ACQUISITION OF GOOD TITLE OF REAL ESTATE THROUGH THE ISLAMIC BANKING PRODUCT OF *MUSHARAKAH MUTANAQISAH*: AN APPRAISAL

BY

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BEING AN LLM THESIS SUBMITTED TO THE POSTGRADUATE COMMITTEE, FACULTY OF LAW, BAYERO UNIVERSITY, KANO

APRIL, 2017

DECLARATION

I hereby declare that this work is the outcome of my own research and intellectual effort: undertaken under the supervisor of Dr. Nasir Ahmad and has never been presented and will not be presented elsewhere for the award of a degree or certificate. All the sources have been duly acknowledged.

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CERTIFICATION PAGE

This is to certify that the research work for this thesis and the subsequent preparation of this thesis by Fatima Jamilu Nashe (SPS/13/MLL/00019) were carried out under my supervision.

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APPROVAL PAGE

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DEDICATION

I dedicate this thesis to my beloved parents: Alhaji Jamilu Nashe and Hajiya Hadiza Tukur who have always been there to support me, congratulate me and show me always the best path to follow. And my husband – Alh.Nazir Bello for the love, care and support.

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7. Companies and Allied Matters Act. *Cap 59. Laws of the Federal Republic of Nigeria 1990*

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1. Olubodun v Lawal (2008) All FWLR part 438 p 1468
2. Odutola V Sanya (2008) All FWLR part 400 p 780
3. Adesanya V Aderonmu (2000). FWLR, part 15, p2492
4. Savannah Bank v Ajilo (1989). I NWLR, part 97, p.305
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ABSTRACT

This dissertation appraises the acquisition of good title of real estate through Islamic banking product of *Musharakah Mutanaqisah*. The study examines the Islamic law rules/principles governing *Musharakah Mutanaqisah*h. It equally examines the rules/principles of *Musharakah Mutanaqisah*h being used in structuring Islamic banking products leading to acquisition of title in real estate transaction. The dissertation also investigates how real transactions through the Islamic banking products of *Musharakah Mutanaqisah* can be validated under the Nigerian land and registration laws. The methodology employed in this research work is the doctrinal method. Through this, primary and secondary sources materials were consulted and examined. The dissertation mainly found that Islamic banks finance real estate through *Musharaka*h Munaqisah banking product. In Nigeria, JAIZ bank has similar product though bringing different name – Ijara Wal-iqtina. It was also found that persons have to perfect and register any real estate they acquire through *Musharakah Mutanaqisah*h in order to have good title on the real estate. The dissertation recommends such persons to follow all the process and procedures provided by the lands and registration laws so that they can validate their titles in the real estate.

CHAPTER ONE

GENERAL INTRODCUTION

1.1 Background to the Study

Islamic Banking system is that banking system which offers services and investments in accordance with the principles of Sharia. From this, two key features can be deduced. The first feature is that it offers banking services as it does under conventional banking system. In the course of transacting its business and services it does not charge interest. It carries out the normal banking services which include receiving money, depositing same under current account, paying and collection of cheques drawn by or paid by customers and so on. Another feature which is the second fundamental feature of Islamic banking is investment. Islamic banking pays attention to investment and all its profits are mainly derived from the investment it makes.

In carrying out its businesses and investment activities, it does so in line with the basic norms of investments and commerce under the Islamic jurisprudence such as avoidance of interest, avoidance of *Gharar*(uncertainty) and the observance of the basic rules of Islamic law of contract[1].

While carrying out investment, Islamic banks use different modes of finical and commercial institutions which have been developed from the Islamic

[1]Ayub, M. (2007). Understanding Islamic Finance. West Sussex: John Wiley and Sons Ltd pp 43-57, 105

jurisprudence.[2] These modes include *Mudaraba, Murabaha, Musharaka, Salam*and *Ijara*.

In order to address the issue of real estate acquisition, Islamic financial institutions have come out with certain products modeled from the principles of Islamic commercial jurisprudence, common among them is *Musharaka*[3].

On the other hand, Nigerian land and registration laws require all transactions in real estate to comply with certain requirements and procedures before such transactions become valid. By the provisions of the Land Use Act[4], no transaction in land will be valid in real estate without the consent of the Governor of the state where the land situates. Equally, transactions in real estate must be registered with the Land Registration Unit of the State Ministry of Land where the land, subject matter of the transaction is located[5].

1.2 Statement of the problem

The process of acquisition and securing of real estate has already been established by conventional laws.

First is search at the land registry; probate registry, Corporate Affairs Commission (CAC) etc. This is followed by the preparation of a proper deed of assignment

[2] Ibid, pp. 181-185
[3]Ahmad, N.A. and Idris, M. (2015).An Examination of the Mode of Housing Acquisition through Islamic Banking Product of Musharaka Mutanaqisa. A paper presented at the 2nd International Conference on Islamic Banking and Finance organized by the IIIBF, B.U.K, April, 2015. Pp. 5-7
[4] Section 21 & 22 of the Land Use Act, 1978.
[5] See section of the Kano State Land Registration Law as an example

then the application of consent. After the governor grants consent, the deed is stamped and such stamp duties paid, and lastly the contract or conveyance is registered.

With the emergence of Islamic banking system, Islamic banks now finance the acquisition of real estate through their banking products, especially *Musharakah Mutanaqisah* based products. A person who acquires real estate through this banking product is then required to follow these laid rules of perfecting and registration of such real estate before he can be said to have acquired good title to it.

There is therefore the need to conduct this research work in order to provide the relevant laws and their requirements on transactions in real estate. This will enable a person who acquires real estate from *Musharakah Mutanaqisah* to perfect their title.

1.3 Research Questions

The following questions are formulated to guide this study:

i. What are the Islamic law rules/principles governing *Musharakah Mutanaqisahh?*

ii. How are the principles of *Musharakah Mutanaqisahh* being used in structuring Islamic banking products leading to acquisition of tile in real estate transaction?

iii. How can real transactions through the Islamic banking products of *Musharakah Mutanaqisah* be validated under the Nigerian land and registration laws?

1.4 Aim and Objectives of the Study

The aim of this research work is to appraise how *Musharakah Mutanaqisah* is being used as Islamic banking products through which title on real estate can be acquired and validated through the relevant Nigerian laws.

The main objectives of this research work, on the other hand are to:

i. examine the Islamic law principles governing *Musharakah Mutanaqisahh;*
ii. ascertain how principles of *Musharakah Mutanaqisahh* are being used in structuring Islamic banking products leading to acquisition of tile in real estate transaction;
iii. investigate how can real estate transactions through the Islamic banking products of *Musharakah Mutanaqisah* be validated under the Nigerian land and registration laws.

1.5 Justification of the Study

This research work will be of immense significance in the following points:

i. It will provide how customers of Islamic bank can validate their title in *Musharakah Mutanaqisah* transactions.

ii. Various Islamic Legal bodies such as Sharia Courts, Islamic scholars and other decision makers will enlighten them more on the issues concerning House Acquisition in Islam.

iii. The study will add to the existing knowledge in the sense that it will review relevant literature on the topic under investigation from which certain areas uncovered by previous authors/scholar will be identified and filled.

iv. Finally, the study will of significance to future researchers who may want to carry out similar studies.

1.6. Scope of the Study

The focus of this research work is mainly on acquisition of title in real estate transaction through the Islamic banking products of *Musharaka Munaqisah*. The study will also take a critical look into the procedure for title acquisition in real estate transaction under the relevant Nigerian laws. Although there are Islamic banking products through which title in real estate can be acquired, the research work is however mainly concerned with the above mentioned products. Similarly, the research work will concentrate on the relevant provisions of the Land Use Act, 1978 and the Registration of Title Laws of Kano State.

1.7 Methodology

The methodology employed in this research work is the doctrinal method. Through this, primary and secondary sources materials will be consulted and

examined. The materials include Statutes, Textbooks, articles, internet sources, Islamic law texts; Qur'an, Sunnah and other sources of Shariah.

The materials will be appraised in order to know how *Musharakah Mutanaqisah* is being structured to provide Islamic banking products that lead to the acquisition of title in real estate transaction. The materials will similarly be analysed to establish the procedure to be followed in order to validate the title of real estate transactions through the Islamic banking products of *Musharakakh Mutanaqisa*.

1.8 Literature Review

Several researchers have been and are still being conducted on the theory and practice Islamic banking system. There are, equally materials and authorities on the subject matter. Some of these are:

Islamic Finance, Law, Economics and Practice by **El Gamal**[6]**.**

This book provides an overview of the practice of Islamic finance and the historical roots that defines its modes of operation. It shows that Islamic finance such as MM exists primarily today as a form of rent-seeking legal abridge. It can therefore be argued that the scope of MM is beyond that. *Murabahah*is the most commonly used mode of financing in Islamic banks. Its variant models have been introduced elsewhere to facilitate a traditional practice of commercial loan. In the Middle East, a product of Islamic banks known as *tawarruq* took that role.

[6] El-Gamal, M.A. (2006) Islamic finance, Law, Economics and practice (New York: Cambridge University press)

Property Law in Nigeria by **Dadem**[7]

This book examines the principles law in Nigeria and gives an overview of the law. It deals with the processes, skills and ethics required for transfer and conveyance of real property/estate in Nigeria. Dadem work does not deal with ways to acquire good title in real estate transactions through Islamic banking products of *Musharakah Mutanaqisah*.

Understanding Islamic Finance by **Ayub**[8]

This book is one of the leading authorities on Islamic banking and finance. The book deals with almost all issues relating to the theory and practice of Islamic banking devoted scholarly discussions on the principles governing *Musharakakh Mutanaqisah* and how Islamic banks are using them to structure their banking products on real estate.

Banking without interest written by **Siddiqi**[9]

This is a book that deals with the mode of establishing an Islamic banking, a thorough discussion on the principles of Islamic banking system, the relationship between the bank and its customers. The author is of the opinion that Islamic banking system assists in curving out the level of poverty of any country in which the system is being practiced.

[7]Dadem, Y. Y. (2009). Property Law in Nigeria. (Jos Nigeria: Jos University Press Ltd.)
[8]Ayub, m. (2007). Understanding Islamic Finance (England: John Wiley and Sons.)
[9]Siddiqi, M. N. (1983). Banking Without Interest (United Kingdom: The Islamic Foundation.)

An Examination of the Mode of Housing Acquisition through Islamic Banking products of Musharakah Mutanaqisahh written by **Nasir and Idris**

The paper has examined the principles governing *Musharakah Mutanaqisah* and their application in Islamic banking products which lead to housing acquisition. The paper cited several Islamic banks which use the product in real transaction but they seem to agree that capital, once contributed, is the property of the *Musharaka* (rather than any individual partner) and inures to the benefit of all partners. This researcher thinks that capital must be specified at the inception of the *Musharaka*, including as to the total amount and the share of each partner.

An Examination on the trends in the Development of Islamic banking in Nigeria written by **Nasir**[10]

The paper traces the trends in the development of Islamic banking system and its operation in the country. The paper has shown how JAIZ bank modeled real estate transaction through the principles of *Musharakah Mutanaqisahh* among or between interest partners. The lacuna here is that the author didn't take into consideration, what it takes to form a partnership in which one of the partners (the home buyer) promises to buy the equity interests of the other partner (the bank providing the financing) on a periodic basis until such time as the equity is completely transferred to the purchasing partner (home buyer). During the course

[10]Nasir, A. A. (2012). An Examination on the trends in the Development of Islamic Banking in Nigeria. A paper presented at Department of Islamic Law, faculty of Law – bayerO University, Kano on Thursday, the 9th day of August, 2012 at the Seminar series of the International Institute of Islamic Banking and finance (IIIBF), Bayero University, Kano

of the purchase transaction, the bank partner leases its undivided interest in the property (the home and related land interests) to the home buyer partner.

Islamic financial System Principles & Operations by **Dasuki**[11]

The book discusses the historical development, the current state and future prospects of the Islamic financial system. The book also discusses various aspects of Islamic finance including the current issues on Islamic banking system. It discusses Shari'ah contracts including *Musharakah Mutanaqisah*.

The lacuna in the paper of Dasuki is that it fails to discuss MM in a context of a home purchase financing. The reason this shouldn't have been left undiscussed is that *Musharaka* agreement may be expanded to include the full range of provisions that are found in documents governing conventional home purchase financings. Thus, for example, *Musharaka* agreements may specify the term of the partnership, the purpose of the *Musharaka*, limitations on the powers, rights, authorities and practices of each of the partners, the terms of dealing that are required and those that are permitted, circumstances in which the various partners will have consent rights, and the full panoply of representations, warranties, covenants, insurance requirements, events of default, remedies and termination rights

[11]Dasuki, A.W. (2012). Islamic financial System, Principles and Operation (Malaysia: International Shari'ahRseearchAcademyfor Islamic finance, 2012)

1.9 Organization Layout

This research work is divided into five chapters. Chapter one contains general background and overview of the research work. It contains the background of the study, statement of the research problem, research questions, aim and objectives, justification, scope of the research, methodology employed and literature review.

Chapter two centers on overview of Islamic banking system; it discusses what the system is all about, its evolution, operations, objectives, principles and similar related issues.

Chapter three highlights the principles of *Musharakah Mutanaqisah* and how Islamic banking products leading to acquisition of title in real estate are modeled from them.

Chapter four gives an overview of the Nigerian laws regulating real estate transactions leading to acquisition of valid title. The chapter correlates transactions on *Musharakah Mutanaqisah* and how such transactions can be validated by satisfying and following the laid down regulations by the relevant Nigerian Land and Registration Laws.

Chapter five summarizes the research work and discusses the major findings and makes observation and recommendations.

CHAPTER TWO

AN OVERVIEW OF ISLAMIC BANKING AND FINANCE

2.1 Introduction

Islamic banking and finance is a concept which has been globally accepted irrespective of people's various religions and sects. It is a concept which serves and has been accepted as an alternative to conventional banking for a very long time. It is based on the profit and loss sharing motive and which is opposed to the institution of interest, speculation and exploitation.

It is comprised of set of principles that are not prohibited by divine guidance through the Qur'an and Sunnah, thus its operation and execution are in line with the spirit of Islamic jurisprudence. An Islamic bank is an intermediary and trustee of other people's money with the difference that it shares profit and loss with its depositors. In practice, most Islamic banks have an organizational set-up similar to their conventional counterpart banks. Islamic banking is phenomenally profitable because, although its underlying funding mechanism is the same as conventional banking, its default experience is better with less charges and more transparent. Islamic banking is not totally different from conventional banking. They are doing same practice such as saving deposits and consumer finances but there are some fundamental differences of its practice and objectives. Islamic banking is interest free and its main objectives are the equal distribution of wealth, decreasing poverty and increasing investment opportunities.

It is very beneficial to the Muslim populace who want to solve their financial matters according to their religion. Islam has guided us the pathways in each and every aspect of life or have laid down the general principles which could act as guidelines for the upcoming situations in any sphere of life, hence Islamic banking and finance is said to be done when the internal processes, procedures and financial transactions are in compliance with the rules prescribed by the Quran and Sunnah.

