In the Supreme Court of Nigeria

On Friday, the 16th day of December 2011

Before their Lordships

Mahmud Mohammed	.....	Justice Supreme Court
Ibrahim Tanko Muhammad	.....	Justice Supreme Court
Christopher Mitchell Chukwuma-Eneh	.....	Justice Supreme Court
Muhammad Saifullah Muntaka-Coomassie	.....	Justice Supreme Court
Nwali Slyvester Ngwuta	.....	Justice Supreme Court

SC.78/2007

Between

Prince Abdul Rasheed A. Adetona *(Receiver of the Property Mortgaged by Henley Industries Ltd to First Bank of Nigeria Plc, by Deed of Mortgage dated 9th day of October 1955)*	.....	Appellants
First Bank of Nigeria Plc		

And

Zenith International Bank Plc	.....	Respondent

Judgment of the Court

Delivered by

Christopher Mitchell Chukwuma-Eneh. JSC

This interlocutory appeal is from the decision of the Court of Appeal, Ibadan (i.e. lower court) which dismissed the appeal of the Appellants against the decision of the trial court (i.e. Ota High Court) in this matter essentially on the ground of want of *locus standi* to maintain the action and the lack of the State High Court's jurisdiction to entertain the matter as per Section 251 (1) (e) of the 1999 Constitution (as amended).

The instant Appellants are the Appellants in the lower court, being dissatisfied with the decision of the lower court they have by a notice of appeal filed on 11/4/2002 raised two grounds of appeal against the lower court's decision. Parties have filed and exchanged their respective briefs of argument in accordance with the rules of this court.

The Appellants in their brief of argument filed on 5/7/2007 have in it identified a sole issue for determination as follows:

> "Whether the Respondent has the *locus standi* to maintain an action in trespass against the Appellants."

The Respondent is also the Respondent in the lower court. In its Respondent's brief of argument filed on 8/4/2008, it has also raised for determination one issue as follows:

> "Whether the Respondents, the legal mortgagee of the subject-matter of this appeal has sufficient right and/or interest to maintain an action against the Appellants for acts of trespass to the said property."

The facts and circumstances central to the transaction in this matter are not disputed. Upon a credit facility granted by the 2nd Appellant to Henley Industries Limited as security for the said credit facility, a deed of legal mortgage has been executed in favour of the 2nd Appellant over its property situated at Plot C. 21/6 Agbara Estate, Ogun State. This arrangement covers the mortgagor's plants and machinery affixed thereto. The Respondent, a banker has also granted credit facility to Henley Industries Limited which has been secured by a tripartite mortgage debenture over the property of John Edge & Co. Limited also situated at the Eastern Part of Plot C. 21/6 Agbara Estate, Ogun State and particularly adjacent to the land over which the aforesaid legal mortgage has been created in favour of the 2nd Appellant. Henley Industries Limited on failing to repay the loan arising from the said credit facility granted to it, the 2nd Appellant in accordance with its right pursuant to the aforesaid deed of legal mortgage moved in and appointed the 1st Appellant as its receiver over the mortgaged property. The 1st Appellant has in the result taken actual possession of the property covered under the said deed of legal mortgage.

It is the Respondent's case that the 1st Appellant severally and unlawfully has encroached into the land and property that secured the loan granted under the mortgage debenture to the Respondent.

Consequently the Respondent in the instant claim as Plaintiff has sought the following reliefs in *brevi manu*.

1. An order of perpetual injunction.
2. An order for account.
3. Damages in trespass.

It is on these facts that the parties herein have predicated their respective arguments in this appeal. It is to be noted that the crucial question in the preliminary objection contending that the trial court lacks the jurisdiction under Section 251(l) (e) of the 1999 Constitution (as amended) to entertain the instant case has been dropped in the appeal now before this court. The only issue now before this court revolves on the sole question of the *locus standi* of the Plaintiff/Respondent to maintain this action for trespass when as alleged by the Defendants/Appellants it is not in exclusive possession of the mortgaged property.

