AN APPRAISAL OF THE LEGAL REGIME FOR REGULATION OF REAL ESTATE INVESTMENT TRUSTS IN NIGERIA

ABUBAKAR MOHAMMED BOKANI*
ABUBAKAR MUHAMMAD MADAKI**

Abstract:
This paper employs the doctrinal method of research to appraise the legal framework for regulation of Real Estate Investment Trust (herein after called 'REIT') in Nigeria. REIT is used as an alternative source of finance for real estate development in Nigeria. The real property market has some peculiar characteristics in contrast to the capital market where stocks and shares can be sold to meet immediate demands. Unfortunately, REIT is facing certain challenges which militate against effective operation of the REIT industry in Nigeria. This paper is focused on the challenges connected to the laws regulating operation of REIT in Nigeria. Thus, the question is how effective is the legal framework for regulation of REITs in Nigeria? The objective of the paper is to answer the research question. The paper finds that the classification of REITs into Equity, Mortgage, and Hybrid REITs is unknown to the Investment and Securities Act which governs REIT in Nigeria. More so, the Nigerian REITs are not performing well like REITs in other jurisdictions because of the interplay of numerous laws that negatively impact on the REIT industry in Nigeria and legal regime regulating REIT is not adequate. It is thus proposed that a comprehensive legislation be enacted to provide the adequate legal framework for operation and also enable the Securities and Exchange Commission to provide the necessary institutional and regulatory support to the REIT industry, especially investors who are interested in the real estate sector.

Keywords: Equity, Trust, Real Estate, Collective Investment Scheme, Real Estate Investment Trust.

1.1 Introduction

Real Estate Investment Trust[1] ('REIT') is an investment vehicle which was inspired by the institution of trust. Although the idea of Trust originally developed as a means of providing support for the family, it has advanced into the commercial market as a vehicle for investment in real estate.[2] There are two major ways in which investors can invest in real estate. The first method is by purchase of real estate directly through vendors or property companies. This is the most common method of investing in real property whereby individuals buy property directly with cash or indirectly with equity funds and get freehold or leasehold title.[3] These individual owners invest capital, and take on significant political, financial and business risks, including those associated with construction. The second method however, involves the purchase of securitized real estate

* **Abubakar Mohammed Bokani**, Lecturer, Department of Private Law, Faculty of Law, ABU, Zaria, Ambokani8@gmail.com;08065591824

** **Abubakar Muhammad Madaki**, Professor of Law, Department of Private Law, Faculty of Law, ABU, Zaria Ammadaki@gmail.com;08033595343

1 Herein after referred to as 'REIT'.

2 Martin, E, *Modern Equity*, (16th Edn, Sweet & Maxwell Ltd 2001), 41.

3 Uchenna, E and Kalu, I. U, 'Views on Real Estate Investment Financing in Nigeria' (2016) (4)(4)*Journal of Economics and International Business Management,* 30.

or equity in real estate investment trusts.[4] This method has become common as indirect investment opportunities now underscore the significance of REIT.

REIT is one of the investment vehicles which provides opportunities for all categories of investors to enjoy the benefits and advantages of investing in real estate without financing the entire stages in development of real estate. REITs are companies that own and most often actively manage income- producing real estate such as residential houses, shopping malls, offices, hotels and ware houses.[5] REIT are required to concentrate their assets in real estate, and share income or dividends from rents and profits on investment to shareholders.[6] They have become a viable alternative for real estate investors since their shares can be purchased by anyone who can afford to acquire the minimum holding as specified in the Initial Public Offer (IPO) or can buy from the stock market.[7] Despite its large-size market, return on investment in REITs in Nigeria is 7% as against 15% in South Africa and 9% in Kenya.[8]

Unfortunately, the huge interest rate of commercial banks is a discouraging factor to most developers. Thus, the real estate investors appear to be unable to effectively compete with other investment opportunities such as capital market due to its capital intensive nature, low yield, and long payback period. Consequently, the conventional methods of financing real estate are inadequate. This failure of the conventional sources to provide financing for real estate development created the need for alternative sources of financing.[9] Unfortunately, the Nigerian REITs are not globally competitive compared to REITs in other countries. More so, there are numerous laws that govern the operation of REIT in Nigeria which militate against the smooth operation of the REIT industry. The question therefore is how effective is the legal regime for regulation of REITs in Nigeria? The aim of this paper is to appraise the legal framework for the regulation of REITs in Nigeria, and the objective is to determine the efficacy of the legal regime for regulation of REITs, and proffer solution to the research problem.