2.2 Meaning and Nature of Islamic Banking

An Islamic bank has been defined as a financial institution whose status, rules and procedures expressly state its commitment to the principle of Islamic shariah and to the banning of the receipt and payment of interest on any of its operations[12]. It also defined as a financial intermediary and trustee of other people's money like any conventional bank with the possible difference that the payoff to all its depositors is a share in profit and loss in one form or the other and its operations are conducted based on the principles of Islamic Shariah[13].

An Islamic bank has also been elaborately defined as a non interest bank which transacts banking business, engages in trading, investments and commercial activities, as well as the provision of financial products and services in accordance

[12]Deji, M.S. (2013). Feasibility of Introducing Islamic Banking in Nigeria, in Dandago, K.I Muhammad, A.D. Oseni, U.A. (eds), Essential of Islamic Banking and Finance in Nigeria. Benchmark Publshers Limited, Ibadan.

[13] Ibid pg 23

with the principles and rules of Islamic Jurisprudence[14]. And therefore, Islamic banking is the system or banking activity that is consistent with the principles of shariah and its practical application through the development of Islamic economics.

Islamic banking is also defined as financial institutions that are primarily based on providing financing and other business services, the traffic and circulation of cash payments adjusted with the implementation of Islamic law.

2.3 Nature of Islamic Bank

Islamic banking is a specialized banking which is based on the principles and ideals of shariah i.e. the rules and principles are based on Islamic jurisprudence or *fiqh*. IBF is a financial intermediary which has a moral dimension rooted in the Islamic value of fairness, transparency, prudency, justice, accountability, objectivity as opposed to its counterpart which is conventional banking where the above are absent. Islamic banking is in line with the Islamic banking principle of "no reward without pain".

Islamic banking is based on the following principles[15]:

- All transactions must be free of interest (*riba*);

[14]Dogarawa, A. B. (2012). The Historical Development of Islamic Banking and the Nigeria Experience, in Karwai, S.A. Jibril, B.T. Habib, A.G (eds0. Islamic Economics: A book of Readings IIIT, Kano
[15]Usmani, N.M. &Abdallah.M.F (2010). *Musharakah Mutanqisah* Home Financing: A Review of Literatures and Practices of Islamic Banks in Malaysia, Internal Rebiw of Business Research Papers Volume 65 Number 2.

- Goods and services that are illegal (haram) from Islamic perspective cannot be produced or consumed;
- Activities or transactions involving speculations (*gharar*) must be avoided;
- Zakat must be paid.

The fundamental elements of IBF include that lending is not a business and as such the rule that there should be no interest is a core feature of such financial transaction, also that any form of investment must be endorsed legally and morally by the shariah i.e. it must be shariah complaint. Another element is that any financial transaction to be carried out must be asset-based or linked to real economic activities for the income to be morally and legally acceptable i.e. the Islamic business model supports financial and economic transactions that would spur real sector of the economy.

IBF has different modes or instruments through which it finances its activities and transactions. The modes include *Mudarabah, Ijarah* (leasing), *Bai salam* (forward trade contract), *Istisna* (partnership in manufacturing), *Qardhasan* (benevolent loan), *Sukuk* (bond), *Wakalah* (agency), *Musharakah*, *Murabahah* and a host of others. These modes however can be categorized into 4 major parts the first been investment financing which is based on estimated rate of return or negotiable rate through *Musharakah* and *Mudarabah*. Secondly, there is trade financing through mark up, leasing, hire purchase, sell and buy back as well as letter of credit. Thirdly, lending through *Qard hasan* and lastly as the fourth category is services

through money transfer, bill collections and trade in foreign currencies based on commission or charges.

Like any conventional bank, an Islamic bank is a financial intermediary and trustee of people's money with the difference that the Islamic banks reject the receipt and payment of *riba* (interest) on any of its operations. What distinguishes an Islamic bank from a conventional one is that the Islamic bank keeps in view certain social objectives intended for the benefit of society. The Islamic bank aims at ensuring social justice and human welfare through forbidding all forms of economic activities

2.4 Evolution of Islamic Banking

The development process of Islamic finance can be traced back to the era of Prophet Muhammad [PBUH] and even before such time among the inhabitants of the middle east and Arabian peninsula there existed trade and business partnership, these communities practiced and followed certain customary practices and traditions, some of which did not have any conflict with the principles of Islam. With the introduction of Islam some of the practice where found to be in conflict with the teachings and principles of Islam and were therefore ratified and re-evaluated such ratifications therefore paved way for the codification and formalization of traditional trade and business practices into a formal legal system of standardized contracts which is with the Shariah. During the area of Prophet Muhammad [PBUH], the doctrine of financial operations was derived directly

from the Holy Quran and the Sunnah of the Prophet [SAW]. The Shariah specifies among others rule that relate to the allocation of resources property right production and consumption and the distribution of income and wealth. Since then Shariah has coordinated all finance transactions between Muslims and there has been a continuing process of mutual adjustment between Shariah and the actual financial practices of Muslim societies[16].

During the prophet's lifetime, Islamic method of finance often drew upon examples from the Prophet's experiences there are any sayings about the Prophet buying on credits taking financing giving his personal property as security or lien taking part in *Mudarabah* contract. The prophet even made it permissible for people to use sale on credit [Bay al Salam][17]. Qard Hassan was also encourage during the time of the prophet.[18] After the prophet's death and with the spread of Islam to non-Arab world, they brought with them their religion, culture, trade and commerce and all other business practice, cultures and customs practiced in the non-Arab world with accepted Islam had to conform with the tenets of Islam[19].

The growth of modern Islamic banking can be attributed to three factors.

First, the rise of oil prices after 1974 has seen a number of Arab and Muslim income, economic activity and greater investment. The oil resource of 1970s

[16]Dusuki, A. W. Islamic Financial System: Principles and Operations, ISRA, Kuala Lampr, Malaysisa, 2012 pg 12
[17] A form of Financing which provides the producer with funds that can be used for working capital in production including payment of labouor and the purchse of raw materials
[18]QardHasan means benevolence loans
[19]Dusuki A>W Opcit p. 13

offered strong incentives for Muslims. Secondly, devout Muslims would not want to put their money into a financial system that was not based on Islamic principles, and hence become dissatisfied with the rigid requirement of western commercial banks and the banks' view of interest earning activities. Thirdly, in countries that began to gain freedom from years of colonialism and urbanization, the belief grew that the best response for both individual communities was to rediscover Islamic values and traditions of modern Islamic banking.

Islamic banking was introduced in the early stages by purely private individual initiatives. The centuries-old practice of finance in Islamic form was largely eclipsed during the European colonial empires, when almost the entire Islamic world came under the rule of western powers. Most of the countries adopted western banking systems and business models and abandoned Islamic commercial practices. Thus, the modern period of Islamic finance traces its beginning to the independence of Muslim countries after World War II.[20]

The first attempt in Islamic finance can be traced to Malaysia and Egypt in the early 1960s. The first institution that was involved in Islamic finance in Malaysia was the Pilgrims' Savings Corporation set up in 1963, to help people to save on a regular basis to pay for their pilgrimage to Mecca. In 1969, this corporation evolved into the Pilgrims' Management and Fund Board (PMFB) The PMFB

[20] Ibid

however provided the main impetus for establishing Bank Islam Malaysia Berhab (BIMB), which represents a full-pledged Islamic Commercial Bank in Malaysia[21].

The first Islamic bank to be established, the Mit-Ghamr Savings Bank Project, was established in the Nile Delta of Egypt[22]. Its main purpose was to induce lower income farmers and agricultural workers o save and to mobilize their earnings for developmental investment. The bank project failed due to lack of resources, government and staff support but has paved way as a model for modern Islamic Banking. The bank was very popular and its experiment led to the creation of other Islamic Banks in Egypt and other Muslim countries. It equally helped set guidelines generally and came up with new terminologies that helped future Islamic banks and raised the hope that Islamic banks can be competitive and profitable[23].

In early 1970s, a meeting of the foreign ministers of Islamic countries was held in Jeddah to discuss Islamic Banking. As a result, the Nasser Social Bank of Egypt was created in 1972. The Nasser Social Bank operated under the strict Islamic principles and by 1979 it had twenty (25) branches throughout Egypt. In 1972, the foreign ministers of Islamic states met in Jeddah where a special committee was formed to prepare the Islamic agreement and subsequently, in 1973 and 1974, the articles of an Intergovernmental Financial Agency were approved and the Islamic

[21] Ibid
[22] It is popularly known as LenbagaTabung Haji which was established in 1962. It has been activity as a development financial institution that interest the savings of would be pilgrims in accordance with should but its role was rather limited, as is not a bank Dusuki Aw Opcit p 114.
[23]Dusuki p 114

Developmental Bank (IDB) was formed. The hosts of the bank was initially Egypt and Pakistan, subsequently Libya, Saudi Arabia, Libya and UAE joined as Egypt and Pakistan were relatively poor countries[24].

Between 1970-1980, several Islamic banks were established which include the Dubai Islamic Bank, established March 1975; the Faisal Islamic bank in Cairo was formed in 1977; the Bahran Islamic bank in 1978; the Jordan Islam Bank for Finance and Investment in 1978 and many others which operate Islamic business practices and services[25].

In 1980, there was another important development the whole financial system of Iran, Sudan and Pakistan was restricted to accord with Islamic percepts also, two group of companies; Dar al mal al Islam in Bahamas and Al Baraka group in Saudi Arabia established in 1981 and 1982 respectively[26].

During the 1990s, the Islamic banking model was further developed and refined the liabilities side saw frameworks put in place for handing trust funds, venture capitals and financial papers based on *Ijara* [leasing], *Salam* [forward] and *Murabahah* [markup]. The special techniques for launching Shariah compatible bonds and mutual funds were also developed in this period. This involved

[24] Ibid
[25] www.Islamic Assignment Assignmentpoint.com Last visited 20/03/2017
[26] Ww.albaraka.com

arrangement where Islamic Bank's shares and other product could be traded in a stock exchange which led to the development of the Islamic capital market[27].

The Islamic banking business has been developing and now has been estimated to more than half of 1.3 billion to 1.5 billion Muslims worldwide deposited their money in Islamic commercial banks. Its main purpose was to induce lower income farmers and agricultural workers to save and to mobilize their earring for development investment the bank project field due to lack of resources government and staff support but has paved the way as model for modern Islamic banking the bank was very poplar and its experiment led to the creation of other Islamic banks in Egypt and other Muslim countries[28].

2.5 Historical Development of Islamic Banking in Nigeria

In the late 1980s a number of conferences and seminars were organized by University based Islamic centers and various Islamic groups to create awareness among Nigerians particularly Muslims on the evils of interest and sensitize Nigerians on the need to adopt interest-free banking along-side interest-based banking, consistently such fora had tried to make the government see reason why Muslim should be given the opportunity to conduct their financial activities in line with the provisions of Shariah framework, the effort result in publication of

[27]Siddiqi, M. N. (2009). Banking Without Interest (United Kingdom: The Islamic Foundation.)
[28] Ibid pg 11

Islamic Banking reading material in form of textbooks, books of reading, conference proceedings leaflets and pamphlets[29].

The year 1991 was a new dawn for Islamic banking in Nigeria .The then military administration headed by General Ibrahim Badamasi Babangida issued a decree now an Act titled "Bank and Other Financial Institution [BOFI]". The BOFI was seen as the first singular effort by the Central Bank of Nigeria to recognize and facilitate the emergence of Islamic banking in Nigeria. Under the heading 'general and supplementary', section 39[1] provides:

> Except with the written consent of the governor no bank shall as from the commencement of this decree be registered or incorporated with a name which includes 'national', 'Nigeria', 'reserve', 'state', 'Christian', 'Islamic', 'Muslim', 'Qur'anic', 'biblical.

Further under the heading 'display of interest rates' section 23[1] provides:

> Every bank shall display at its offices its lending and deposit interest rates and shall render to the bank information on such rates as may be specified from time to time by the bank provided that the provisions of this subsection shall not apply to profit and loss sharing banks

The two aforementioned sections of BOFI decree [as amended] were seen to have recognized Islamic banking in Nigeria and provided the necessary legal framework for the establishment of Profit and Lost Sharing (PLS) banks. And it is based on these provisions two banks were licensed in 1992 to carryout banking

[29]Nasiru, A. A. and Mansur, I. (2015).Principles and Practice of Islamic Banking. Benchmark Publishers Limited, Kano, Nigeria,

business based on PLS but none commence operation in the late 1990s. In early 2000s, Habib Bank Nigeria Limited created as Islamic banking window for provision of Shariah complaint financial products based on the provisions of these sections and enjoyed a lot of patronage for a while United Bank for Africa [UBA] and Access Bank Plc on the other hand were reported to have attempted to introduce no-interest-no-COT product and on the other hand Standard Trust Bank was reported to have tried to create Islamic window between 2000 and 2003 but without success.

In addition to the efforts of deposit money banks [DMBs], a few microfinance banks especially in the north and south-west of the country had tried to blend some of their product to look like Shariah-complaint but without much success. In April 2003, a full pledge Islamic bank Jaiz International Bank was registered to carry out banking operations in line with Islamic Shariah. Although a lot has been done by various stakeholders to actualize Jaiz, the bank was able to meet up with CBN requirement in mid-2011 and is billed to commence operation in September 2011. Many reasons have been advanced as to why these successive efforts did not materialize. In the case of Jaiz Bank, it was believed that absence of regulatory framework for the application of Islamic banking in Nigeria was the main reason for the failure of these efforts.

Releasing the potentials of Islamic banking in Nigeria, CBN in March 2009 released a draft framework for the regulation and supervision of Non Interest

Banks (NIBS) in Nigeria. The draft, which attracted comments and observations from stakeholders for almost two years before a final document was released in January 2011, was seen as a proof of CBN's readiness to answer the clarion call of the teaming Muslim population particularly from the late 1980s to provide adequate legal and regulatory framework for Islamic banking to enable its proper takeoff. It also confirms the resolve of the apex bank to come to term with the reality of the global search for new financial architecture since the beginning of global financial crises in 2007 through 2008.

2.6 General Principles of Islamic Banking

Islamic banks in compliance with the welfare principle of Islam, offer facilities more or less the same as conventional banks. The practices and situations are not so different from conventional banking such as cost of funds are closely related to interest rates and guarantees are nearly as important in Islamic banks as they are in conventional bank, but all these are done in line with the basic fundamentals of Islamic banking which are profit and loss sharing between the contracting parties as well as very strongly, prohibition of riba. The basic Shariah principles and norms on the operation of Islamic banking generally include the avoidance of interest (riba), unjustifiable acquisition of wealth, prohibition of games of chance, and prohibition of uncertainty/risk. These principles are discussed below;

2.6.1 Prohibition of Interest (Riba)

Riba under Islamic jurisprudence stands for every increase not justified by return. Literally, *riba* means increase. It is also defined technically as an increase in one or two homogeneous equivalents being exchanged without this increase accompanied by return. It is the equivalent of interest or usury under Islamic jurisprudence.