The Appellants have argued that in the circumstances the court must have regard to the reliefs as claimed as per the writ of summons and the statement of claim in considering the Plaintiff's *locus standi* to sue in this matter; and particularly so in an action for trespass where the person suing must be in exclusive possession or have a right to immediate possession. For so contending they rely on *Amakor v Obiefuna (1974) 3 SC 67; (1974) 3 SC (Reprint) 49; (1974) ANLR 109* per Fatai-William, JSC, (as he then was) and *Olagbemiro v Ajagungbade III (1990) 5 SC (Part I) 61; (1990) 3 NWLR (Part 136) 37 at 55* per Bello, CJN. They also contend that by the finding of the trial court not otherwise challenged by the Respondent that the person in possession at the time of the alleged trespass is not the mortgagee, upon which ground they have submitted that the interest of the mortgagee in the property qua mortgagee cannot suffice to give such a Respondent the *locus standi* to sue for trespass when in actual fact he is not in exclusive possession of the mortgaged property. They also have even then alleged that the Respondent's interest as a mortgagee *vis-a-vis* the mortgaged property being a contingent right has not ripened as to constitute a vested interest to enable and so entitle the Respondent to sue. They refer to the case of *Wilson v Oshin (2000) 6 SC (Part III) 1; (2000) 9 NWLR (Part 672) 442 at 461*, in expatiation of the contingent state of the mortgagee's (i.e. the Respondent) interest at the time of the trespass. In the premises, they have urged the court to allow the appeal.

The Respondent's case however, turns on the assertion that the Respondent having by the legal mortgage a right to exclusive possession can sue in this matter for trespass. See *Ekretsu v Oyogbebere (1992) 9 NWLR (Part 266) 438 at 455; Atunrase v Sunmola (1985) I NWLR (Part I) 105 at 110.* The Respondent even also has maintained that upon the above decided authorities it has sufficient interest in the subject matter of the action particularly so as the acts of trespass have been adverse and will otherwise affect his interest in the mortgaged property and that the principle of *locus standi* as considered and expounded in *Adesanya v President, Federal Republic of Nigeria (1981) 5 SC 112; (1981) 5 SC (Reprint) 69; (1981) 12 NCLR 358* and *Imade v Military Administrator Edo State,* are the relevant authorities and applicable.

The Respondent furthermore, has submitted that from the statement of claim that the said loan not having been repaid its proprietary right in the subject matter that is the mortgaged property as a mortgagee has been infringed upon by the wrongful acts of the Appellants hence the instant action for trespass to preserve the Respondent's security as per the mortgaged property. It has urged the court to dismiss the appeal as unmeritorious and misconceived and uphold the judgment of the lower court.

Before going into the merits of this matter, the issues raised by both parties to the appeal seemly make it clear on the point that the challenge of the trial court's jurisdiction pursuant to Section 251 (1) (e) to the effect that the State High Court as against the Federal High Court cannot entertain the instant action because of want of the jurisdiction to deal with this matter, rightly in my view, has been dropped as conceded. That leaves as the sole issue as raised for determinations by both sides in the appeal as to the question of *locus standi* of the Plaintiff/Respondent to institute the instant action for trespass. The Appellants, again and again have contended in this case that the mortgagee as the instant Respondent is not in exclusive possession of the mortgaged property in dispute and so cannot sue for trespass; even moreso the trial court has so found.

To raise the issue of *locus standi* or as is often commonly denoted, standing or title to sue, that is, simply put, the term means the Plaintiff's capacity to sue, goes to the competence of Plaintiff to institute an action to be adjudicated upon before the court. See *Gamioba & Ors. v Esezi & Ors. (1961) 1 ANLR 584 at 588* - this case has decided the point that once the *locus standi* of the Plaintiff cannot be established from his pleadings that is to say, where it is not so disclosed, then the action is liable to be dismissed; meaning that the court is not obliged to go into the merits of the case. This is the position both in our public and private law. It is strongly contended that it would otherwise open the floodgate for unwarranted cases where this principle is either relaxed or ruled out more so in the area of our public law. I have expressed my view on this proposition anon in this matter.

I find myself in agreement with the Appellants on the point that as a general principle the averments in the statement of claim and the writ of summons are mainly the materials required at this stage to ascertain the *locus standi* of a Plaintiff, that is to say, they are the materials relevant in the consideration of the instant question. See an analogous situation in the decision of this court in the case of *Seismograph Services v Oshie (2009) 16 NWLR (Part 1168) 158 at 160 E-F*. Besides, the Respondent in this case as the Plaintiff has contended that it has established even more strongly a sufficient interest in the subject matter of this case namely its proprietary interest in the mortgaged property in dispute to enable it sue for trespass. The Appellants in answer say that the Respondent herein not being a mortgagee in possession lacks the capacity to so institute the present action against the Appellants for trespass nor on the peculiar facts of this matter has the Respondent the right to possession either and that the instant claim having no legs on which to stand should be dismissed. The Respondent has countered this submission as arising from a misapprehension of the case to the contrary on this point.

It is necessary here to start with examining firstly the meaning of mortgage as I accept its definition as per *Bank of the North v Bello (2000) 7 NWLR (Part 664) 224 C.* A., to the effect that:

> "A mortgage is the creation of an interest in a property defeasible (i.e. annullable) upon performing the condition of paying a given sum of money with interest at a certain time. The legal consequence of the definition is that the owner of the mortgaged property becomes divested of the right to dispose of it until he has secured a release of the property from the mortgagee."