1.2 Historical Development of Real Estate Investment Trusts

It is important to examine the historical background to the development of REITs in Nigeria. Before the advent of REITs, investors could only invest in real properties in the property market by buying completed houses or building new ones. With REIT, it became possible to securitize real estate and trade units of real properties in the stock market.[10] REIT had long existed in the

---

[4] Michael, J. S et al, 'Can Private Real Estate Portfolio Be Balanced /Diversified Using Equity REIT Shares?' (2001)(7)(1) *Journal of Real Estate Portfolio Management*, 25.

[5] Helen, X.H.B, et al, 'Real Estate Investment Trust Returns: Predictability and Determent',(2015) (18)(1) *Journal of Real Estate Practice and Education*, American Real Estate Society, 109.

[6] (f.n,5) at 90.

[7] (f.n,5) at 30.

[8] Dabara, D.I. and Ogunba,O.A(2019) Real Estate Investment Trusts in Nigeria and the Structure-Conduct-Performance Paradigm. In: Laryea,S. and Essah,E. (eds.) Proceedings of West Africa Built Environment Research (WABER) Conference held at Accra, Ghana from 5-7 August, 2019, p.877.< https://www.researchgate.net/publication/335106438_Real_estate_investment_trusts_in_Nigeria_and_the_structure-conduct-performance_paradigm> DOI:10.33796/waberconference2019.63. Accessed on 23/5/2021 at 5:58pm.

[9] Ajibola, M.O. et al, 'Real Estate Investment Trust: An Attractive Investment Vehicle for Real Estate Development in Nigeria' (2009) (32) (1) *Journal of the Nigerian Institute of Estate Surveyors and Valuers*, 62.

[10] <Https://nairametrics.com/2019/08/04/key-considerations-when-investing-in-real-estate-investment-trusts/>

United States and were not taxed if the trust income was distributed to the beneficiaries.[11] However, REIT structure was legally recognised, when the Real Estate Investment Trust Act was signed into law by the U.S. Congress.[12] The legislation enabled small investors invest in income-producing properties in large scale.[13] Before 1960, the real estate market was dominated by high net- worth individual or institutional investors in the United State.[14] Since 1960s, REITs have been established across different countries at different times because of its acceptance as a viable and high return yielding investment.[15]

However, over the years, investment in REITs increased with U.S. REITs becoming the most important indirect investment vehicle in real property.[16] Previously, REITs could only own real property but not manage same; but the Tax Reform Act of 1986 changed the fortune of REITs in United States as an investment vehicle, and modernised the property market by reducing the deductibility of interest, increasing depreciation periods, and permitting REITs.[17]

Boom in REITs investment appeared throughout the 1980s when the Tax Reform Act[18] eliminated many real estate tax shelters. The Tax Reform Act enabled REITs to manage properties directly and in 1993, REITs investment barriers to pension funds were eliminated.[19] This trend of reform continued to increase and improve the opportunities and prospects for REITs to make high quality investments. Thus, United States' REITs grew with approximately $500 billion of commercial real estate assets, or 10-15% of total institutionally owned commercial real estate.[20] Recent statistics show that US REITs own more than 520,000 properties and about $3 trillion in real estate assets.[21] In January, 2020, the total market capitalisation of all publicly traded REITs in United States was $1.4 Trillion but due to Covid-19 pandemic, it has fallen to $1.1 trillion as of May, 2020.[22]

Accessed on 25/12/2020 at 11:12am.

11 Ajibola, M.O. et al, 'Real Estate Investment Trust: An Attractive Investment Vehicle for Real Estate Development in Nigeria' (2009) (32(1) *Journal of Nigerian Institute of Estate Surveyors and Valuers*, 62.

12 Klamer, P. et al, *Retail Investments by Real Estate Investment Trusts: A comparative Analysis of Local Retail Returns for the United States Tinbergen Institute Discussion Paper*, (2001) 2.

13 Nyachiro, D. and Jangongo, A, 'Role of Real Estate Investment Trust (REITs) in a Mixed Asset Portfolio: A Review of Literature' (2017) (19)(3) *IOSR Journal Of Business And Management*, 103.