Riba is clearly prohibited under Islamic law and therefore applies to Islamic banking and finance. The prohibition is seen in the holy Quranic verses and traditions of the prophet PBUH as follows:

(a) Qur'an

i. "Those who benefit from interest shall be raised like those who have been driven to madness by the touch of devil; this is because they say: 'trade is like interest' while Allah has permitted trade and forbidden interest. Hence, those who have received the admonition from their Lord and desist may have what has already passed, their case being entrusted to Allah; but those who revert shall be the inhabitants of the fire and abide therein forever[30]."

ii. Allah deprives interest of all blessing but blesses charity; He loves not the ungrateful sinner.[31]"

[30] Qur'an
[31] Qur'an 2:276

iii. "Oh believers fear Allah and give up interest that remains outstanding if you are believers[32]"

iv. "If the debtor is in difficulty, let him have respite until it is easier, but if you forgo out if charity, it is better for you if you realized"

v. "And fear the day when you shall be returned to the lord and every soul shall be paid in full what it has earned and no one shall be wronged[33]"

Base on the above verses, one will clearly seen that *riba* of any form is strongly prohibited under Islamic law. Also in Sunnah, some hadiths discuss riba and its implications:

(b) Hadith

i. From Jabir who reported that, the Prophet said that Allah curse the receiver and payer of interest [*riba*] the one who records it and the two witnesses to the transaction and said "they are all alike[34]."

ii. From Abu Hurairah which reported that the Prophet [peace be upon him] said, Allah would be justified in allowing four person to enter paradise or to test its blessings; he who drinks habitually, he who takes riba, he who usurps an orphan's property without right and he who is undutiful to his parent.

iii. Jafar ibn Abdallah said that on the Prophet farewell pilgrimage the Prophet [peace be upon him] addressed the people and said,

[32] Qur'an 2:277
[33] Qur'an 2:278
[34] Imam Abdallah Ahamad Ibn Qudamaah al-maqisi, Al-Mughni: Sharh al-Kabir, King

> "All the riba *jahiliyya* is annulled. The first *riba* that I annul is that riba accruing to Abbas ibn Abdulmutallab; it is being cancelled completely"

iv. From Anasibn Malik the prophet [peace be upon him] said; "when one of you grants a loan and the borrower offer him a dish , he should not accept it, and if the borrower offers a ride, he should not ride, unless the two of them have been previously accustomed to exchanging such favours mutually"

v. Abu Hurairah reported that the prophet [peace be upon him] said; "Gold is to be paid by gold are of equal weight, like for like. Silver is to be paid for silver, both are of equal weight, like for like. If anyone gives more or asks more its riba."

Riba has been classified into two;

(i) *Riba al-nasiah* (interest on debt) - This is where the increase or growth is due to postponement. It is specified in the beginning of the transaction or maturity of the debt. It is understood to mean a premium that must be paid by the borrower to the lender along with the principal amount as a condition for the loan or for an extension or surplus over and above the principal in loan transaction. The practice of riba al-nasiah was among the prevalent practices of Arabs of Jahiliyyah period.

(ii) *Riba al-fadl* (Interest in Trade and Commerce) - It relates to trade and commercial transactions on exchange of commodities and spot transactions involving cash payments in one hand and immediate delivery of the commodity

on the other hand. It means an increase in the counter value of an exchange commodity or delay in delivery of the exchanged commodity in spot transactions.

Rationale behind the Prohibition of Riba

The wisdom behind forbidding usury can be traced to customs of the early Muslim society which was rooted in social justice whereby there was exploitation of the poorer and the weaker by the greedy merchants and money lenders. Also, money in Islam was considered as having no intrinsic value because currency should be a medium of exchange and not a means of making it merely off the use of the money. And there should be a reward for efforts only.

Riba is prohibited because interest taking fosters the accumulation of wealth that is not the product of work or ones sweat. Interest which is seen as a predetermined cost of production tends to prevent full employment. It is contended that international monetary crises are largely due to the institution of interest. Riba also adversely affect the production in the sense that investments, which provides goods and services needed by the society are subjected to risks inherent in investments. Interest is also one of the factors that lead to depression of the economy and stagflation.

Similarly, interest has the tendency of causing social and political unrests as it affects production and income negatively, creates wide gap between the rich and the poor, inflation and prevents the execution of critical social welfare projects by

the government. The loans taken by Nigeria from the world credit institutions can aptly be used to illustrate the argument.

2.6.2 Prohibition of Uncertainty (Gharar)

Another ethical requirement and principle governing operation of transactions of Islamic bank is the avoidance of transactions which are characterized with uncertainties (gharar). Gharar literally means risk, uncertainty or hazard. Technically, it implies uncertainty and deceit. It is also defined as any element of absolute or excessive uncertainty in the subject matter or price in a contract or business, its price, or mere speculative risks.

In jurisprudential literature, gharar has been variously divided and defined. First, gharar applies exclusively to cases of doubtfulness or uncertainty as the case of not knowing whether something will take place or not therefore, according to Ibn Abidin, gharar is an uncertainty over the existence of the subject matter of sale. Secondly, according to ibn hazm, gharar in sales occurs when the purchaser does not know what he has bought and the seller does not know what he has sold therefore it is the uncertainty of the unknown and the view is adopted by the Zahiri School. Thirdly, gharar here covers both the unknown and the doubtful i.e. it is the combination of the first and the second view and it is proposed by Al-Sarakhsi. It

states that gharar obtains where consequences of a contract are not known and it is the most favoured by the jurists[35].

Gharar is classified into two, namely; ghararyasir (minor gharar) and ghararfahish (major gharar). Minor gharar is that gharar which is not sufficient to invalidate an investment while a major gharar is disallowed because it will lead to dispute and it involves ontological possibilities on the existence or non-existence of the thing being contracted.

Gharar is clearly prohibited in business transactions in Islam and this can be seen in the Quranic verses and prophetic traditions as follows:

Quran

(i) 'He has enjoined you that you use full measure and a just balance. We charge every person only a much responsibility as he can bear[36].'

(ii) 'Woe to those who deal in fraud, who when they measure from others take it fully, and when they measure or weigh for them give less than what is due[37].'

(iii) 'Oh my people! Give just measure and weight, nor withhold from the people the things that are their due. Commit not evil in the land with intent to do mischief that which is left for you if you are believers[38].'

[35]Muna waiIqhal &PhilpMolynevepg 13
[36] Qur'an 6:152
[37] Qur'an 83: 1-3
[38] Qur'an 11: 85-86

Hadith

(i) The Prophet (PBUH) passed by a man who was selling grain. He asked him "How are you selling it?" The man then informed him. The prophet (PBUH) then put his hand in the heap of grain and found it was wet inside. He then said, "He who deceives other people is not one of us."

(ii) The Prophet {PBUH} said, "When you enter into a transaction say, 'there should be no attempt to deceive."

2.6.3 Prohibition of Maysir (Gambling and Speculation) - Islam prohibits all kinds of gambling and games of chance. This is seen in the legal sources of shariah i.e. Quran and the hadith as follows:

- "O you who believe! Intoxicants (all kinds of alcoholic drinks), and gambling, and ansab (animals that are sacrificed in the name of idols on their altars) and al azlam (arrows thrown for seeking luck or decision) are an abomination of satan's handiwork. So avoid that abomination in order that you may be successful[39]"
- "They ask thee concerning wine and gambling. Say, 'in them is great sin and some benefits for people; but the sin is greater than the benefits"
- Abu hurairah (Allah be pleased with him) narrated that the Messenger of Allah (PBUH) SAID: 'whosoever says to another: come lets gamble should give in charity (as a form of expiation for intending to gamble)

[39] Qur'an 3:90

Maysir and Qimar are involved in a number of conventional financial transactions and bank schemes or products which Islamic banks have to avoid. Insurance by conventional banks is not shariah complaint due to the fact that riba and maysir are involved therein. Private and public sector corporations and also the government mobilize lottery and draws, which comes under the banner of gambling and are equally prohibited. This is so because they are purely based on luck and it is what maysir entails, therefore Islamic banks cannot launch any of such schemes or products which are apparently based on such.

2.6.4 **Unjustifiable Acquisition of Wealth-** it is the goal of Islamic law to eradicate all forms of deceit and falsehood and also all types of illegal and defective elements in commercial transactions through which one of the parties to the contract is been exploited. The holy Quran clearly states such prohibition in the following verse.

> "Oh you, who believe, do not eat your properties among yourselves in vanities. But let there be among you trade by mutual consent[40]"

2.7 Conclusion

Islamic banking system which is also known as interest free banking is based on Islamic jurisprudence. Its practices started from early 70s and started in Nigeria by way of public sensitization in 1980 through seminars, conferences and symposia and up to 2011 when successfully CBN granted license to Jaiz Bank Plc as the

[40] Qur'an 4:29

first full-fledged Islamic bank to practice Islamic banking which till today is smoothly operating and has gained global acceptance worldwide. Islamic banks only answer their name by sticking to the principles of shariah, while offering their banking services and products to the public. Islamic banks must therefore ensure that there is justice and fair play between price and counter value so as to completely avoid interest.

CHAPTER THREE

MUSHARAKAH MUTANAQISAH (DIMINISHING PARTNERSHIP)

3.1 Introduction

Islamic Banking is by nature a profit and loss sharing (PLS) venture. The PLS system is an old form of financing which was legitimized as a finance technique and it is considered by Muslim scholars to be the most authentic and most promising form of Islamic contracts. Islam as a religion of justice for all prohibits both the charging and payment of interest and promotes the concept of participation in transaction thereby utilizing the funds at risk on a profit and loss sharing basis as is the case in *sharikah* or *Musharaka Musharaka* known as equity partnership is a financial instrument which is based on the system of PLS where two or more persons or entities jointly own property or own it by virtue of inheritance or gift or any legitimate transaction and agreed to use it to generate surplus money enjoying similar rights and liabilities in it, according to some agreed formula depending on the equity ratio of participation in profit and loss. It is an accredited mode of financing which is based on equity participation and commonly referred to as *sharikah* or joint venture. In modern times, the principles of sharikah/*Musharaka*h are being extended to cover *Musharakah Mutanaqisah* which is used to finance construction and housing acquisition.

This Chapter discusses on the principle of *Sharikah*, its legality, classification, etc. and most importantly the concept of Diminishing *Musharakah* and its application by Islamic banks with particular emphasis on Jaiz Bank Plc.

3.2 Meaning and Nature of Sharikah

Sharikah is derived from the Arabic word "*shirkah*" which means sharing. It means contract of partnership itself because it causes people to associate by mixing of their shares resources. Literally, it signifies the conjunction of two or more estates in such a manner that one is not distinguishable from the other. Jurisprudentially, it signifies the union of two or more persons in one concern which is of two kinds[41].

Technically, *sharikah* is an umbrella financial structure of financing that encompasses not only partnership in the ordinary sense but other partnership arrangements like *mudaraba* where one party, a financier (*rabb-al-mal),* entrusts his money or capital to another party (*mudarib*) who is akin to a fund manager and whose contribution in the partnership is the provision of skill, managerial expertise or the necessary experience to run a particular venture[42]. In another definition, sharikah means participation of two or more persons in a certain business with defined amount of capital according to a contract for jointly carrying out a business and for sharing of profit and loss in specified proportions.

[41]Nasir A. A. and Mansur, I. (2015).Principles and Practice of Islamic Banking. Benchmark Publishers Limited, Kano, Nigeria.
[42]Ibid pg 39

3.3 Legal Basis of Sharikah

The legality of *sharikah* is firmly established in the Holy Quran, prophetic tradition and *ijma* (consensus among learned scholars). In the following, we shall view the holy Quran and the hadith text which refer to *sharikah* as well as what the Muslim scholars unanimously agree upon.

3.3.1 Legality of Sharikah in the Holy Quran.

There are many verses of the Holy Quran which makes inference to sharikah, some of them are the followings:

> "They ask you concerning orphans; the best thing to do is for their good, if you mix their affairs with yours, they are your brothers"[43]

While emphasizing the above verse, Ibn Kathir says, 'if you mix their affairs with yours they are your brothers', that is if you mix your food with theirs and you drink with theirs. There is no blame on you as they are your brothers in religion.[44]

Al Qurtubi says, if you mix their affairs with yours they are your brothers, the kind of mixing is like the mixing of equal for example mixing date fruit with date fruits.[45]

Al Tabari says, if you mix your affairs thus mixing your capitals with theirs for the purpose of developing their capital, they are your brothers. Brothers help one

[43]Quran 2;20
[44]IbnKathir, Tafsir A-Quran Al-Azim Vol1 chapter 257
[45] Al- Qurtabi, Al Jami' li ahkam Al-Quran, vol 3 chapter 65

another, the wealthy will have the indigent and the healthy helps the weak. Allah says in effect that you believers and your orphans are likewise in behavior if you mix your affairs with theirs. This is lawful unto you as you are brothers unto one another.[46]

Sayyid Qutb says, 'if you mix your affairs with yours, they are your brothers'. Some administrators of wills use to mix the orphans food with theirs and orphans wealth with theirs to trade in the combine capital. The orphans will however, get a raw deal. Verses were revealed warning against eating the wealth of orphans some pious people took it to heart and separated the food of orphans from theirs.[47]

Al Sabuni says, if you mix their wealth with yours for their own good, you may do so in terms of brotherhood in religion and brotherhood base on religion is even stronger than one based on sanguinity.[48]

Al Tabataba'I says, what the verse allows in guardian makes his wealth with that of the orphans should be like the mixing among brothers, equal in social right before people.[49]

We see that by the commentators of the Holy Quran, the verse points to the literal meaning of sharikah that is mixing and sharing. It urges and encourages guardians to mix their wealth with the orphans under their guardianship. That is because

[46]Attabari, Jami' Al Bayan, vol 2;chapter 372
[47]Sayyidqutb, fi zlal Al-Quran,3;65
[48]Assabuni, Safwat At-Tafsir, 1;144
[49]Al Tabatabai, Al-mizan Fi Tafsir Al Quran, 2;206

before the relation of the verse guardians used to mix their wealth with that of the orphan for the purpose of trade etc. and but at the disadvantage of the orphans it was against such injustice that the verse was revealed to urge them to mix and share with orphans as equals and brothers in religion. The permission to mix wealth and develop it through is evidence of the legality of sharikah.

Related to issue, another verse of the Holy Qur'an reads:

'*But if more than that they share in a third*'[50]

All the Qur'anic exegesis consulted agreed that this verse explained the ways 'uterine', i.e., siblings from the same mother, share their inheritance if the mother have more than a child whether male, female or a combination of both. Sharikah or the partnership among uterines referred to in the verse is equivalent to the literal meaning of mixing and sharing. Al Azhari, a philologist, says: ishtarknawatasharakna {we shared} in such and such shariktahu {I shared with him} in trade and inheritance.

The reason for shearing among uterines is the inheritance. The technical meaning of sharikah, that is a joint of common right, also applies here. The uterines here share the right in one third of the estate. Thus the verse gives more proof to the legality of sharikah.