In other words in a proper mortgage the title to the property must have been transferred to the mortgagee subject to the proviso of the mortgaged property being reconveyed by the mortgagee to mortgagor upon performing the condition stipulated in the mortgage deed and invariably upon payment of the debt at the time so stipulated in the deed of mortgage. The mortgagor is liable to repay the loan as stipulated otherwise the mortgaged property is foreclosed. It is settled that by a legal mortgage, the mortgagee becomes the legal owner of the property although the mortgagor may be left in actual possession/occupation of the mortgaged property but because the mortgagee is entitled to enter into possession immediately upon the execution of the mortgage he has a right to immediate possession. In this position the mortgagee wields enormous rights over the mortgaged property. In the instant case, the mortgagor has mortgaged its property situate at Plot C 21/6 (6 Agbara Estate), Ogun State to its bankers the 2nd Appellant to secure credit facilities granted to it. The mortgagee although not in exclusive possession as found by the trial court, nonetheless has a right to immediate possession and in my view sufficient interest to ground this suit as I will show anon. What is deducible from the essence of the instant legal mortgage is that the mortgagee's interests or rights in the mortgaged property are both contractual and proprietary; contractual in the sense that that fact has arisen from the deed of legal mortgage executed between it and the 2nd Appellant, that is, in which the mortgagor and mortgagee are parties: See *Alhaji Nabu Akibiya v Alhaji Sambo (1978) 11-12 SC 139; (1978) 11- 12 SC (Reprint) 105*. On the other hand his proprietary rights also derive from his property rights to the mortgaged property transferred to him by the very act of the mortgage. See *Bridges v Mees (1957) Ch. 475*. Arguably these interests or rights so created are subject to be protected and indeed preserved by actions for injunctive reliefs at law in the courts notwithstanding the mortgagor being in actual occupation of the mortgaged property.

Having put the issues in this matter in their perspective, the point has to be reiterated that it is not easy to define, based on decided cases, the true relation between mortgagor and mortgagee. This is because the mortgagor's relation *vis-a-vis* the mortgagee has been described variously as a tenant to the mortgagee, even a trespasser in cases where he has refused to yield up possession to the mortgagee, etc. The mortgagor is also liable to be sued for any injury to the mortgagee's reversion. However, it is certain that a mortgagor is not an agent as such of the mortgagee in the strict legal terms; he would have been so described as having functioned as per that capacity in decided authorities; and no authority in that regard has been given by the parties. From the above settled positions it is therefore difficult to analyse the relation (i.e. *inter se*) between the mortgagor to the mortgagee; it is even moreso in this case. And I do not intend to do so here between the instant mortgagor and mortgagee in the tripartite mortgage debenture save to rationalize their relation through their actions in this case, as it is not directly in issue at this stage of the case but see *Fishers v Industry Cooperation & Co. Ltd. (1911) 2 Ch.223, and Bagnall v Villar (1879) 12 Ch.D 812.*

Again, having accepted as settled the foregoing, there is the danger in the instant action of one delving too deep into some aspects of the matter still very live issues to be resolved or settled at the trial of the substantive suit still pending at the lower court. In fact, this case has not yet opened at all since wherefore it has started its journey to this court on account of the instant preliminary objection. In such circumstances lives issues in the matter as here must be left for the substantive trial of the matter. As a matter of principle such live issues should not be pre-empted at the interlocutory stage of hearing an objection. See with approval *Madubuike v Madubuike (2001) 9 NWLR (Part 719) 698 at 707*. And so, whereas here in a claim as the instant one *vis-a-vis* an interlocutory matter as here that has arisen therefrom an issue questioning as here the Plaintiff's standing or title to sue and the question has gotten interwoven with factual and legal considerations not clearly determinable before the court as an appellate court as here without more which would otherwise assist it conclusively in resolving some of the questions arising for determination in the preliminary objection before the court, even then, the court has to walk the tightrope of resolving the matter without reference to or deciding those live issues one way or the other as the court has no jurisdiction to decide at the interlocutory stage as here the substantive issues for the trial court to decide at the trial. However, it is settled law that the mortgagee whether in possession or not, is entitled to have the mortgaged property preserved from being wasted in the hands of the mortgagor or any other person who has an inferior interest to his.