14 Pham, A.K. '*An Empirical Analysis of Real Estate Investment Trust in Asia: Structure, Performance and Strategic Investment Implications'.* (Unpublished Ph.D Thesis, University of Western Sydney 2013)3.

15 Olanrele,O.O. et al, 'Comparison of REIT Dividend Performance in Nigeria and Malaysia'(2015)(9) (16) *African Journal of Business Management,*608-609.

16 (f.n,15).

17 Lemicux, C.M. et al, *Points to Consider when Financing REITs: Emerging Issues Series*. (1999 Department, Federal Reserve Banks of Chicago), 3.

18 Tax Reform 1986.

19 Mazurczak, A. 'Development of Real Estate Investment Trust (REIT) Regimes in Europe' (2011) (4)(1) *Journal of International Studies,* 116; Imperiale, R, *Getting Started in Real Estate Investment Trusts*, (2006 John Wiley & Sons, Inc.), 19.

20 Imperiale, R, '*Getting Started in Real Estate Investment Trusts*' (John Wiley & Sons, Inc., New Jersey, 2006), 116.

21 <Https://www.millionacres.com/research/reit-statistics> Accessed on 20/5/2021 at 10:33am

22 (f.n,21)

REITs were introduced in United Kingdom and Germany in 2007 with enactment of laws establishing REITs.[23] The United States has had a REIT regime since the 1960s and was a model for the UK, German and other jurisdictions. In Africa, few countries such as South Africa, Kenya, Ghana, and Nigeria have subscribed to REITs as a source of finance and an alternative to direct investment in real estate.[24]The REIT industry experiences relatively significant consolidation activity during 1990s which raises questions on the financial implication in the short and long run for shareholders.[25] The REIT regulation was introduced in Ghana in 1994 by the Securities and Exchange Commission of Ghana, and subsequently, HFC bank of Ghana launched the first REIT Company.[26] Similarly, Kenya has only one listed REIT i.e. the Stanlib Fahari-REIT, which started trading in November 2015.[27] Nigeria followed suit in 2007 when the Securities and Exchange Commission started implementing REIT regulation in Nigeria.[28] The number of REITs in Nigeria has not been increasing though there are top three REITs; UPDC REITs, Skye Shelter Fund REITs, and Union Homes REITs.[29] Skye Shelter Fund was introduced in 2007, with a capitalisation of about $6.5m but listed on the Nigerian Stock Exchange on 28 February, 2008 while Union Homes REIT was introduced in 2008, with a market capitalisation of about $40.8m.[30]

1.3 Meaning and Nature of Real Estate Investment Trust

The REIT has its genesis in business trust which is a form of association based on the equitable trust, [31]and it is essentially an arrangement whereby property is conveyed to trustees, in accordance with the terms of a trust instrument to be held for the benefit of the holder of transferable certificate representing the share into which the beneficial interest in the property is divided.[32]One of the purposes for which trust device has been deployed is business investment which is the underlying idea of REIT.[33] REITs are constituted to own, and in most cases, manage and lease income- producing real estate such as apartments, shopping centres, offices, hostels, hotels, health facilities, industrial facilities, infrastructure and warehouses, for the benefit of investors as beneficiaries.[34]

---

[23] Fritsch, Nicola and Prebble QC, John and Prebble, Rebecca A Comparison of Selected Features of Real Estate Investment Trust Regimes in the United States, the United Kingdom and Germany (2010) *Bulletin for International Taxation,* Victoria University of Wellington Legal Research Paper No. 14/2013,p.367.< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647484>. Accessed on 14th June, 2021 at 3:15pm.

[24] Sahin, F.O The Performance of Acquisition in the Real Estate Research, (2005) (27)(5) American Real Estate Society, 321.

[25] Dabara, D.I et al, Financial Structure of REITS in Emerging Property Markets: An Assessment of N- REIS (2018) (9)(16) Research Journal of Finance and Accounting, p. 30.

[26] Nyachiro,D and Jagongo, A, 'Role of Real Estate Investment Trusts(REITS) in a Mixed Assets Portfolio: A Review of Literature' (2017) (9)(3)*IOSR Journal of Business and Management,*103.

