins, the borrower has no chance

[21] See: Section 8 (2) of the Contract Act, 1960 (Act 25)
[22] Christine Dowuona-Hammond, The Law of Contract in Ghana (Frontiers Printing and Publishing 2016) 95.
[23] [1966] 2 Q.B. 617 C.A
[24] See: Dowuona-Hammond supra

of reprieve than to pay the full amount lest he loses the security interest. The payment contracts can indeed, be restructured under the law and the borrower needs not give any further consideration for the renegotiated payment.[25]

Writing in the Quarterly Journal of Economics, Hart and Moore recognize this proposal when they acknowledge the right to seize security interests while also admitting such default of loans should not bring an end to business relationships.

> *"The entrepreneur promises to make a fixed stream of payments to the investor. As long as he makes these payments, the entrepreneur continues to run the project. However, if the entrepreneur defaults, the investor has the right to seize and liquidate the project assets.* ***At this stage the entrepreneur and investor can renegotiate the contract"***[26] *(Emphasis mine)*

Recommendations

Drafters must take cognizance of such situations and expressly provide for renegotiating of debt payments based on contingencies. These must be fused into boilerplate terms such as what happens in a force majeure. Dispute resolution clauses in loan financing and debt contracts must include clear terms spelling out how ADR can be explored in times of default instead of merely proceeding against security interest. No property owner uses their asset to secure a loan with the intention of actually losing it in times of default, advocates and other contract drafters must thus take up higher responsibility of exploiting all available means of ensuring foreclosure is indeed the only means by which the lender can reclaim his money without undue delay.

CONCLUSION

It is trite learning that he who comes to equity must do equity and must come with clean hands. Thus, a borrower, proceeding to court under the terms proffered by this paper, must show that his inability to defray the debt is not occasioned by any misdeed or recalcitrance. He must also show

[25] S. K. Date-Bah, "The Doctrine of Consideration and the Modification of Contracts" (1973) 5 R.G.L. 10
[26] Oliver Hart and John Moore, 'Default and Renegotiation: A Dynamic Model of Debt' (1998) 113 Quarterly Journal of Economics 1

that is ready to adhere, almost strictly to the terms of a potential renegotiated contract, already being in default. When these two requirements are met to the satisfaction of the court, any lender, not being in distress themselves and seeking to protect business relation and public confidence, should have no qualms consenting to a renegotiated contract. This will be a consequence of the borrower intercepting the foreclosure proceedings with a commercial claim, seeking relief against foreclosure through negotiation or mediation—a process encouraged by Order 58 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47).