In the instant case, the acts of trespass by the 1st Appellant as alleged have tended to diminish the quality of the Respondent's security for the loan it has granted to the mortgagor i.e. Henley Industries Limited. A mortgagee is not supposed in the circumstances to sit idly by watching, while his security is being wasted and so make it insufficient to satisfy the facility granted on the security. And furthermore, in order not to prejudice the Plaintiff's case by a plea of waiver or acquiescence at the trial court. And so the fact that the mortgagee is not in possession is of no moment in deciding him to protect his interest in the mortgaged property. In this case, the Plaintiff as a banker has the right in the circumstances of this case to take action against any attempt to damage or diminish its security. Even though some of the questions on the *locus standi* of the Respondent to sue in this matter cannot conclusively be resolved here at this stage as they have become interwoven with some serious questions of factual and legal consideration that should be left for the trial court, all the same, the Respondent in this case has established such clear and sufficient interest arising both from the instant contract between the mortgagor and the mortgagee as expressed in the tripartite mortgage debenture and his proprietary rights to the mortgaged property as arising as per the fact of the conveyance of the mortgaged property itself to the Respondent to sustain this suit. The question of the merits of the Respondent's case in this matter at this stage of considering the instant preliminary objection should not be the issue, that is as to whether the action will succeed or fail.

One of the factors that has emerged after having scrutinized the implication of the term; *"locus standi*" above *vis-a-vis* the instant case, if I may repeat, is that the Plaintiff has also satisfied the requirement that he has established on undisputed facts substantial interest in the subject matter of this case and that the Plaintiff's interest in the mortgaged property will be adversely affected if not protected from the immediate alleged wrongful and trespassory acts of the Appellants as enumerated as per Paragraphs 10, 12, 14 and 15 of statement of claim; I will revert to them anon. See *Imade v Military Administrator Edo State (2001) 6 NWLR (Part 709) 478 C.A.* And this is so as the Appellants' acts are as alleged clearly adverse as they are not referable to lawful rights. The paragraphs of the statement of claim that bear forth these facts are set out as follows:

> "(10) The Plaintiff avers that in the course of his duty, the said 1st Defendant has made several encroachments into the property mortgaged to the Plaintiff and has begun selling the sodium silicate from the premises which is beyond his powers under the said instrument appointing him.
>
> (12) The Plaintiff avers that the action of the Defendant is wrongful as the powers of the 1st Defendant which is clearly spelt out in the deed appointing him as a receiver covers only the western part of the said piece/parcel of land and does not extend to the Plaintiff's eastern portion of the said plot of land.
>
> (14) The Plaintiff also avers that the said 1st Defendant also disrupted the operations of the said Henley Industries, turned off its industrial machinery and plant leading to wholesale damages to the said plants and machinery.
>
> (15) The Plaintiff avers that not satisfied with the above action, the said 1st Defendant summoned all the workers to an open air rally whereat he derided the management of the company and called them '419 managers' and threatened to sell off the entire premises to prospective buyers with whom he claimed he had commenced negotiations."

The above paragraphs of the statement of claim speak eloquently of how the Respondent's interests are threatened and have been threatened and will suffer irreparable damage if not stopped by injunctive reliefs. On the uncontested facts in this case, it is my view that the Mortgagee/Respondent has established sufficient interest in the mortgaged property to justify its intervention to ask for injunctive reliefs to stop the acts of trespass whether or not the Respondent eventually will succeed on its claim should not come into consideration at this stage. See again *Imade v Military Administrator Edo State (2001) 6 NWLR (Part 709) 478 C.A.* In Imade's case, the court has considered the quantum of interest to warrant an action as the instant one in the circumstances in these terms:

> "A person is said to have an interest in a thing when he has rights, advantages, duties, liabilities, loses or the likes, connected with it whether present or future, ascertained or potential, provided that the connection, and in the case of potential rights and duties, the possibility is not too remote. The question of remoteness depends upon the purpose which the interest is to serve."

The foregoing cited case is most apt in considering the degree of the Respondent's interest or rights *vis-a-vis* the mortgaged property in this matter. It has been shown that the Respondent's interest is connected with the mortgaged property.