[27] <https://cytonn.com/blog/article/understanding-real-estate-investment-trusts-reits> Accessed on 12/07/2021 at 12:11pm

[28] (f.n,27)

[29] https://mixtafrica.com/real-estate-investment-trust-reits/ Accessed on 26/11/22 at 10:27pm.

[30] https://punchng.com/property-investment-trusts-struggle-15-years-after-take-off/ Accessed on 26/11/22 at 10:47pm.

[31] W.E.N, 'The Real Estate Investment Trust in Multistate Activity' (1962) (48) (6) *Virginia Law Review*, 1125.

[32] (f.n,31) at 1125

[33] Guobadia, D 'The Creation, Operation and Regulation of Units Trusts' In: Akank, E.O. (ed.) *Essays on Company Law*, (Department of Commercial and Industrial Law, University of Lagos 1992) 313.

[34] O'Neal, N.C (2009) The Development of Islamic Finance in America: the Future of Islamic Real Estate Investment Trusts. Real Property, Trust and Estate Law Journal American Bar Association, vol. 44, No. 2, p. 281

REIT has been defined as a Collective Investment Scheme (CIS) that enables investors to pool their resources together with the objective to form, own and manage portfolios of real estate properties.[35] This definition however does not determine the type of interest investors can acquire, and how the company will raise funds for real estate development. A different definition of REIT is that it is a company that invests in and manages a portfolio of real estate, with the majority of trust's income distributed to its shareholders.[36]Unfortunately, this definition is not comprehensive because it does not represent the nature of Nigerian REIT as a collective investment scheme. Fortunately, the Investment and Securities Act defined REIT as "a body corporate incorporated for the sole purpose of acquiring intermediate or long-term interests in real estate or property development through the issuance of securities in the capital market.[37] This simple but comprehensive definition explains the nature of REIT as investment vehicle which enables investors to pool resources together, and acquire shares in real estate without directly owning real estate.

The major characteristic of REIT is that it is an innovation of tax law.[38] This means that so long as a REIT distributes at least 90% of its ordinary taxable income and meet other requirements of the law, it will not be taxed on that portion of its income which is accordingly distributed.[39] Thus, REITs enjoy a special 'tax status' and they are able to avoid taxation if they are able to meet certain regulatory requirements regarding the organization, operation and distribution of income generated from rents or sale of the properties.[40] However, REIT regulations globally have undergone numerous changes that have dramatically affected the growth of the industry. Real estate is an important portfolio of many institutional as well as individual investors. Because of some special features of real assets such as lack of liquidity, lack of efficiency, lack of relevant performance measurements as well as high capitalization, private investors are limited in real estate direct investment.[41] These factors discourage many investors from participating in the ownership of large commercial real estate. Therefore, it has been argued that a possible solution is to create alternative forms of indirect real estate investments in the form of REIT.[42]

To facilitate private and institutional investment, numerous countries have created special tax regimes for property companies in the form of REITs, so as to avoid double taxation, and to create a level playing field between the different forms of real estate investment. A good example is the Finance Act[43] in Nigeria that has provided certain tax reliefs for REIT. The essence of the tax regime is to avoid taxing a rental income stream at the corporate level and again at the shareholder level.[44]REIT corporate structure enables qualified REITs to be able to avoid taxation at the

[35] Rowh, M *Careers in Real Estate*, (McGraw-Hill, 2003), 63.
[36] Garner, B.A. (2014) *Black's Law Dictionary.* (10th edn, Thomson Reuters 2014), 1455.
[37] Investment and Securities Act 2007, s 193(1).
[38] Aldrich, K.C, 'Real Estate Investment Trusts: An Overview. *The Business Lawyer*, (1972) (27) (4) 1165.
[39] (f.n,38) at 1165.
[40] Penz, et al. 'An Overview of Equity Real Estate Investment Trustee (REITs): 1993-2009 (2011) (19)(2) *Journal of Real Estate Literature, American Real Estate Society*, 307.
[41] Mazurczak, A. 'Development Real Estate Investment Trust (REIT) Regimes in Europe. (2011)(4)(1) *Journal of International Studies*, 115.
[42] (f.n, 41) at 115.
[43] Finance Act, 2020.
[44] (f.n, 41) at 115-116.