The Holy Qur'an similarly uses the word Sharikah in the following verses:

[50]Holy Quran Q 4;12

'they say, what is in the wombs of such and such cattle is special reserved for [food] for our men and forbidden for our women; but if it stillborn, then all have shares therein"[51]

"And arouse those whom you can among them, with your [seductive] voice; make assaults on them with your cavalry and your infantry mutually share with them wealth and children".[52]

"And make him share my task"[53]

In another passage, the Qur'an praises partners in business who are sincere to each other:

> *'Truly many are the partners {in business} who wrong each other, not so are those who believe and practice righteousness, and how few are they!'*[54]

Commentators (IbnKathir, Al-Qurtabi and so on) explain that the meaning of al – khulata in the verse means al shuraka; that is, partners.

We see that the words 'many are the partners [in business] who wrong each other each other expresses a general rule, meaning that the partners could have a joint right like that of inheritance by a number of heirs or partners to a joint business based on a contract between two or more people. Any partner can be wronged by other[s].

[51]Holy Quran 6;139
[52]Holy Quran 17;64
[53]Holy Quran20;32
[54]Holy Quran 38;24

In a relevant verse, the Holy Qur'an uses a parable to show that a slave man can belong to two masters who give him conflicting instructions. The relevant verse provides:

> *"Allah puts forth a parable –A man belonging to many partners at variance with each other, and a man belonging entirely to one master: are those two equal in comparison?"* [55]

Roshash strongly submits that the above verses and their commentaries by renowned commentators of the Holy Qur'an provide the legal basis of Sharikah under the Islamic Jurisprudence.[56]

3.3.2 The legality of Sharikah in the Prophetic Traditions

There are equally traditions narrated from the prophet [SAW] establishing the legality of sharikah.

Abu Huraira reports the Prophet [SAW] as saying:

> *Allah [SWT] says:*
>
> *"I am the third of any two partners as long as one does not betray the other; if they do, I get out of their partnership."*[57]

In another version Hadith As Sa-ib said: I came to the Prophet [SAW] and the companions of the Prophet [SAW] kept passing and thanking me, and the Prophet

[55]Holy Quran 39;29
[56]Roshash, M.A. (2005). Islamic Company Law: A Comparative Analysis. Pharos Media and Publising Pvt. Ltd New Delhi
[57]Quoted by Roshash, M.A.A op.cit.pp.27-28

[SAW] said: I know him best. I said: you told the truth, you were my sharik, partner in business the best partner were you never cheated or betrayed.[58]

3.3.3 Ijma [Consensus of the Scholars]

As Sharikah has been recognized by the Qur'an and Hadith, Muslim scholars of all times have unanimously upheld its validity under the Shariah[59].

3.4 Classification of Sharikah

Sharikah, in the sense of owning property jointly by two or more persons, is broadly divided into Sharikatal Mulk (Joint ownership of a property) and Sharikatulaqd (partnership through the mutual agreement by the partners). According to Roshash, this classification has been accepted by all the four schools of law.[60]

3.4.1 Sharikat al Mulk [Partnership in Ownership]

The basic element of sharikatulmulk is the mixing of ownership, either mandatory or by choice. Two or more people are joint owners of one thing. It is further sub divided into two categories: optional and compulsive. Optional partnership by ownership is explained in the words: "where two persons make a joint purchase of one specific article or where it is presented to them as a gift, and they accept of it or where it is left to them, jointly, by bequest and they accept of it". Basically, it is

[58]Narrated by Abu Daud and IbnMajah and quoted by Roshash, M.A.A.op.cit.p.28
[59] Usmani, N.M. &Abdallah.M.F (2010).MusharakahMutanqisah Home Financing: A Review of Literatures and Practices of Islamic Banks in Malaysia, Internal Review of Business Research Papers Volume 65 Number 2
[60]Roshash, M.A.A.op.cit.p.29

not for sharing of profit. The co-owners may use the property jointly of individually. Compulsive partnership is where the capital of goods of two people becomes united without their act and it is difficult or impossible to distinguish between them, or where two people inherit one property.

In other forms of partnership, a partner is treated as an agent to the other partner's share. But in partnership by ownership, partners {co-owners} are not agents of each other: here a partner is a stranger and in the absence of the other partner he has no right to use the absent partners property, nor can he be responsible for a liability arising out of the latter's share. He cannot use even his own share if it is detrimental to the interest of the other partners share. It is however, lawful for one partner to sell his share to the other partner, and he may also sell his shares to others without his partners consent, except only in cases of association or a mixture of property. For in both this instances, one partner cannot lawfully sell the share of the other to the third person without his partner's permission. If joint property is use by one partner, the owner may demand rental for his part of the property from the benefiting partner. The distribution of the revenue of sharikatulmulk is always subject to the proportion of ownership.[61]

3.4.2 Sharikat-al Aqd [Partnership Based on Contract]

Sharikatal'aqd is a partnership through contract otherwise called business or commercial partnership.

[61]Ayub, M. (2007).Understanding Islamic Finance, West Sussex, John Wiley and Sons Limited.opcit p.311

It is also referred to as contractual partnership in the works of classical jurist. It includes all types of partnership association where the partners mutually agreed to come together for the purpose of carrying out joint business activities in order to jointly share the gains from such association. Sharikat al Aqd includes mudarabah or qirad [partnership where one party provides the funds while the others provides expertise and management for conducting a business], muzarah [share cropping: a partnership contract in which one person agrees to till the land of another person in return for a part of the produce of the land] and musaqah [a partnership contract in which the owner of garden shares it produce with another person in return for his services irrigating the garden], they all fall under the broad form of Sharikat al aqd.

3.6 Shariah Principles of *Musharakah Mutanaqisah*

The term *Musharakah Mutanaqisah* is not found in the classical Islamic jurisprudence *(Fiqh).* It has been developed by modern jurists in order to meet the needs of contemporary Islamic finance[62]. *Musharakah Mutanaquisah* has been fundamentally evolved from the basic principles and rules governing the normal Sharikah/*Musharaka*h contact. In that case, all the rules governing normal *Musharakah Mutanaqisah* are primarily applicable to *Musharakah Mutanaisah*[63]

[62]Nasir A. A. and Mansur, I. (2015).Principles and Practice of Islamic Banking. Benchmark Publishers Limited, Kano, Nigeria.
[63] Ibid pg 50

Most of the Islamic jurists agreed upon the permissibility of *Musharakah Mutanaqisah.* The majority ruled that it is permissible and Shariah compliant. As stated in the Quran;

> *'If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister. Each one of the two gets a sixth; but if more than two, they get share in a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus it is ordained by Allah. Allah is All-knowing, Most Forbearing.'*[64]

The above verse describes the partnership of the property. If a person dies without leaving behind any ascendants or descendants; but he has brothers and sisters more than two in number; then they will share a third of the property of the mortal. So, based on this verse the partnership of the property is legal in the shariah.

It is generally agreed by Muslim scholars on the validity of the combination of sale contract with lease contract and also there is no text which clearly prohibits the *Musharakah Mutanaqisah*. It should therefore be highly encouraged considering its benefits to public interest and importance to investment. The International Fiqh Academy of Organization of Islamic Conference (OIC) in its 15th session made a resolution that *Musharakah Mutanaqisah* is a valid contract in the shariah. Besides, the Shariah Advisory Council of Bank Negara Malaysia in its 56th meeting decided that *Musharakah Mutanaqisah* is a recognized contract in shariah and the current practice of the contract is permissible as well.[65]

[64]Holy Quran 4;12
[65]Ahmad, N.A and Idris, M. op.cit p.51

There are some principles and guidelines laid down by scholars that are needed to be observed in *Musharakah Mutanaqisah* and they are as follows;

a. The goods must be present. So, the property which is not present or on loan is not allowed for having a transaction.
b. The proportion of the profit must be specified and the profit will be in proportion not by amount of money.
c. Both the financier and the client must share the profit and loss of the property.
d. The Shariah advisory board must have the right to monitor the contract.
e. The contract of partnership and the contract of sale should be done separately, and not collectively.
f. A binding promise can be taken from one partner to purchase the share of the other partner gradually. [66]

3.7 Diminishing *Musharaka*h as an Islamic Mode of Financing

Islamic Banks use Diminishing *Musharaka*h for the purpose of financing fixed assets. This includes house financing, auto financing, plant and machinery financing, factory/building financing and all other fixed assets financing. Muslim scholars required that three contracts are entered separately, and that each contract is independent of the other two contracts.[67] The sequencing of the contracts should be:

[66] Abdallah, I., An Appraisal of the Applicaton of the Principles of Diminishing Musharakah n Islamic Banking System,2013, p.38
[67] Ayub. M., opcit p.339

a. A contract between partners to create a joint ownership, the client partner makes a promise before or after the lease agreement is finalized, to purchase the share of the financier partner;[68]
b. The financing partner gives units of his share to the client on lease;[69]
c. The client partner goes on purchasing the units of the ownership of the financing partner as per his promise accordingly, the rent goes on decreasing[70].

Financing by an Islamic bank on the basis of Diminishing *Musharaka*h can take different forms depending upon the assets involved. Some assets can be leased out e.g. in the case of house financing and financing the purchase of plant and machinery. Assets of a commercial nature such as in trading would not involve leasing.

3.8 House or real estate financing on the basis of diminishing *Musharaka*h

Where the principles of *Musharakah Mutanaqisah* are involved in Islamic Banking Products in housing or real estate financing, the following steps must be taken:

a. Creating joint ownership in the property (shirkat-al-mulk)
b. Giving the share of the financier to the client on rent
c. Promise from the client to purchase the units of share of the financier
d. Actual purchase of the units at different stages

[68] Ayub, M. Opcit p.313
[69] Ibid
[70] Ibid

e. Adjustment of the rental according to the remaining share of the financier in the property.

f. When the client pays for all the rents and units of the share of the financier (in the joint property), the property becomes his own alone.[71]

These steps are briefly explained below.

a) The first step is to create a joint ownership in the property. It has already been explained that sharikat al mulk can come into existence in different ways including joint purchase by the parties[72]. This has been expressly allowed by all the schools of Islamic Jurisprudence. Therefore no objection can be raised against creating this joint ownership.

b) The second part of the arrangement is that the financier leases his share in the property to his client and charges rent from him. This arrangement is also above board because there is no difference of opinion among the Muslim jurists in the permissibility of leasing one's undivided share in a property to his partner.

c) The third step in the aforesaid arrangement is that the client purchases different units of the undivided share of the financier. This transaction is also allowed. If the undivided share relates to both land and building, the sale of both is allowed according to all the Islamic schools[73]. Similarly if the undivided share

[71]Ayub, M., opcit p.339
[72]Dogarawa, A. B. (2012). The Historical Development of Islamic Banking and the Nigeria Experience, in Karwai, S.A. Jibril, B.T. Habib, A.G (eds0. Islamic Economics: A book of Readings IIIT, Kano
[73]El-Gamal, M.A. (2006) Islamic finance, Law, Economics and practice (New York: Cambridge University press)

of the building is intended to be sold to the partner, it is also allowed unanimously by the entire Muslim jurist. However, there is a difference of opinion if it is sold to the third party. It is clear from the foregoing points that each one of the transactions mentioned herein above is allowed per se, but the question is whether this transaction may be combined in a single arrangement. The answer is that if all these transactions have been combined by making each one of them a condition to the other, then this is not allowed in shari'ah, because it is a well settled rule in Islamic legal system that one transaction cannot be made a precondition for another. However, the proposed scheme suggest that instead of making two transactions conditional to each other, there should be one sided promise from the client, firstly, to take share of the financier on lease and pay the agreed rent, and secondly, to purchase different unit of the share of the financier of the house at different stages.

d) When the client pays for all the units of shares of the financier in the property he becomes the sole owner of such property.

On the basis of the analysis, diminishing *Musharaka*h may be used for house financing with the following conditions:

i. The agreement of joint purchase, leasing and selling different units of the share of the financier should not be tied-up together in one single contract. However, the joint purchase and the contract of lease may be joined in one document whereby the financier agrees to lease his share, after joint

purchase, to the client. This is allowed because, as explained in this chapter, Ijarah can be effected for a future date. At the same time, the client may sign one-sided promise to purchase different units of the share of the financier periodically and the financier may undertake that when the client will purchase a unit of his share, the rent of the remaining units will be reduced accordingly.

ii. At the time of the purchase of each unit, sale must be effected by the exchange of offer and acceptance at that particular date.

iii. It will be preferable that the purchase of different units by the client is effected on the basis of the market value of the property as prevalent on the date of purchase of that unit, but it is also permissible that a particular price is agreed in the promise of purchase signed by the client.

Ahmad and Idris[74] have simplified on the steps to be followed for a customer of Islamic Bank to acquire house through *Musharakah Mutanaqisah* housing financing product. The steps are as follows:

A. **Steps one -** The customer identifies the house that he/she wants to purchase and signs a Sale and Purchase (S&P) agreement with the developer and pays a deposit. Then he approaches the bank for a financing facility, once it is approved the customer and the bank will enter into sharikatulmulk arrangement where the purpose of the co-ownership is to acquire a house. The initial deposit or down payment made by the customer at this stage will be his/her contribution towards

[74]Ahmad,N., and Idris, M., opcit pp.53-55

the *Musharakah Mutanaqisah* venture while the bank's contribution will equal the financing amount.

B. **Step two -** The Bank subsequently leases the acquired house to the customer through Ijarah contract. The Banks' share in the house is only let to the customer but the rental payments goes to the bank. This rental portion is similar to a financing profit which conventional banks earn.

C. **Step three -** The customer then promises (through the contract of Wa'ad) to be buying the units representing the bank's share in the house throughout the tenure of the lease, at the agreed time intervals from the bank. This is implemented by the customer paying additional amount in addition to the rental payment to purchase the bank's share in the house. The contract of bay takes place here. The share of the bank will be reduced by every purchase of the units by the customer. At the end of the tenure of the lease, the house will be wholly owned by the customer and the ownership title will be transferred to the customer and with this step, the contract of *Musharakah Mutanaqisah* will be terminated.

3.9 Legality of *Musharakah Mutanaqisah*

Shari'ah validity of general *Musharakah* contract can be found in the *Qur'an* (for example, see *an-Nisa'*: 12 and *Sa' d*: 23-4), the Prophet's *Sunnah* and consensus of Muslim scholars (*ijma'*). When it comes to the legality of the MM model, then we can say that it is fully in line with *Shari'ah*. It consists of several contracts,

namely *Musharakah* (partnership), *ijarah* (leasing) and *bay* (sale), whose validity is found in all sources of *Shari'ah*.

There is no disagreement even among the Muslim scholars on its permissibility. The only slight differences exist with regard to the conditions related to the MM and its implementation. It should be also noted that the MM has been discussed and agreed upon even during the first Islamic banking conference held in Dubai 23-25 of *Jumad Thani* 1399H/1979[75]. Furthermore, the International Fiqh Academy in its 15th meeting held in 'Amman from 6-11 March 2004 resolved that MM is permissible if it is practiced according to its actual parameter[76].