The difficulty experienced in dealing with this matter has arisen from the background that the case in the trial court has not yet opened. Without deciding the point it would have been obviated if the question of standing or title to sue here has not been raised until after the exchange of pleadings or even on the completion of evidence and argument thereof to resolve the thorny factual and legal issues interwoven as in this dispute most of which borders on evidence. In *Imade's* case cited herein it has arisen after exchange of pleadings and issues have been joined between the parties. Even although this approach would impugn on the general principle that "*locus standi*" as a threshold matter should be dealt with first, such procedural approach should not stand in the way of doing justice in a matter as here. I have seen no reason that it is an inflexible principle of law. I make this observation because there are cases in which the question of *locus standi* could not be so resolved on the Plaintiff's statement of claim used alone. Even though the issue of jurisdiction in this case is settled, the receiver's involvement has introduced some complications in this matter as to his legal position *vis-a-vis* Section 393(1) of CAMA Cap 59 of LFN 1990 so also whether or not the mortgagee as found by the trial court and not otherwise challenged here or at the lower court can sue even if not in actual possession at the time of the alleged acts of trespass (a finding reached at the interlocutory stage of this matter) and whether the Respondent/Mortgagee has re-entered because of the alleged acts of trespass. In the case of *Attorney General of Eastern Nigeria v Attorney General of the Federation of Nigeria (1964) 1 ANLR 224,* the issue of *locus standi* was not even raised at all nor pronounced upon as an issue in deciding the merits of the case. I find that the Respondent has established its interest in the subject matter of this case that is, the proprietary interest to enable it institute this action for trespass to protect its security on the mortgaged property; and this is particularly so on the backdrop of no reaction to the acts of trespass by the mortgagor of the tripartite mortgage debenture; it has not sued even though it may be in possession of the property.

I have no difficulty in view of what I have said above in agreeing *in-toto* with the decisions of the two lower courts which also constitute concurrent findings in the matter and have not been displaced howbeit by having showed them to be perverse. See *Okulate v Awosanya (2000) 1 SC107.* Having found nothing perverse i.e. special circumstances in regard to the findings on the question whether the Respondent has interest to be protected in the subject matter of this suit to warrant any interfering by this court, the Respondent is entitled to my judgment in its favour; it has the *locus standi* to sue in this matter. In the result, I find no merit in the appeal. It is dismissed.

The judgment of the lower court is hereby affirmed. The case is remitted back to the trial court i.e. for the suit to commence on the merits before the trial court; that is about 10 years since after its inception and starting its journey to this court from the trial court upon a notice of preliminary objection which otherwise has no basis and this delay is highly deprecated. I make no order as to costs.

Judgment delivered by
Mahmud Mohammed. JSC

This appeal is against the judgment of the Court of Appeal, Ibadan Division delivered on 29th March, 2007 which dismissed the appeal against the ruling of the trial High Court of Justice, Ogun State given on 19th December, 2002 dismissing a preliminary objection to the jurisdiction of that court to entertain the suit of the Plaintiff/Respondent. The main issue for determination in this appeal is whether the Respondent as legal mortgagee of the property the subject matter of this appeal, has sufficient interest or rights to maintain an action for trespass against the Appellants/Defendants.

In the resolution of this lone issue, I am entirely with my learned brother, Chukwuma-Eneh, JSC., in his leading judgment which I have had the opportunity of reading in draft before today in coming to the conclusion that the Court of Appeal was right in holding that the Respondent has sufficient rights and interest to maintain the action for trespass against the Appellants. This is in fact the position in law if the decision of Fatayi Williams, JSC, (as he then was) in the case of *Ajadi v Olarewaju (1969) 6 NSCC 334 at 339*, is taken into consideration, regarding the right of a legal mortgagee to take appropriate action to protect his interest in the mortgaged property in an action for trespass.

In the result, I also hold that this appeal is devoid of merit and the same is hereby dismissed by me. I also abide by the order on costs in the leading judgment.

Judgment delivered by
Ibrahim Tanko Muhammad. JSC

This appeal is against the decision of the Court of Appeal, Ibadan Judicial Division, delivered on the 29th day of March, 2007, whereby the court dismissed the appeal.

Henley Industries Limited, a company carrying on business at Agbara in Ogun State is a customer of the 2nd Appellant. The company obtained a credit facility from the 2nd Appellant and executed a deed of legal mortgage in favour of the 2nd Appellant over its property situated at Plot C 21/6 Agbara Estate in Ogun State together with the plants and machinery affixed thereto as security for the credit facility.

The Respondent is also a banker to Henley Industries Limited and equally granted a credit facility to the company. The credit facility was secured by a tripartite mortgage debenture over the property of John Edge & Company Limited situated at the eastern part of Plot C 21/6 Agbara Estate, Ogun State.

Due to the failure of Henley Industries Limited to repay the credit facility granted to it by the 2nd Appellant, the 1st Appellant was appointed by the 2nd Appellant as receiver of the mortgaged property pursuant to the terms of the deed of legal mortgage.

The 1st Appellant was appointed under a deed of appointment dated the 9th day of February, 2001. The 1st Appellant sequel to the powers vested in him under the deed of appointment and the relevant provisions of the Companies and Allied Matters Act took possession of the mortgaged property situated at Plot C 21/6 Agbara Estate, Ogun State with a view to realizing the said property for the benefit of the 2nd Appellant, his appointor.