corporate level provided they meet certain regulatory requirements prescribed by law.[45] Exemption from the tax for a real estate company puts the investor in such a company in a favourable position as an investor who outrightly owns a real estate portfolio since the rental stream for such investor will only be taxed as income.[46] If a REIT meets all the statutory requirements, it will not be subjected to taxation on any of its capital gains or ordinary income which it distributes to its shareholders.[47]

In the United States and Nigeria, REITs are classified into three categories;[48] equity REITs, Mortgage REIT and Hybrid REITs. Equity REITs own income- producing real estate and seek to make profit by managing and selling real estate, improving existing properties and purchasing additional properties.[49]Equity REITs can be fully integrated real estate operating companies or may be focused on a specific aspect of real estate operations. Their operations generally include; acquisition and sale of properties, property management and leasing, property rehabilitation and repositioning and/or property development.[50]Mortgage REITs provide finance to real estate owners and operators either directly through mortgages or loans that are secured by real estate or indirectly through the purchase of mortgage backed securities.[51] That is, they lend money to investors, and invest indirectly through acquisition of loans or mortgage- backed securities.[52] Mortgage backed securities are publicly traded assets backed securities that are secured by a mortgage or a collection of mortgages and receive cash flows from the underlying pool of mortgages owned.[53]

However, Mortgage REITs do not purchase, own or manage properties but invest in mortgages on real estate properties. Though these properties serve as collateral for the loans the mortgage REIT invests in, the REIT has no ownership position in the property itself.[54] Hybrid REITs are mixture of the Equity REITs and Mortgage REITs, and they generally participate in the real estate development and money lending and taking percentage of ownership.[55] Hybrid REIT benefits from the higher income potential of mortgage REITs and the stability of equity REITs.[56]Thus, while the equity REITs own the physical real estate properties, mortgage REITs finance real estate transactions.[57] Equity REITs invest and purchase properties and in most cases invest in commercial properties and lease these structures out to tenants and occupiers thereby making

[45] Feng, Z. et al 'An Overview of Equity Real Estate Investment Trust (REITS) 1993-2009' (2011) (10)(2) *Journal of ReaL Estate Literature,*1.
[46] (f.n,41,) at 116.
[47] Marvin S. Kahn, 'Taxation of Real Estate Investment Trusts' (1962) (48)(6) *Virginia Law Review*,1015.
[48] Kruger- Levy, N. and Bertoldi, A. *Residential REITs and their Potential Top Increase Investment and Access to Affordable Housing in Africa.* (Centre for Affordable Housing Finance in Africa, 2017) 30.
[49] McClellan, J.N The Basics of Real Estate Investment Trusts (REITs)'(2018) *American Association of Individual Investors Journal*, Michigan Are., 8.
[50] (f.n, 49) at 8.
[51] (f.n, 49) at 8.
[52] Mozurczak, A. 'Development Real Estate Investment Trust (REIT) Regime in Europe. (2011) (1) *Journal of International Studies,* 118.
[53] (f.n, 49) at 8.
[54] <Http://www.nse.com.ng/products/equities/reits> Accessed on 13th August, 2020 at 1:08pm.
[55] Cummings, J, *Real Estate Finance and Investment Manual*, (9th edn, John Wiley & Sons, Inc., 2008), 118.
[56] (f.n, 55) at 63.
[57] (f.n, 49) at 8.

 ISSN: 2736-0342

income through collection of rents and sale of the properties they own in the long run.[58] Mortgage REITs principally invest in mortgages or investment securities which are tired to commercial or residential properties. They operate by providing finance in terms of loan to mortgage owners by purchase of existing mortgage backed securities thereby making profit through sales of the mortgage or the interest earned from these investments.[59] Though the REITs finance real estate, their objective is to make profits through management of real estate.[60]

However, it is difficult to understand the legal basis of the classification of REITs into Equity, Mortgage, and Hybrid REITs in Nigeria. The Investment and Securities Act which regulate REITs in Nigeria recognises three types of collective investment Schemes; Unit trust scheme, Open-ended Investment Company, and REIT.[61] Thus, the provision of the ISA and SEC Rules are silent on the aforementioned types of REIT which can be registered under the Act by SEC.[62] Therefore, it is arguable that these classifications of REITs are without legal basis and the classification suggests that there are different regulations for different categories of REITs. Nevertheless, the SEC Rules provide that a Real Estate Investment Scheme may be constituted as a company, a trust or such other structure as SEC may approve.[63] In any case, REIT must comply with the following requirements:[64]

a. It must derive minimum of 90% of its revenue (excluding capital gains) from rental income or dividend income;
b. It must effect the annual distribution of not less than 75% of its rental income or dividend income to shareholders.
c. It must make a distribution, at least, annually otherwise; it shall cease to be registered as REIS by the Commission.