Musharakah Mutanaqisah (Diminishing Equity Partnership) is deemed as the solution for various issues such as[77]:

- Ownership issues under MM: Many times especially those regarding financing of properties under construction, the question of constructive ownership and physical ownership is being questioned for the sale validity. Issues where developers have not released the rights to a property during construction, and whether customers have the right to enter into a sale contract where there is no clear ownership of the asset is determined, are

[75]Abdallah, A.A. (1995), "Forms of investment in real estates in Islamic perspectives", in Mahdi, M.A. (Ed.), *Islamic Banking Modes for House Building Financing*, IRTI, Jeddah, pp. 43-53.
[76]Resolution No. 136 (2/15) (2004), OIC session-15, 'Amman, Majallah Majma' al-Fiqh al-Islami, j.1, Dar al-Bashir li al-Nashr wa al-Tawzi'Jeddah, 6-11 March.
[77]Smolo, E. (2007), "Utilizing *musha rakah mutanaqisah* partnership for micro and medium enterprises (MMEs)", *Enhancing Islamic Financial Services for Micro and Medium Sized Enterprises* (*MMEs*) *Proceedings of the First International Conference on Inclusive Islamic Financial Sector Development, Brunei*, Vol. 1, University Brunei Darussalam and IRTI, Brunei, pp. 289-316.

common arguments in the term-financing space. Or when the customer puts in a significant down-payment, questions are asked of who has the controlling rights on the property. With *Musharakah Mutanaqisah*, this was expected to be resolved.

- Issues surrounding inter conditionality is also seen to be resolved with *Musharakah Mutanaqisah*. This is because the down-payment paid by customer is now deemed as equity purchase (instead of purchase for ownership). No longer will there be an issue of Bai Inah, where the transactions will be a 2 party transaction i.e. Customer owning 10% of the property is selling this ownership to the Bank and re-purchasing it from the Bank -Bai Inah transaction.

3.10 Kind of Contract Agreement between the bank and the customer

It is important to note that in a co-operative agreement such as *Musharakah*, partners mingle their capitals and make it as one that is indistinguishable. All the partners in *Musharakah* can participate in managing funds, but if a partner does not want to take a part in management it is still a valid partnership[78]. This means that participating in management under *Musharakah* contract is not required. The same applies to the MM.

Regarding the PLS, partners must agree at the beginning of a partnership on an exact percentage (e.g. each share 40 and 60 per cent, respectively) of the profit

[78]Usmani, M.T. (2002), *An Introduction to Islamic Finance*, Kluwer Law International, The Hague.

that is due to each one of them. *Shari'ah* did not prescribe any specific percentage; rather it is up to the partners to agree on. It can be in equal proportions or in different ones. The only thing that *Shari'ah* does not allow is to prescribe a lump-sum amount of profit for any party involved in partnership or any percentage tied up with the capital[7980]. However, the partners are free to agree on any percentage of the profit to be allocated between them.

On the other hand, Muslim scholars are unanimous about the sharing of the loss incurred in *Musharakah*. In this case, they all agree that it must be according to the capital invested by each party involved. For example, if the financier's and the client's shares in *Musharakah* are in proportion 40:60 then the loss will be borne in that very same proportion, i.e. 40:60, respectively.

The MM or decreasing partnership represents a joint venture between the bank and the customer where they buy the house (or any other asset) together. Once acquired, the house is leased to the customer who pays the rent to the bank for using its shares in the house. Together with the rent, the customer will pay additional amount in order to redeem the shares of the financier. Consequently, the financier's shares will decrease while the customer's shares will increase until the house is fully owned by the customer. This mechanism entails three contracts – according to Usmani[81]. These contracts are:

[79]AAOIFI (2004), *Shari'a Standards*, Accounting and Auditing Organization for Islamic Financial Institutions, Bahrain.
[80]Usmani, M.T. (2002), *An Introduction to Islamic Finance*, Kluwer Law International, The Hague.
[81]Usmani, M.T. (1995), "Methods of house building financing according to *shari'ah*", in Mahdi, M.A. (Ed.), *Islamic Banking Modes for House Building Financing*, IRTI, Jeddah, pp. 61-74

1. Establishment of the joint venture;
2. Leasing the shares of financier to the customer; and
3. Selling the successive shares of the financier to the customer.

It is obvious from the above that MM financing technique consists of three parts, namely: *Musharakah* (partnership), *ijarah* (leasing) and *bay* (sale). All of these contracts are allowed by *Shari'ah* and consensus of the Ulama¯. However, some issues arise when it comes to combining of these three contracts under one. It is general agreement of the Muslim scholars that two contracts combined into one, where one of them is conditional for another, is not allowed by *Shari'ah*. Therefore, *Ulama* put forward several conditions for this mode of finance to be valid from *Shari'ah* point of view. These conditions can be summarized as follows: -

The agreement of joint purchase (*Musharakah*), leasing (*ijarah*) and selling (*bay*) the financier's shares in asset should not be combined in one single contract. However, there can be one document joining the joint purchase and the contract of leasing. In this document, the financier may agree to lease his shares to the customer after they jointly purchase the asset.

Whenever the purchase of new shares is taking place, it must be done through the exchange of offer and acceptance between the financier and the client at that particular time. Prices of the units of the financier's shares will be determined according to the market value at the time of sale/purchase. This is more preferable

– according to[82] . However, it is also permissible for the price to be agreed in the promise signed by the client.

Apart from the conditions put forward by Usmani, the following has been suggested by Bendjilali and Khan:

- There should be promise by the bank to put its shares on sale at specific future date.
- The purchase of the shares should not be binding on the customer.
- The prices to be determined at the time of sale[83] .

The only issue at question here is regarding the determination of the prices of the different units of the financier's shares. As stated above, Usmani[84] is of the opinion that these prices can be agreed in the promise signed by the client. However, Bendjilali and Khan[85] opine that it should be at the market value. This is also upheld by the[86] it says that to acquire the shares at their original or face value is not allowed to be stipulate (i.e. predetermined), since this would guarantee the value of the shares of one partner by the other partner and this is against *Shari'ah*[87]. Shaykh al-Darir is of the same opinion as stated earlier. Although the prices can be agreed in the promise signed by the client according to Usmani, he gives preference to the market determination of the price of the shares. Therefore,

[82] Ibid
[83]Bendjilali, B. and Khan, T. (1995), *Economics of Diminishing Musharakah*, IRTI, Jeddah.
[84]Usmani, M.T. (2002), *An Introduction to Islamic Finance*, Kluwer Law International, The Hague.
[85]Bendjilali, B. and Khan, T. (1995), *Economics of Diminishing Musharakah*, IRTI, Jeddah.
[86]AAOIFI (2004), *Shari'a Standards*, Accounting and Auditing Organization for Islamic Financial Institutions, Bahrain.
[87] Ibid

it can be concluded that the prices of shares should be determined through market forces.

3.11 Banks and Liabilities: Shared or Unified?

In my view, the structure of the product under *Musharakah Mutanaqisah* is not an equity-based structure; it is essentially still a debt-based structure. This researcher says this based on the following:

1. *Musharakah Mutanaqisah*, in the Malaysian context, is not an equity partnership arrangement, although some Banks would like to think so. A *Musharaka* structure where the equity is concerned, carries valuation risks where the equity is not principally guaranteed. In a *Musharaka*, if there is a valuation loss, the Bank and the customers share the losses. In *Musharakah Mutanaqisah*, this does not happen.
2. Why does the above do not happen? It is because the main contract of *Musharakah Mutanaqisah*h is not *Musharaka*, but Ijarah (Leasing) instead. This is the main operating contract, where the customer pays installment which consist of 2 elements i.e the rental for the right to use the usufruct (benefit) of the property, and purchase of "equity" from the Bank over a period of time (akin to principal payment in a Murabaha).
3. *Musharakah Mutanaqisah*h comes into the picture not as a transactional contract, but as an "arrangement" contract (for lack of better word). The "partnership" is to bind the main contract (Ijarah), with the various sub-

contract necessary to make the whole arrangement viable. To support the Ijarah contract with the intention of transferring equity to the customer over a period of time, the necessary sub-contracts may include the following (the sub-contracts used varies from Bank to Bank, structure to structure):

1. *Ijarah Mausufah Fi Dhimmah* (Forward Lease) or Istisna'a (Construction Sale) to support properties under construction or multiple disbursements
2. *Musharakah* (Partnership) with undertaking to purchase equity over of period of time
3. Wa'd (Promise) for the acceleration of equity purchase in the event of default, usually via Letter of Undertaking.
4. Service Wakalah (Agency) where the client undertakes to maintain and keep in good working order the asset under lease to protect its usufruct.

4. The use of "Letter of Undertaking" removes the valuation risks from the Bank and therefore converts the arrangement into a debt-financing arrangement. As such, the capital charge (and classification under the risk-weighted assets) revert to the familiar home debt financing weightage of 50%-100%, instead of the capital charge of 200% to 400% for a "pure-risk" *Musharaka* structure.

3.12 Conclusion

Musharakah Mutanaqisah, as we understood from the chapter, is a contract which is based on a diminishing concept and it is a combination of three contracts i.e.

*Musharaka*h, ijarah (lease), and bay' (sale). This concept is applied by different Islamic Banks to finance real estate especially house acquisition.

As a summary, a lot of hopes have been placed on *Musharakah Mutanaqisah* to be the next big thing in Islamic Banking. It has a lot of potential and can be further expanded to take even more calculated risks. With strong push from the regulators, this product can flourish even on the international market. But it has been quite a letdown in our haste to introduce the product, a lot of infrastructure and support from various parties have been lacking; resulting in many issues remaining unresolved. In the end, what we see now is an alternative working structure to the conventional housing loan product as we incorporated a lot of their features into the *Musharakah Mutanaqisah* product.

The end result, in its current form, is hardly an "equity-based" product, but instead a "debt-based financing" product, where the risks associated with a *Musharaka* is greatly mitigated, where the loss of equity has been prevented with the use of legal documents and deliberate structuring to reflect what you see in a conventional housing loan product.

CHAPTER FOUR

ACQUISITION OF TITLE IN LANDED PROPERTY THROUGH *MUSHARAKAH MUTANAQISAH*

4.1 Introduction

This chapter discusses what amounts to landed property, various land laws, procedure of land acquisition, perfection of titles in land and how all these affect the acquisition of titles to land through *Musharakah Mutanaqisah* Islamic banking procedure.

4.2 Meaning of Landed Property

The term "property" has diverse meanings, but it is generally regarded as an aggregate of rights belonging to a person which is guaranteed and protected. The word is commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal.[88] Property may mean the right of a person to something tangible and physical things, such as a parcel of land or real estate.

Property law is designed to regulate the relation of persons to property thereby providing a secure foundation for the acquisition, enjoyment and disposal of property.

[88]Black H.C (1979); Black‟s Law Dictionary, (6th Ed.) St. Paul-Minn; West Publishing Co. 1990, p. 1216.

Property law practice in Nigeria involves the process of acquisition of land and devolution of real property. Property law also deals with the transfer of interest in land (or real property). This is otherwise known as conveyance or conveyancing.

A conveyance is transfer of any interest in land from one person to another. Conveyancing is the application of the law of real property in practice. It deals with the art of creating and transferring rights in land. Conveyancing transactions may occur in a number of situations such as sales of land, leases, and mortgages. Conveyances are described as including 'assignment', 'appointment', 'lease', 'settlement' and other 'assurances' and 'covenant to surrender', made by Deed, on a sale, mortgage, demise, or settlement of any real property, or any other dealing with of for any real property.

4.3 Laws Regulating Land/Real Estate Acquisition in Nigeria

The source of laws applicable to land/real estate acquisition is no less different from the sources of laws applicable to other legal relationships in Nigeria and may be classified under four heads:

i) Customary Law

ii) Case Law

iii) Nigerian Legislation

iv) Received English Law

4.3.1 Customary Law

Custom or customary law is a set of rules of conduct applying to persons and things in a specific locality, which exist at the relevant and material time and is recognized and adhered to by the inhabitants of the community as binding on them. It is usually a question of fact which is required to be pleaded and proved by witnesses in any legal proceeding.[89]The number of customary laws may be as many as the number of ethnic-groups. There are about 500 ethnic groups in Nigeria.[90] Thus in the same state or among the same tribe there exist numerous customary laws.[91] These rules and customs vary from one society to another. When dealing with property that is subject to customary law, it is well advised that a solicitor knows the particular customary law in question. Accordingly, in preparing a document where the land is regulated by custom, a solicitor should be mindful of the customary requirements so as not to overreach them. The simple requirements for payment of the purchase price; the presence of witnesses (to the transaction); and allowing the vendor into possession, are sufficient elements for sale under native law and custom in Nigeria. Once these three elements exist, it is assumed that a valid sale have taken place.[92]

Documentary evidence is inapplicable under customary law. This means that instruments like Deeds and Powers of Attorney cannot be used.

[89]Olubodun v. Lawal (2008) All FWLR part 438, p. 1468.Odutola v. Sanya (2008) ALL FWLR part 400, p. 780
[90]Adewale, O. Customary Environmental Law. In Ajomo and Adewale (eds) *Environmental Law and Sustainable Development in Nigeria* NIALS Lagos and The British Council 1994 p 158.
[91]Obilade, A.O.,Nigeria Legal System, Sweet and Maxwell London 1979 p.83.
[92]Adesanya v. Aderonmu (2000) FWLR, part 15, p. 2492

4.3.2 Case Law

Case law are decisions of the courts and opinions expressed by jurists in respect of disputes over real property that may be brought by contending parties before and decided by the courts. The court structure in Nigeria may differ from one State to the other since Nigeria is a Federation of States.[93]

But, decisions of a customary arbitration is not considered as a means of proving title to land in Nigeria; although it may aid in establishing the traditional history of root of title based on the custom of the people.

Some landmark decisions that have shaped the landscape of property law practice in Nigeria include: ***Savanah Bank v. Ajilo***[94] where the Supreme Court considered the wordings of section 26 and took the view that it was undesirable to invoke the *maxim ex turpicausa non orituraction*; ***Ogunleye v. Oni***[95]where the Supreme Court held that a certificate of occupancy issued pursuant to the Land Use Act only gives right to use and occupy land; ***International Textiles (Industries) Nigeria Limited v. Aderemi***[96] the court held that by virtue of section 22 of the Act, the holder of a Right of Occupancy alienating or transferring his right of occupancy must obtain the consent of the Governor to make the transaction valid. If he fails, the transaction is null and void under section26 of the Act;***Bucknor-***

[93]Some of the Courts in Nigeria are provided in the Constitution. See part vii (section 230-284) of the Constitution of the Federal Republic of Nigeria, 1999
[94](1989) 1 NWLR, part 97, p. 305
[95](1990) 2 NWLR, part 135, p. 745
[96](1999) 8 NWLR, part 614, p. 268

Maclean &Anor v. Inlaks Limited[97], where the Supreme Court held that notwithstanding non-compliance with the prescribed form for register, once the registrar of titles accepts such documents for registration, the same is conclusive as to form. Succinct details on the aforementioned laws are written below.