The Respondent believed that the 1st Appellant was acting beyond the scope of the powers vested in him under the deed of appointment whereby he was appointed as receiver particularly in relation to the eastern part of the property situated at Plot C 21/6 Agbara Estate, Ogun State.

By writ of summons and statement of claim dated the 30th day of May, 2002, the Respondent instituted an action against the Appellants at the High Court, Ota.

The Appellants, by a notice of preliminary objection dated the 30th day of September, 2002 raised an objection to the jurisdiction of the court on the grounds that the Federal High Court is the court vested with jurisdiction to entertain the subject matter of the suit by virtue of Section 245(1) (e) of the 1999 Constitution of the Federal Republic of Nigeria and also that the Respondent has no *locus standi* to institute the action.

The learned trial judge, in his ruling on the preliminary objection delivered on the 19th day of December, 2002 dismissed the objection.

The Appellants lodged an appeal at the Court of Appeal against the decision of the learned trial judge vide a notice of appeal dated 31st day December, 2002. The Court of Appeal delivered its judgment and dismissed the appeal.

The Appellants being dissatisfied with the decision of the Court of Appeal lodged an appeal against the same by a notice of appeal dated the 11th day of April, 2007.

Briefs were filed and exchanged by the parties in this court. Learned counsel for the Appellant formulated the following lone issue for determination, viz:

> "whether the Respondent has the *locus standi* to maintain an action in trespass against the Appellants.
>
> (Ground 1 of the notice of appeal)."

Learned counsel for the Respondent distilled the following issue for our determination:

> "whether the Respondent, the legal mortgagee of the subject matter of this appeal, has sufficient right and/or interest to maintain an action against the Appellants for acts of trespass to the said property."

It is to be noted that there are two grounds of appeal filed by the Appellant. Learned counsel for the Appellant abandoned the 2nd ground of appeal on the hearing day which is accordingly struck out.

The lone issue for determination is on *locus standi* of the Respondent to maintain an action in trespass against the Appellants. The Respondent's claim against the Appellants at the trial court include, among others:

a) an order of perpetual injunction.

b) an order for account.

c) damages for trespass.

I think the fundamental question in relation to the issue under consideration, is: who can maintain an action for trespass in a suit on land matters? Authorities are legion that trespass to land is actionable or maintainable at the suit of a person in exclusive possession of the land or anyone that has a right to possession. See: *Eleretsu v Oyobebere (1992) 9 NWLR (Part 266) 438 at 455.* The simple reason behind this principle of law is that exclusive possession of the land gives the person in such possession the right to retain it and to undisturbed enjoyment of it against all wrong doers except a person who can establish a better title. See: *Amakor v Obiefuna (1974) 3 SC 67; (1974) 3 SC (Reprint) 49; (1974) All NLR 109; Olagbemin v Ajagungbede III (1990) 5 SC (Part I) 61; (1990) 3 NWLR (Part 136) 37; Adeban;o v Brown (1990) 6 SC 63; (1990) 3 NWLR (Part 141) 661; Thomson v Arowolo (2003) 4 SC (Part II) 108; (2003) 7 NWLR (Part 518) 163.*

The next vital question is: what then is the position of the Respondent *vis-a-vis* the land in dispute? The Respondent was the Plaintiff at the trial court. The trial court, after assuming jurisdiction, properly in my view, made the following findings:

> "from the facts in this case, it is not in dispute that the Plaintiff was the legal mortgagee in the mortgage contract with Joan Edge & Company and Henley Industries Ltd. The substance of a mortgage of land (which is a legal or equitable conveyance of title as a security for the payment of debt) is a right of property vested in the mortgagee, and in law, a mortgagee is regarded as the legal owner of the mortgaged property. Unless the mortgage had precluded it, a legal mortgagee has a right qua mortgagee to possession of the mortgage property. Amongst the rights and or powers exercised by a mortgagee is the right to enter into possession of the mortgaged property to place, maintain, and hold the property undiminished in value, and to prevent the mortgagor from committing waste on the property. As against third parties, the mortgagee is entitled to protect the property from damage or encroachment prejudicial to his interest, and in doing so, may sue for trespass committed even before his entry."

The court below, after having reviewed the record of appeal placed before it, counsel's addresses both written and oral, it concluded in the following words:

> "in this case, the Respondent granted a credit facility in the sum of ₦350 Million Naira to Henley Industries Ltd. The same Henley Industries Ltd., had obtained a credit facility from the 2nd Appellant, which was secured by a deed of legal mortgage over property on the same plot of land used to secure the credit facility the Respondent granted to the company, albeit different parts. The Respondent's claim is that its interest in the said land is being adversely affected by the activities of the 1st Appellant and it wants the court to stop it. That is all and at this stage, that is sufficient to give it the standing to sue. The lower court was therefore right, and its conclusions cannot be faulted."

Thus, it is beyond dispute that the legal right of the Respondent over the land in dispute has been established.

He therefore has a vested interest over the said land. Further, it is to be noted, my lords, that for a person to have interest in a thing, he has to have rights, advantages, duties, liabilities, losses or the like, connected with the thing, whether present or future, ascertained or potential; provided that the connection, and in the case of potential rights and duties, the possibility is not too remote. The contention of the Appellant is that the Respondent has no *locus standi*, as it was neither in exclusive possession of the parcel of land allegedly trespassed on nor has an immediate right to possession of same. I agree with the learned counsel's submission that the Respondent as a mortgagee has the right to protect the mortgaged property against threat to its interest by third parties. I feel fortified by the finding of the trial court on that same issue where it stated:

"The Plaintiff, a mortgagee, pleaded facts relating to its rights, obligations and interest in the subject matter of this case. The Plaintiff also alluded to facts that the acts of the Defendants - have adversely affected its interest as a result of which it suffered injury for which it is entitled to be indemnified in damages. It would be inconceivable and a misconception to say that Plaintiff, in the circumstances of this case, does not have sufficient interest to institute this action against the Defendants who are alleged to be engaged in acts prejudicial to the Plaintiff's interest."

The trite position of the law is that for a person to have *locus standi*, he must show that his civil rights and obligations have been or are in danger of being infringed and that he has sufficient legal interest in seeking redress in a court of law and whether he will succeed or not has no bearing on his standing to sue. See: *Adesanya v President FRN (1981) 5 SC 112; (1981) 5 SC (Reprint) 69; Lawal v Salami (2002) 2 NWLR (Part 766) 346; Odeleye v Adepegba (2001) 5 NWLR (Part 706) 330; Imade v Military Administrator Edo State (2001) 6 NWLR (Part 709) 478 CA* On the appeal on hand, the collateral used to secure the facility granted to Henley Industries Ltd., by the Respondent was being encroached on and dissipated which is adverse to the interest of the Respondent. Thus, since it has been established that the loan secured from the Respondent by the Appellant has not been paid, it means that the mortgagee (the Respondent) still retains the proprietary right over the property. It is, in my view, a right worthy of protection by the mortgagee and by extension, the court. I think the Respondent is pre-eminently qualified to protect the said property. This is what the two courts below rightly did in my view. Their decisions are unassailable and I affirm them.

Like my learned brother, C. M. Eneh. JSC, who treated the issue at length, and with whom I agree, I, too, find no merit in the appeal. I accordingly dismiss the appeal. I abide by all consequential orders made in the leading judgment.

Judgment delivered by
Muhammad Saifullah Muntaka-Coomassie. JSC

I have the privilege of reading in advance the leading judgment of my learned brother, Chukwuma-Eneh. JSC, just delivered. I think I agree entirely with him that the appeal lacks merit for the reasons which his lordship has given therein and which I adopt, with respect as mine, I too dismiss the appeal and affirm the decision of the lower court. In a result the matter is remitted back to the trial court to be heard *de novo.*

Judgment delivered by
Nwali Sylvester Ngwuta. JSC

Henley Industries Limited obtained a credit facility from the 2nd Appellant. As security for the loan facility granted to it, the company executed a deed of legal mortgage over its property situate at Plot C 21/6 Agbara Estate in Ogun State with the plants and machinery thereto affixed in favour of the 2nd Appellant.

The company also obtained a loan facility from the Respondent, also the company's banker. The loan was secured by a tripartite mortgage debenture over a property belonging to John Edge & Company Limited situate at the eastern portion of the same Plot C 21/6 Agbara Estate in Ogun State. The company failed to repay the loan granted to it by the 2nd Appellant.

Pursuant to the terms of the deed of legal mortgage executed in its favour by the company, the 2nd Appellant appointed the 1st Appellant as a receiver of the mortgaged property. The appointment was under a deed of appointment. Pursuant to the powers vested in the 1st Appellant by the deed of appointment as well as the relevant provisions of the Companies and Allied Matters Act and for the benefit of the 2nd Appellant his appointor, the 1st Appellant took possession of the mortgaged property situate at Plot C 21/6 Agbara Estate, Ogun State.

The Respondent felt that the 1st Appellant exceeded the powers vested in him by the deed of appointment and went beyond the property situate on the eastern part of Plot C21/6 Agbara Estate to encroach upon the other property on the same estate mortgaged to it by the company.