4.3.3 Nigerian Legislation

Nigerian Legislation, enacted by either States or the Federal Government regulates property transactions. The most important of the legislation on property practice are:

i) Constitution of the Federal Republic of Nigeria
ii) Land Use Act
iii) Property and Conveyancing Law
iv) Registration of Titles law
v) Will laws of the state of Nigeria
vi) Administration of Estates laws
vii) Illiterate Protection Laws
viii) Land Instrument Registration Laws
ix) Land Instruments Preparation Law
x) Stamp Duties Act
xi) Companies and Allied Matters Act
xii) Town Planning Laws.

[97](1980) All NLR 184

There are other legislations which deal with property law practice, where the specifics of the transaction require their application. These include the Companies and Allied Matters Act,[98] the Environmental Laws,[99]and the several gazettes of the various States on property practice.[100]Brief clarifications on the aforementioned laws are emphasized below.

a) Constitution of the Federal Republic of Nigeria

The Constitution of the Federal Republic of Nigeria, 1999 explicitly provides in section 43 that "Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria." The constitution also prevents government from compulsorily acquiring the properties of Nigerians except "in the manner and for the purposes prescribed by law".[101] It went further to state that the power of compulsory acquisition does not affect any general law relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts; or relating to vesting and administration of property of persons adjudged or otherwise declared bankrupt nor insolvent, of persons of unsound mind or deceased persons, and of corporate or unincorporated bodies in the course of being wound-up.[102]

[98]Where, for instance, a company needs to mortgage its properties in order to raise capital.
[99]Where, for instance, development of properties is restricted because of fear of environmental hazards.
[100]For example, the designation of lands into urban and non-urban area, pursuant to the provisions of the Land Use Act is contained in States regulations and gazettes to that effect. Section 3 Land Use Act.
[101]Section 44 (1) of the 1999 constitution.
[102]Section 44 (2) (c&d) of the 1999 constitution.

b) Land Use Act

This law is applicable throughout the Federation. The introduction of this Act is for the availability of land to all Nigerians. It is a legislation that enjoys some special treatment, because it is referred by the constitution. Its amendment can only be effected using the huge process for amending the constitution.[103]This is an Act to vest all land compromised in the territory of each State (except land vested in the Federal government or its agencies) solely in the Governor of the State, who would hold such Land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the State and to organisations for residential, agriculture, commercial and other purposes while similar powers will with respect to non urban areas are conferred on Local Governments.

c) Property and Conveyancing Law

This law[104] applies to most of the states of the former Western Region of Nigeria. The most important features of this law is that no sale of land shall be enforced except there is a note of memorandum in writing containing the terms of the sale and signed by the person to be charged,[105] also all conveyances of land or interests in land for the purposes of creating any legal estate are void unless they are made

[103]Section 315 (5) 1999 Constitution. Section 9 (2) of the Constitution provides for process for amendment of the Constitution. See Nkwocha v. Governor of Anambra State (2001) FWLR part48, p. 1386
[104]Cap 100 Laws of Western Region of Nigeria (1959)
[105]Section 5 (1) (a&b)

by deed.[106] Moreover the right to create leases is safeguarded so long as certain elements exist in it;[107] and where one executes a deed, he shall sign his mark on it and sealing alone is not satisfactory.[108]

d) Registration of Title's Law

This law[109]requires titles to land to be registered as first or subsequent registrations. The principal purpose of this law is for the State to guarantee titles that have been investigated and registered by the Registrar of Titles so that purchasers of land can rely on it in determining if the vendor has title to sell the property and the encumbrances that attach to the land.

e) Wills Law of States

Even though the **Wills Act 1837** is an English Statute of General Application in Nigeria, some states have replaced it with their individual Wills Laws. A good example is Wills Law[110].

The major aim of this law is that freedom to make will and dispose of estate by every person is guaranteed; the right of testation (that is the right to make a will) is sometimes restricted by imposing limitations on the maker of the will in respect of the disposition of his estate; there are requirement for the validity of a will;

[106]Section 77(1) and 78(1) PCL
[107]Section 97 (1) PCL
[108]Section 79 (2) PCL
[109]Cap. R4 Laws of Lagos State of 2004
[110]Cap W2 Laws of Lagos State (2003)

witnesses are required for making and revoking wills; and there are provisions to ensure that a will does not lapse as a result of the death of the beneficiaries.

f) Administration of Estate Laws of States

Many states of Nigeria have laws regulating the estate of deceased persons. A good example is the Administration of Estates Law of Lagos State[111]. These 9laws cover issues such as devolution of estate on personal representatives, rights, duties and obligation of personal representatives, process of obtaining probate and administration of estate.

g) Illiterate protection Act Laws

An illiterate is a person who is unable to read or write or understand the language of a particular document. The various Illiterate Protection Laws are made to protect illiterate persons involved in property transactions generally from fraud. It is like a very wide umbrella and covers all forms of writings or documents written at the request of an illiterate person. The Federal Capital Territory and the various states have what are commonly referred to as Illiterate Protection Laws.[112]

h) Land Instrument Registration Laws of Various States

Many states have land registration laws. These laws define a registrable instrument and also make provisions for the effect of non-registration of a registrable

[111]Cap A3 Laws of Lagos State (2003)
[112]Cap 13 Laws of Lagos State (2003); Illiterate Protection Act, Cap I 1, vol. 3, Laws of the Federal Capital Territory (2006)

instrument. Many states have land registration laws. A good example is the Lagos State Land Registration Law.[113]

i) Land Instrument Preparation Laws of Various States

Most states of the federation have enacted land instrument preparation laws. These laws require that the preparation of instruments and documents on sale or transfer of land can only be done by a Legal Practitioner. A good example is the Kaduna State Land Instrument Preparation Law.[114]

j) Stamp Duties Act/Laws

Stamp Duties are a form of taxation paid to the Federal or State Governments on documents such as conveyances on sale, lease or mortgage of land, agreements, contracts, bills of exchange, promissory notes and instruments (letters and certificates of admission, instruments of apprenticeship, insurance policies). Stamp duties require that the above instruments be stamped.

There is a Stamp Duty Law for every State. For example, Lagos State Stamp Duty Law[115]and the Stamp Duty Act[116]for the Federal Capital Territory (FCT), which provide for the procedure for stamping of documents and the effect of failure to stamp a document. Duty on land within the control of the State is paid to State Internal Revenue Service; while duty on land in control of the Federal Government is paid to the Federal Inland Revenue Service. Stamping of

[113]Cap. L 58 Laws of Lagos State (2003)
[114]Cap. 84 Laws of Kaduna State (1991)
[115]Cap. S.10 Laws of Lagos State (2003)
[116]Cap S8 Laws of the Federation of Nigeria (2004)

documents should be within **30 days** of the execution of the document though it may be stamped out of time, which will attract penalty.

k) Companies and Allied Matters Act

The Act permits registered companies under the Act to mortgage their properties by the creation of debentures over the assets of the company. **Section 166 of the Act** states that a company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital and issue debentures, debenture stocks and other securities for any debt, liability or obligation of the company. 'Property' in the section includes land or any interest in land which the company has.

4.3.4 Received English Law

This is the intrinsic incident of the fact of Nigeria's colonial history in which the colonizing authority inflicted its legal regime, which comprises of the principles of common law, doctrines of equity and statutes of general application. These principles of the received English law apply to regulate property practice in Nigeria, particularly in respect of disputes that are tried before the High Courts and other Superior Courts. These common law principles are rules of action which acquire their authority solely from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs, especially the ancient unwritten law of England.[117]

[117]Blacks Law Dictionary, Supra, p. 276.

According to the Supreme Court in ***Ude v. Nwara***,[118] English Law applies to property transactions in Nigeria where there is no comparable local legislation or customary law that applies to such a transaction.

Some English Statutes of General Application applicable in property transactions in Nigeria are:

i) **Statute of Fraud Act 1677** – notable for its section 4 mandating that land transactions should be written down or evidenced in a memorandum in writing. Perhaps the reason for this provision is to evade the possibility of a non-existing agreement between two parties being claimed to exist through fraud;

ii) **Wills Act of 1837** – This is applicable to states of Nigeria that have not yet enacted their Wills law, assures the right of any person to make a Will without any restriction,[119] provision of the formal requirements of wills to be in writing and signed by the testator and attested by witnesses;[120]and

iii) **Conveyancing Act 1881–**This applies as law in states that are yet to enact their property laws – exceptionally some states of former Northern and Eastern regions of Nigeria.[121] The law applies so long as there is no comparable local legislation enacted by such a state. Some States (e.g.

[118]Supra.
[119]Section 3
[120]Section 9
[121]Supra

Abiaand Imo State) however have enacted legislation to regulate property practice.

4.4 Concept of Securing and Acquisition of Real Estate

Property connotes land or immovable as it is sometimes called and other objects known as chattels or movables.[122] Legally, these are known as real property and personal property respectively. Property is the exclusive right to possession, enjoyment and disposition of anything which can be the subject matter of ownership; and it also includes the exclusive right to the future benefits of an economic good, be it material or non-material, as determined by law.

The above rights constitute a bundle of rights.[123] Real property refers to the interests, benefits and inherent right in the ownership of the physical land (real estate). But for the purpose of this study real property means land and buildings, which are categorized into different types according to the various uses to which they are being put and for which they are designed. These include residential, commercial, industrial, agricultural, recreational properties, etc.

Real estate has continued to play a significant role in man's evolution. It is not a coincidence that food, shelter and clothing believed to be the three essentials that sustain mankind, also have some linkage to land. Food grows out of land while shelter is affixed to it, and man's clothing is made largely from what grows out of land. Indeed, whether in ancient times or today's modern system, land constitutes

[122]Megarry: Manual of the Law of Real Property 6th Ed.Stevens & Sons Ltd., London (1982).
[123]Denman, D.R.: *Land Use: An Introduction to Land UseAnalysis*. The Estate Gazette Ltd., London (1968).

a significant index for man's wealth, and as economic activities have assumed more sophistication over time, land has continued to play a central role in their development.[124] There is hardly any business venture that does not require to be supported by some form of real estate: from the small business that requires real estate as offices from where its business can be organized, to the major venture that needs it for its factory.

Consequently, through some very robust and well thought out land policies comprehensively address challenges that are encounter in the real estate sector. This is not exactly the situation here in Nigeria and the result is that there is a myriad of problems in the real estate sector.[125]

Real estate investment is intrinsically connected to the economic development and wellbeing of any nation, thereby necessitating some intervention by prudent governments. Such interventions vary in degrees, depending on the nation. In Nigeria, individual could rarely lay claim to any part of it as owner and therefore could not alienate it without the consent of the head.

Primarily, the real estate bundle of rights is described, including the right to control, use, enjoy, and dispose of real property. Real estate acquisition is the laid down processes which must be followed in order to acquire good titles in land in order for the above rights to be enjoyed.

[124]Lewis, M.G.: When Real Estate Becomes Big Business: Mergers, Acquisitions and Joint Ventures. Cahners Publishing (1994).
[125]Adewale, J.R.: *Real Estate Investment Analysis.* Lexington Books (2000).

4.4.1 Real Estate Finance

Real estate finance can be looked at, as the fund needed to carry out real estate acquisition and other related operations. It is an essential ingredient in modern day real estate acquisition and development, and most large-scale development would not take their present scale without substantial credit. There is no iota of doubt that funding is an important factor in real estate development and investment.[126]

Proper financing is all-important to successful real estate investment and development. Various forms of finance on varying terms from diverse investing agencies are available to the real estate market. The principal field where various forms of investment finance are employed is that of development where every loan has to be specially tailored for an individual scheme and the particular stages within the scheme. Since real estate and property acquisition and development in particular involves huge capital expenditure, finance is therefore an essential input, the nature of which is to provide capital to enable the enterprise operate commercially.[127] The cost and availability of finance for real estate development can influence the viability of such project. It is necessary to examine the nature of real estate investment in Nigeria with a view of finding solutions to the associated challenges.

The housing finance system in Nigeria is not viable and this makes mobilization of finance and credit for housing development difficult.

[126]Ratcliff, R.U.: *Real Estate Analysis*. McGraw Hill, New York(1999).
[127]Ratcliff, R.U. Op. Cit.

Finance constitutes a fundamental centerpiece in any real estate development; the ability of a developer or investor to mobilize enough funds for the project determines largely, the success of the project. It is a key factor, a sine qua non and very crucial ingredients to projects, no matter their nature. It is basically the fulcrum, which sustains the lever for development projects.

The performance of any housing finance system will depend primarily on the volume and nature of funds within the economy and the proportion of it that can be spread, mobilized or even dedicated for housing. Real estate finance can be viewed as the borrowing of money to carryout real estate acquisition and development.

4.4.2 Sources of Real Estate Finance in Nigeria

As a result of the huge capital outlay needed for real estate acquisition, investors or developers usually source for fund in order to complement their equity capital. Large investors will usually have multiple funding arrangements with a variety of financial agencies. Nevertheless, the field is becoming so complex and competitive that effective project management is increasingly concerned with the way in which control over a particularly scheme will be influenced by the origin and nature of development finance. There are various sources through which the investor can get fund to finance real estate acquisition.[128]

[128]Ogedengbe, P.S. &Adesopo, A.A. *Problems of Financing Real Estate Development in Nigeria*, J. Hum. Ecol., 14(6): 425-431 (2003)

a. Equity Capital

This is the fund realized from personal savings and family savings. It is usually low because of low per capita income, unequal distribution of income and high population in each family unit resulting in excessive consumption, low savings and low investment in Nigeria.

Since this equity capital is usually small, it is prudent for him to decide on a mixture of equity and debt capital which will not only guarantee the highest expected return but also not impair the viability of the real estate acquisition. An investor's ability to borrow will be enhanced by the size of equity capital at his disposal.

b. Direct Loans

These are the loans got directly from the various lenders such as banks and other financial institutions for a specific period. They are classified according to their duration, short, medium and long terms.

(i) Short Term Loans: The conventional method of raising funds for the acquisition of land and the subsequent development of potential investment property over a two to three year period is by way of short-term finance. The traditional sources of short-term finance are the commercial and merchant banks as well as finance houses. The terms on which these loans are provided are usually very stringent and the interests charged are usually on variable interest basis and 2 percent to 6 percent above basic rate. In the past, joint stock or clearing banks have also been involved in this kind of loan.

One advantage of loans in commercial banks is that a substantial proportion tends to mature, within 1-5 years. Most times, the forms of collateral security demanded by the banks are not quite satisfactory and prospective borrowers are deterred by these rather inflexible demands.

Merchant banks also have the same maturity pattern as commercial banks but are even more concerned with liquidity.

In an effort to mobilize funds into residential housing sector, commercial and merchant banks were directed by the central bank of Nigeria to treat the residential sector as a preferred sector and allocate at least 7 percent of their loanable funds into the sector. The guidelines further stipulated that where the total housing loans granted by the banks in any given year is lower than the level prescribed by the Central Bank, the short fall will be taken from the banks and channeled through the Central Bank to the federal mortgage bank. Loans for residential building construction were for a minimum period of 15years. However, these guidelines have not been strictly complied with as the banks are structured to accommodate comfortably short term lending. Property companies also provide short-term loans to developers or real estate investors.

(ii) Medium Term Loans: These are loans granted for periods not exceeding 10 years. They are normally obtained by direct loan or overdraft from the commercial banks. Such loans are frequently raised while arrangements are being made for long-

term loans. The banks are free to lend to whom they choose. Loans are repaid in a lumpsum or by arrangement, and are subject to recall by the bank at anytime.

(iii) Long Term Financing: Long-term development finance as its name implies is finance that is redeemable within 20 to 30 years or even more and usually at a relatively lower rate of interest. The greater equity participation providers in Nigeria are the federal mortgage Bank of Nigeria, various states' property Development Corporation and Insurance and Assurance Companies, etc. Their lending activities are concentrated mainly in the residential housing sector.

Long-term development finance has traditionally been raised either by mortgage or particularly in terms of credit squeeze by sale and leaseback. Another aspect of long term financing is the forward sale, which is normally provided by the insurance companies and pension funds. These companies tend to exercise extremely tight control over the entire project, including land acquisition, design, construction and sale or letting of the project.

4.4.3 The Real Estate Bundle of Rights

The separate components that comprise the real estate bundle of rights are the essential building blocks of real property. When you own a piece of real estate (land and building and associated rights), you own not just the property and the things attached to it, but a bundle of rights related to the property. Randall Bell's real estate guidebook[129]states that a fee simple estate includes all the bundle of

[129]Randall Bell *et al*., Bell's Guide: The Comprehensive Real Estate Handbook 48 (Sequoia Publishers 2d ed. 1999).

rights (sells, do nothing, lease, enjoy, bequeath, encumber, use, occupy, and so forth). Hence, if you own all the rights, you have fee simple ownership. The bundle includes the right to use the property, enjoy the property, control the property, and dispose of the property, subject only to taxes, zoning, and other police powers.

The thumbnail of each of the right is described below.

a) Right to Use Property

This right means the owner(s) can conduct certain activities on the property, subject to legal restrictions such as building codes, zoning, easements, and covenants. The owner(s) can decide what to use it for, what not to use it for, whether to occupy the property or lease it out, when to change uses, and when to make improvements or modifications. Generally, one may use one's property in any way that does not create a nuisance for others.

b) Enjoy Property

This means different things if it is an owner-occupied house or an investment property. For an owner occupant, enjoyment means to take advantage of the housing services generated by the property. This means the ability to enjoy the land, and the warmth and comfort of the building and all its rooms, vegetation, rooftop, clean air and groundwater, and other property components, in a legal manner. In the event that any of these features of the property are impeded, a loss has occurred. For commercial property or residential property for rent, enjoyment means to derive

profit from owning real estate. This would be in the form of monthly or annual cash flows. The right to enjoy also includes having the asset appreciate in line with market conditions.

c) Control of the Property

Control of the property is related to being able to use the property how you want to and when you want to, subject to legal restrictions. The right to control property also means being able to exclude others from using it or coming onto it.[130] If people come on to your property without permission, they are trespassing. This loss of control is most commonly associated with the surface of the property (stop or I'll shoot!).

d) Dispose of Property

This is the right to sell or bequeath the property when you want to at a fair market price. If you cannot sell at a time of your choosing, within normal market conditions, then this right has been taken away. This means you may not be able to access the equity in your property and move onto other investments. Alternatively, you may be required to act as a lender and extend financing to a future buyer rather than cashing out of the property.

[130]John A. Kilpatrick, Concentrated Animal Feeding Operations and Proximate Property Values, Appraisal J., July 2001, at 301-06.

e) Special Case for Contract-for-Deed Transactions

In some cases, buyers acquire property under a land contract, or a contract for deed, instead of getting fee simple ownership. Contract for deed is a form of owner financing that typically involves a weak borrower or weak market. The seller/financier retains title to the property until the loan is paid off. In the interim, the buyer/borrower has most rights of the bundle of rights but title has not transferred yet and it will not until the note is paid off.

4.5 Methods of Acquisition and Securitization of Real Estate

Acquisition of land involves a number of procedures. These cover investigation of title of land, drafting the deed of assignment and execution of the contract of sales.

Investigation of the Title

The first step towards acquiring real estate is to carry out an investigation on title of the vendor.

The primary objective at this stage is to ascertain that the Vendor has a good root of title. A good root of title in this context means the following:

i) that the Vendor is the rightful (beneficial) owner of the land.

ii) that the land is free from any encumbrance or pending litigation.

iii) that the land is not the subject of any Government acquisition.

iv) that the land is not subject to any of the overriding interests in land (e.g. short leases, easements, licenses, road or right of way).

v) that the Vendors are acting in good faith (for instance where the land is family owned land)

Investigation of title is carried out at the Lands Registry of a State or New Towns Development Authority (whichever is applicable) shortly after inspection and expression of interest in the land using copies of the key title documents, evidence of payment of levies, approved building plans, survey plans, excision plans, etc. Sometimes investigations may include visiting the neighbours to the property and making direct enquiries in respect of the land in question.

If the property falls within the Excision Area (i.e. areas exempted from Government acquisition), the investigation will include the verification of the red copy of the "Excision Plan of the Layout" where property is situated. The Excision Plan itself is a vital document and a prerequisite for Registration of Title to property at the Lands Registry. Very often, an area covered by an excision plan will also be published in the Government Gazette for the avoidance of doubt.

It is always prudent to verify the Excision Plan by re-confirming the survey beacons around the land. Where there is no Excision Plan, an application for the approval and registration of one will have to be made to the State Government in the prescribed form by the original title holder/ beneficiary of the Government Excision. The process is usually an expensive procedure depending on the size of the property and the valuation of the property.

4.5.1 The Purchase Transaction

Where it is satisfied with the title, and a sale price agreed upon by the parties, the necessary documents of sale are drafted, which include the following:

i) An Agreement for Sale of Land (preceding the actual sale).

ii) A Deed of Assignment of title to Land.

iii) A Power of Attorney to deal with the land.

iv) A Purchase Receipt.

v) Form for application for Governor's consent (Form 1C)

These documents (especially the Sale Agreement and the Deed of Assignment) must contain the names and descriptions of the parties, proper description of the property, the agreed purchase price, the acknowledgement of receipt of that amount, the capacity in which Vendoris selling, a Warranty that he has a right to sell in that capacity, condition that the contract shall be conditional on the obtaining of any requisite consents to the transaction, etc.

4.5.2 The Exchange of Contract

After ascertaining good title and preparing the necessary documents, the contract of sale is exchanged between the parties.

The exchange of contract creates a binding agreement between parties to entitle either party to specific performance (i.e. to execute the Deed of Assignment). What is preferable is that signed documents are exchanged for the purchase price (either a transfer or payment by bank certified

cheque). Although a common practice today is to have the purchaser credit the account of the vendor prior to any exchange of documents, is strongly advice against this.

On exchange of contact and after obtaining Governor's consent the Assignor [Vendor] becomes a trustee of the legal estate while purchaser becomes a beneficial owner and acquires equitable interest. He could deal on the land and becomes entitled to all improvements and increases in the value of property.

4.5.3 Interest/Control of Land Pending Perfection

In view of the time it takes to perfect the documents of title so executed, a Power of Attorney in favour of the Purchaser to deal with land as he deems it fit is a necessary part of a land transaction. It must be made irrevocable and coupled to the purchase price.

An irrevocable Power of Attorney may be issued to accompany the contract empowering the purchaser to assign or procure the assignment of the property to himself or to any other person(s) and to execute all documents relating to it. However, the mere issuance of the power of

Attorney is not per se alienation or parting with possession. It is a vehicle by which these acts could be done.

4.5.4 Perfecting Title to Land

The next stage after the sales agreement is to secure the investment made on the land by perfecting the Purchaser's title. This also involves a number of issues.

The first thing to do after the sales is to take and exercise effective possession of the land and perhaps fencing it(even with a 2 feet perimeter wall, or corner edge walls i.e. if there are no developments already on the land). A very practical step which is often employed is also to put up a sign board on the property notifying the third parties of the Purchasers interest. While these measures are not full proof, the aim at all times is to do something that puts a careful third party on notice (caveat emptor). Possession they say is two-thirds of the law.

The purchaser of the land will then do the following:

a) Paying STAMP DUTIES on the documents of sale (usually ad valorem 2%of value of land) within 30 days of execution. Any default to stamp outside prescribed period attracts penalties. One way to circumvent this however which has even received judicial approval is to leave such documents undated till such time as one is ready to proceed with perfection.
b) Paying CAPITAL GAINS TAX (which the Vendor is by law liable to pay, but which by practice is passed on to the Purchaser), usually 15% of assessed value of land.
c) Applying for the GOVERNOR'S CONSENT and paying the Consent fee (10%of assessed value of land).

4.5.5 Registering Title Documents

The registration of title document is done at the Lands registry and paying the Registration fee (usually 6% of assessed value) within 6 months of obtaining the Governor's consent.

4.5.6 Effect of Non-Registration

Where documents created over a land transaction are not registered it renders such documents inadmissible in a court of law as evidence of the transaction, and a party to a land dispute will not be allowed to rely on it in a dispute over title to land thus negatively impacting his/her case.

Loss of Priority: The document registered immediately after its first execution subject to Governor's consent takes effect as against other instrument affecting the same land from date of its registration. This essentially reflects the "first in time rule" which is to the effect that where there are competing claims over the title to land whoever registers his interest first takes priority over other claimants.

4.5.7 Documents Required for Perfection

The documents required for perfection of the purchaser's title at the State Board of Internal Revenue, the Lands Registry, State Ministries of Finance and Justice, Governor's office, etc. are as follows: -

a) Application for Governor's consent in Land Form 1C
b) Current Income Tax Clearance Certificate of the parties for three (3) years preceding application.
c) Receipts of payment of all Tenement Rate for three (3) years if a developed land
d) Affidavit in lieu of payment of tenement rate if undeveloped land
e) Survey or Building plans whichever is applicable.

f) Duly executed Deed of Assignment (6 copies)

g) Original or Certified True Copies of Assignors Title documents

h) Receipts of payment of all Ground rent.

i) Receipts of payment of Development Levy

j) Receipts of payment of all land charges.

k) Covering letter addressed to Governor through the Lagos State Ministry of Lands and Survey, Alausa, Ikeja, Lagos applying for consent and attaching all documents listed above.

4.5.8 Financial Requirements

The various processes in perfecting title to land in Lagos State, requires certain percentage of fees payable to the Lagos State Government in a Bank Certified Cheque as may be assessed as the value of property notwithstanding the consideration on the deed.

The key factors in the valuation exercise are: -

i) The size of the property usually valued per square meter.

ii) The location of the property (example, if land is within the designated areas called the titled areas such as Ikoyi, Lekki, Victoria Garden City(VGC), Lagos Island, Ebute Metta, etc.) or if Land is within the excised areas and covered by an Excision Plan.

iii) Security of property.

iv) Structural design of building.

v) Building layout (total number of rooms and relative size of rooms).

vi) Aesthetics of building and quality of material used.

vii) Relative cost of property.

4.5.9 Time Frame for Perfection Procedures

The processes are burdened with a lot of bureaucracies and averagely take between six to twelve months.

Documents to Expect after the Perfection is Completed

Below are the documents that are required following completion of the Perfection of purchaser's title.

a. Original Letter (for instance No. LU/GC/12345/Assign./12) conveying the Governor's Consent.
b. Original Certificate of Occupancy with the Governor's consent endorsed therein.
c. Where the land has never been covered by a certificate of occupancy, then the Original Deeds (Deed of Assignment) with the Governor's consent endorsed therein.
d. At least one Counterpart of the Deeds (Deed of Assignment) with the Governor's consent endorsed therein
e. Approved Layout of the XXX Chieftaincy Family Land Excised at XXX Village or layout
f. Original Letter (No. LU/GC/12345/SUB stating the assessed payments due on the property.
g. LSG Treasury Receipt for Land Charges & Fees

h. LSG Treasury Receipt for Registration Fees.

i. LSG Miscellaneous Receipt for Capital Gains Tax.

j. LSG current & previous year Income Tax Clearance Certificate for purchaser/assignee (with the assessment form & bank teller slip). Where there are joint or co-owners, e.g. husband and wife, then they should have separate tax clearance certificates.

k. LSG Treasury Receipts for stamp duties, oath fees, etc

4.6 Securing the Title of Real Estate through *Musharakah Mutanaqisah*

Diminishing *Musharaka*h is a kind of transaction where two parties come together and pull resources to acquire an asset or venture into a business. Since the bank's aim is not to do that business continuously, the bank will be gradually disengaging itself from the business and as such, whatever a client does by participating in acquiring an asset e.g. a land or real estate, the bank puts in 80% of the cost and the client puts in 20% of the cost, and this results to co-ownership under Diminishing *Musharaka*h. At the same time, the bank is divesting out of the joint venture by selling its own portion to the client, as such the bank's share will be reducing while the customer's share will be increasing. The gain for the bank is that the bank puts a nominal profit that it makes out of its own portion, as the bank owns that asset and it has the usufruct. So since it has the right to own the usufruct of that asset, it can as well sell the usufruct to the client so that the client will be paying some rent on whatever it jointly own with the bank.

A client has to come to the bank, review its assets, choose from which the client wants to buy or venture into, confront the bank and then negotiate with the bank. The bank can then see how viable that asset is, and based on that viability, the bank will agree and be willing to finance. However, the bank usually comes up with a price to be the rent to be paid by the client and the portion to be paid by the bank, and if the client assents, then the bank makes payment to the vendor of that asset thereby the business continues. At the end, ownership will be transferred to the client.[131]

For a client to acquire good title through *Musharakah Mutaraqisah* Islamic banking products, the status of the landed property has to be determined. When the bank has followed all procedure of acquisition and perfection, the bank has good title to pass to the client. In this case, what is left for the client is to enter into a contract of sales through the deed of assignment. After the sales, the client will then follow the procedure of registration of the property in his own name as discussed above.

When the bank has not followed the laid down and procedures on the acquisition and securitization of land, such land cannot be made the subject matter of *Musharakah Mutanaqisah*. This is because the bank has no good title to transfer to the client.

[131]Zakariya, M. (2014).An Appraisal of the Application of the Principles of Sharikah in Islamic Banking Products and Services. A Dissertation submitted to the faculty of law Bayero University Kano in partial fulfillment of the requirement for the award of the Degree of Master of Laws (LLM) p 143

4.7 Acquisition of Good Title to Land through *Musharakah Mutanaqisah*: JAIZ Lesson

First of all, it should be noted that JAIZ bank doesn't use *Musharaka*h *Mutanaqisah*. They use Ijarawal-iqtina and this would be related *Musharakah Mutanaqisah*

In *Musharakah Mutanaqisah* house financing, the customer and Islamic banking institution jointly acquire and own the property. The Islamic banking institution then leases its share of property to the customer on the basis of *ijarah* (leasing). The customer, as an owner tenant, promises to acquire periodically the Islamic banking institution's ownership in the property. The customer pays rental to the Islamic banking institution under *ijarah*, which partially contributes towards increasing their share in the property.