The Respondent filed an action in the High Court, Ota, Ogun State against the 1st Appellant and his appointor, the 2nd Appellant. The Appellants challenged the jurisdiction of the High Court of Ogun State to entertain the matter on two grounds:

"(1) By Section 251(l)(e) of the Constitution of the Federal Republic of Nigeria, 1999 the Federal High Court is vested with exclusive jurisdiction over the subject matter of the suit.

(2) The Respondent lacks *locus standi* to institute the action."

The learned trial judge dismissed the preliminary objection on 19/12/2002.

The appeal lodged at the Court of Appeal, Ibadan by the Appellants was dismissed by the Court of Appeal and being dissatisfied with the judgment of the lower court, Appellants appealed to this court by a notice of appeal dated 11th April, 2007. Learned counsel for the parties filed and exchanged briefs of argument. From the two grounds of appeal filed, learned counsel for the Appellant distilled the following lone issue for determination:

"Whether the Respondent has the *locus standi* to maintain an action in trespass against the Appellants."

(Ground 1 of the notice of appeal).

Ground 2 of the notice of appeal from which no issue was formulated is deemed abandoned and is hereby struck out.

Learned counsel for the Respondent formulated the following issue for determination:

"Whether the Respondent, the legal mortgagee of the subject matter of this appeal, has sufficient right and/or interest to maintain an action against the Appellants for acts of trespass to the said property."

In my view, the two issues raised by the parties are substantially the same. "*Locus standi* to maintain an action in trespass in the context of this case, means the same thing as "sufficient right and/or interest to maintain an action ..... for acts of Trespass ....." What, then is *Locus standi*? The term, *locus standi* has been defined *inter alia* as the right of a party to appear and be heard on the question before any court or tribunal. See *Senator Abraham Adesanya v President of the Federal Republic of Nigeria & Anor. (1981) 5 SC 112 at 128-129; (1981) 5 SC (Reprint) 69*, per Fatayi Williams, CJN, (as he then was); *Ogunsanya v Dada (1992) 4 SCNJ 162 at 168; Gombe v P.W. Nig. Ltd. (1995) 7 SCNJ 19 at 32.*

At the time of its suit in the High Court of Ogun State, had the Respondent the *locus standi* to sue in trespass on the property over which a deed of legal mortgage was executed in its favour? Trespass is unjustified intrusion by one person upon land in possession of another. See *Ogunbiyi v Adewunmi (1985) 5 NWLR (Part 59) 144 SCNJ at 156; Okagbue v Romaine (1982) 5 SC 133 at 148; (1982) 5 SC (Reprint) 66.* The essence of trespass is injury to possession.

In view of the fact that the law does not permit concurrent possession of the same piece of land by two persons who claim adversely to each other, who was in exclusive possession and, *ipso facto* entitled to sue for trespass to the property in question at the material time?

It is the person who was in exclusive possession, or entitled to the right of possession in respect of the property. The claim of the Respondent was founded on the legal mortgage executed over the property in its favour. Mortgage is defined *inter alia*, as a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms. See *Advanced Law Lexicon 3rd Edition. Reprint 2009. Book 3. Page 3072*.

The main difference between a mortgage and a pledge is that in the former, the general title in the property is transferred to the mortgagee subject to it been reversed by performance of the condition; whereas by the latter, the *pledgor* retains the general title and parts with the possession. By a mortgage the title is transferred; by a pledge, possession is transferred. See *A Treatise on the Law of Mortgages*. S.4 at 5-6 (5th Ed. 1908) by Leonard A. Jones.

If this was a pledge, it would follow that the Respondent has possession of the pledged property. On the facts of the case at hand, only one person can have exclusive possession of the mortgaged property at a time. If there are competing claims to possession, the one with better title will prevail. See *Amakor v Obiefuna (1974) 3 SC 67; (1974) 3 SC (Reprint) 49; Umesia v Onuaguluchi (1995) 9 NWLR (Part 421) 515; Ekpen & Anor. v Uyo & Anor. (1986) 3 NWLR (Part 26) 63.*

Even if the Respondent is not a mortgagee in possession, it has a right to immediate possession and that right subsists and prevails against all other claims to title and/or possession of the mortgaged property for as long as the debt remains unpaid.

In conclusion, I hold that the Respondent has the *locus standi* to maintain an action in trespass against the Appellants. I resolve the lone issue in the appeal in favour of the Respondent.

For the above and the more comprehensive and exhaustive reasoning in the leading judgment of my learned brother, Chukwuma-Eneh, JSC., which judgment I had the privilege of reading in draft, I also dismiss the appeal. I adopt the consequential orders in the leading judgment.

Counsel

Olatunde Adejuyigbe *with him* O. T. Duke R. O. Abdullahi	.....	For the Appellants
Emeka Etiaba *with him* Ifeyinwa Nwabeze	.....	For the Respondents