In other words, the portion of the payment proceeds or monthly instalments received from the customer shall be used towards the gradual acquisition of the Islamic banking institution's share in the jointly owned property. At the end of the *ijarah*term and upon payment of all lease rentals, the customer would have acquired all the financier's shares and the partnership will come to an end with the customer being the sole owner of the house.

In adding to the point, the scholars even agreed that it is best to implement *Musharakah Mutanaqisah* for house financing whereby the property can be leased out according to agreed rental. Joint ownership of a house is accepted by all

schools of Islamic jurisprudence since the financier sells its shares to the customer[132]

The status of the land under *Ijarah Wal-Iqtina* is that since it is a contract under which an Islamic bank provides equipment, building or other assets to the client against an agreed rental together with a unilateral undertaking by the bank or the client that at the end of the lease period, the ownership in the asset would be transferred to the lessee. The undertaking or the promise does not become an integral part of the lease contract to make it conditional. The rentals as well as the purchase price are fixed in such manner that the bank gets back its principle sum along with profit over the period of lease.[133]

Ijara is a rental of an item by its owner to a client and *ijara waiqtina* is a rental of an item followed by its sale to the client. In the case of real estate acquisition using *ijara waiqtina*, the JAIZ Bank will buy from the vendor the property desired by the home-buying client at an agreed price, rent it to the client for a period of years, and then sell it to the client at the end of the period at a price agreed between them at the outset of the contract. The client's monthly payment to the bank will comprise two main payments. One is rent, the other an amount that is held by the bank as an assurance that the client will be able to pay for the purchase of the property when required to do so at the end of the rental period. The client's

[132](TaqiUsmani, 2002).

[133]SBP, FAQ on Islamic Banking. *State Bank of Pakistan.*[Online] [Cited: 06, 06, 2015.] available @www.sbp.org.pk/ibd/faqs.pdf

monthly payments correspond approximately to the payments under an amortizing interest-based loan.

4.8 Practice of *Mushraka Mutanaqisah* in Malaysia

Musharakah Mutanaqisah also known as diminishing partnership which is an Islamic method of home or property financing whereby an Islamic Bank and the customer jointly owns the property and the Islamic Bank leases its ownership of the property to the customer in the form of *ijarah* (lease). The customer promises to redeem/purchase the Islamic Bank's ownership share of the asset until the whole property becomes the customer's. The customer pays to the Islamic Bank, a monthly rental which serves to redeem the Bank's share of the property. At the end of the lease period the customer becomes the sole owner of the property after he has purchased all the ownership ratio of the Bank.

The Process of *Musharakah Mutanaqisah* Practice in Malaysia is as follows:

- Both customer and Islamic bank contribute the capital for the acquisition of the property
- The Islamic bank leases the asset to the customer pays the rent. (Rent increases the ownership of the customer)
- Islamic Bank transfers ownership of the asset to the customer

The *Musharakah Mutanaqisah* as practiced in Malaysia uses the same formula as conventional Banks to calculate the monthly payment but MMP replaces the interest rate with the rental rate and it is calculated as:

The rental rate, x = X/P

Where:

X = Monthly rental payment

P = Total value of the asset

4.8 Conclusion

One may conclude that *Musharakah Mutanaqisah* is a diminishing partnership between a financier and a homebuyer. The bank purchases the property desired by the homebuyer using its own fund and a deposit paid by the client. The client now lives in the house and pays a rent for the bank for its share. The amount of the rent is adjusted to reflect the fact that the client owns part of the property. In addition to the rental, the client buys over time the part of the bank in the property and eventually becomes the owner of the house.

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CHAPTER FIVE

CONCLUSIONS

5.1 Introduction

This chapter is made up of the summary, observations, recommendations and conclusions from the study. Its key objective is to observe, recommend and conclude on the subject matter of the entire study.

5.2 Summary

Islamic banking system is based on Islamic commercial jurisprudence that started from early 1960s to late 1970s. It follows sharia rules on transactions. Islamic banks provide varieties of products and services based on the various technique of Islamic commerce such as *Musharakah*, *Mudarabah*, *Murabahah*, *Wakalah*, Qard Hassan, among others. *Musharakah* is one of the most important Islamic banking product which means financial instrument which is based on the system of Profit and Loss Sharing (PLS) where two or more persons or entities jointly own property or own it by virtue of inheritance or gift or any legitimate transaction and agreed to use it to generate surplus money enjoying similar rights and liabilities in it.

Musharakah Mutanaqisah is a product which is developed by modern jurists to meet the needs of contemporary Islamic finance. It is a contract which is based on a diminishing concept and it is a combination of three contracts i.e. *Musharaka*h, Ijarah (lease) bay (sale).

Islamic banks use diminishing *Musharakah* for the purpose of financing fixed assets and real estate including house, factory and all other fixed assets.

JAIZ Bank Plc has a baking product which is known as lease to own and it formed by the combination of principles of *Musharakah Mutanaqisaand* Ijarah (which is another Islamic banking product). JAIZ doesn't practice *Musharakah Mutanaqisah* in the strict sense but uses *Ijarah waliqtina'a* in acquisition of real estate and therefore passes good title where such product is used in acquiring good title.

5.2 Summary of Findings

Based on the discussions and analysis on the foregoing chapters, this research work was able to make the following major findings:

i) With the introduction of Islamic banking system, Islamic banks finance the acquisition of real estate through its banking products particularly *Musharakah Mutanaqisah* based products.

ii) To acquire and source good title in real estate to through *Musharakah Mutanaqisah,* the provisions of different laws must be satisfied in Nigeria for example, a Governor of a state must consent on the transaction on the land to be acquired through *Musharakah Mutanaqisah* and the acquired title must be registered with the land register of the concerned state as required by laws

iii) JAIZ Bank Nigeria PLC, the only full licensed Islamic has a banking product similar to *Musharakah Mutanaqisah*. The product in termed on Ijara waliqtinaa. Through this, landed property can be acquired.

iv) The legal status of the properties to be acquired through Ijarah waliqtinaa in JAIZ Bank PLC cannot be determined. All attempts to find out this fact from the bank prove abortive.

5.3 Observations

From the foregoing findings, the following are observed:

i. Islamic banks cannot completely pass good title to real estate to their customers through *Musharakah Mutanaqisah* and banking product. This is even when the banks have acquired good title to the real estates which are made the subject matter of the products. This customer must take steps to perfect and register the real estate.

ii. The only Islamic bank that offers banking product leading to acquisition of title in real estate is JAIZ Bank PLC. the bank is, however, using the principles of *Ijara waliqtina'a* for the same purpose

5.4 Recommendations

Based on the totality of the foregoing, this research work makes the following recommendations:

i) Islamic banks which other *Musharakah Mutanaqisah* banking products leading to acquisition of title in real estate must have good title on the property which they make the subject matter of such product

ii) Clients and customers of Islamic banks are strongly advice to follow all the laid down requirements of perfecting and registration of the title of the real estate they acquire through *Musharakah Mutanaqisah* banking products. It must be emphasized that mere acquisition of title without perfecting it and registering it will not center them with good title in law.

iii) JAIZ Bank Plc is strongly been urged to change its banking product *Ijarah waliqtina'a* to the acquisition of title in real estate to *Musharakah Mutanaqisah*. *Ijara waliqtina* is more to do with leasing contracts. On the other hand, *Musharakah Mutanaqisah* is the commonest and most widely used principle in structuring Islamic banking products leading to the acquisition of real estate.

iv) Since MM is *Shari'ah*-based mode of finance and accepted internationally, future research should focus on various payment mechanisms under MM that reduce the burden of the homeowner and is still acceptable to the bank.

v) Further research should also focus on whether a banking model under fractional reserve banking model is suitable to provide an equitable housing finance while adhering to the spirit of *Shariah*.

5.5 Conclusion

Base on findings, this study concludes that *Musharakah Mutanaqisah* is a contract which is based on a diminishing concept and it is a combination of three contracts i.e. *Musharaka*h, ijarah (lease), and bay' (sale). This concept is applied by different Islamic Banks to finance real estate especially house acquisition. However, a lot of hopes have been placed on *Musharakah Mutanaqisah* to be the next big thing in Islamic Banking. It has a lot of potential and can be further expanded to take even more calculated risks. With strong push from the regulators, this product can flourish even on the international market. But it has been quite a letdown in our haste to introduce the product, a lot of infrastructure and support from various parties have been lacking; resulting in many issues remaining unresolved. In the end, what we see now is an alternative working structure to the conventional housing loan product as we incorporated a lot of their features into the *Musharaka Mutanaqisa*h product.

The end result, in its current form, is hardly an "equity-based" product, but instead a "debt-based financing" product, where the risks associated with a *Musharaka* is greatly mitigated, where the loss of equity has been prevented with the use of legal

documents and deliberate structuring to reflect what you see in a conventional housing loan product.

Islamic banks are now financing the acquisition of real property. They do this through their banking products structured on the principles of *Musharakah Mutanaqisah*. On the other hand, the laws of many nations (including Nigeria) provides for the procedure and process of acquiring good title to real estate. Islamic banking customers who enter into *Musharakah Mutanaqisah* contracts leading to the acquisition of real estate are recommended to ensure that the banks have good tittle to pass in the first place. After the execution of the content, the customers must take all the necessary steps to product and register the real estate. It is after doing all these that they can have good title to the real estate.

BIBLIOGRAPHY

STATUTES

Constitution of Federal Republic of Nigeria 1999

Property and Conveyances law Cap 100 law of Western Region of Nigeria 1959

Land Use Act Cap 202: Laws of the Federation of Nigeria 1990

Registration of Title's Law cap R4 laws of Lagos State 2004

Illiterate Protection Act Laws Cap 13 laws of Lagos State 2003

Stamp Duty Act cap 58 Laws of the Federation of Nigeria

Companies and Allied Matters Act.*Cap 59. Laws of the Federal Republic of Nigeria 1990*

BOOKS

The Holy Qur'an

Ibn Kathir, Tafsir A-Quran Al-Azim Vol1 chapter 257

Al- Qurtabi, Al Jami' li ahkam Al-Quran, vol 3 chapter 65

Attabari, Jami' Al Bayan, vol 2;chapter 372

Al Tabatabai, Al-mizan Fi Tafsir Al Quran, 2;206

Abdallah, I., An Appraisal of the Applicaton of the Principles of Diminishing *Musharaka*h n Islamic Banking System,2013, p.38

Adewale, J.R.: *Real Estate Investment Analysis.* Lexington Books (2000).

Ayub, M. (2007) Understanding Islamic Finance (West Sussex: John Wiley and Sons Ltd) pp 43-57, 105

Ayub, M. (2007).Understanding Islamic Finance, West Sussex, John Wiley and Sons Limited.

Black H.C (1979); Black‟s Law Dictionary, (6th Ed.) St. Paul-Minn; West Publishing Co. 1990, p. 1216.

Dadem, Y. Y. (2009). Property Law in Nigeria. (Jos Nigeria: Jos University Press Ltd.)

Dasuki, A.W. (2012). Islamic financial System, Principles and Operation (Malaysia: International Shari'ah Research Academy for Islamic finance, 2012)

Deji, M.S. (2013). Feasibility of Introducing Islamic Banking in Nigeria, in Dandago, K.I Muhammad, A.D. Oseni, U.A. (eds), Essential of Islamic Banking and Finance in Nigeria. Benchmark Publishers Limited, Ibadan.

Denman, D.R.: *Land Use: An Introduction to Land Use Analysis*. The Estate Gazette Ltd., London (1968).

Dogarawa, A. B. (2012). The Historical Development of Islamic Banking and the Nigeria Experience, in Karwai, S.A. Jibril, B.T. Habib, A.G (eds0. Islamic Economics: A book of Readings IIIT, Kano

Dusuki, A. W. Islamic Financial System: Principles and Operations, ISRA, Kuala Lampr, Malaysisa, 2012 pg 12

El-Gamal, M.A. (2006) Islamic finance, Law, Economics and practice (New York: Cambridge University press)

John A. Kilpatrick, Concentrated Animal Feeding Operations and Proximate Property Values, Appraisal J., July 2001, at 301-06.

Lewis, M.G.: When Real Estate Becomes Big Business: Mergers, Acquisitions and Joint Ventures. Cahners Publishing (1994).

Megarry: Manual of the Law of Real Property 6th Ed. Stevens & Sons Ltd., London (1982).

Nasir A. A. and Mansur, I. (2015).Principles and Practice of Islamic Banking. Benchmark Publishers Limited, Kano, Nigeria.

Ogedengbe, P.S. &Adesopo, A.A. *Problems of Financing Real Estate Development in Nigeria,* J. Hum. Ecol., 14(6): 425-431 (2003)

Randall Bell *et al*., Bell's Guide: The Comprehensive Real Estate Handbook 48 (Sequoia Publishers 2d ed. 1999).

Ratcliff, R.U.: *Real Estate Analysis*. McGraw Hill, New York (1999).

Roshash, M.A. (2005). Islamic Company Law: A Comparative Analysis. Pharos Media and Publishing Pvt. Ltd New Delhi

Siddiqi, M. N. (2009). Banking Without Interest (United Kingdom: The Islamic Foundation.)

PAPER PRESENTATIONS

Ahmad, N.A. and Idris, M. (2015).An Examination of the Mode of Housing Acquisition through Islamic Banking Product of *Musharaka*Mutanaqisa. A paper presented at the 2nd International Conference on Islamic Banking and Finance organized by the IIIBF, B.U.K, April, 2015. Pp. 5-7

Nasir, A. A. (2012). An Examination on the trends in the Development of Islamic Banking in Nigeria. A paper presented at Department of Islamic Law, faculty of Law – bayerO University, Kano on Thursday, the 9th day of August, 2012 at the Seminar series of the International Institute of Islamic Banking and finance (IIIBF), Bayero University, Kano

Zakariya, M. (2014).An Appraisal of the Application of the Principles of Sharikah in Islamic Banking Products and Services. A Dissertation submitted to the faculty of law Bayero University Kano in partial fulfillment of the requirement for the award of the Degree of Master of Laws (LLM) p 143

JOURNALS

Usmani, N.M. &Abdallah.M.F (2010).*Musharaka*hMutanaqisah Home Financing: A Review of Literatures and Practices of Islamic Banks in Malaysia, Internal Review of Business Research Papers Volume 65 Number 2.

INTERNET SOURCES

SBP, FAQ on Islamic Banking. *State Bank of Pakistan.*[Online] [Cited: 06, 06, 2015.] available @www.sbp.org.pk/ibd/faqs.pdf

www.Islamic Assignment Assignmentpoint.com Last visited 20/03/2017

www.albaraka.com