These conditions qualify a Collective Investment Scheme as a REIT in Nigeria and fulfillment of the conditions qualify the scheme for registration by SEC. However, if a REIT fails to meet these conditions after registration, it is liable to be de-registered by SEC. more so, it will not enjoy the special 'tax status' which affords it certain tax exemptions.

1.4 Legal Framework for Regulation of Real Estate Investment Trusts in Nigeria

In Nigeria, there are numerous laws which regulate REITs but the two main laws are the Investment and Securities Act and Companies and Allied Matters Act[65]. The Land Use Act[66] is also

[58] Nyachiro, D. and Jagongo, A, 'Role of Real Estate Instrument Trust (REITs) in a Mixed Asset Portfolio: A Review of Literature' (2017) (10(3) *Journal of Business and Management,* 102.

[59] (f.n, 58) at 102.

[60]<Http://www.nse.com.ng/regulationsite/IssuersRules/Proposed%20Rules%20for%20Listing%20of%20REITs%20on%20The%20Nigerian%20Stock%20Exchange%20-%2031%20May%202018.pdf>Accessed on 23rd July, 2020 at 3:00pm.

[61] ISA 2007, s154(1)(a)(b)(c)

[62] ISA, s195(1)

[63]Rule 508 of SEC Rules. <Http://sec.gov.ng/wp-content/uploads/2017/07/June-2017-SEC-Executed-Rules.doc&ved=2ahUKEwiUkLDDy93xAhUR6OAKHbyDDZQQFjAAegQIChAB&usg=AOvVaw3D-ls6xc4c45tiZIeWgN4Z> Accessed 12th July, 2021 at 4:00pm.

[64] Rule 510 of SEC Rules 2013 amended by the New Rules and Amendment to the Rules and Regulations, 2007 Issued in June, 2017 by the SEC pursuant to ISA, 2007, s 313.

[65] CAMA, 2020.

[66] LUA Cap. L5, LFN 2004.

important because it has been described as the most impactful of all legislation touching on land tenurial system in the country and a legal regime which revolutionized the interests of Nigerians by expropriation.[67] Other relevant laws include the Capital Gains Tax Act, which makes every gain on property a chargeable gain; Land Instrument Registration Act and Laws of various States; Conveyancing Act; Property and Conveyancing Laws, and Stamp Duties Act which are all relevant to real estate development and investment.[68] The idea underlying these laws is the right of persons (individual and corporate entities) to acquire, and invest in immovable property in Nigeria.[69]

REITs as defined by the Act does not include a Collective Investment Scheme permitted by any other Act.[70] Orojo opined that before the enactment of the Companies and Allied Matters Act (CAMA), no special provisions were made for Collective Investment Schemes, and thus CAMA was the first to make adequate provisions for the Unit Trust Schemes.[71] Subsequently, the Investment and Securities Act recognised Unit Trust Scheme and other forms of Collective Investment Scheme.[72] Orojo, noted that ISA dealt almost exclusively with the unit trust scheme and other Collective Investment Scheme such as REIT.[73]

There are three types of Collective Investment Schemes permitted in Nigeria: the Unit Trust Scheme, Open- ended Investment Company and Real Estate Investment Company or Trust.[74] The Unit Trust Scheme is an arrangement in which participants pool resources for the purposes of sharing profits or income arising from the management of their money or property solely from the efforts of a third party.[75] Advantages provided by the Unit Trust Scheme is to assist, encourage, and promote investors' participation in the capital market with little fund while enjoying the benefit of risk diversification, professional management, liquidity capital appreciation and earning through dividends payment.[76] However, REIT can only be registered if it complies with certain requirements of the law.[77] First, it must be incorporated under Companies and Allied Matters, after fulfilling the requirement for registration of companies.[78] Consequently, the subscriber of the memorandum together with other members shall be a body corporate by the name contained in the memorandum.[79] It must also have capital and reserve as SEC may prescribe from time to time; it must carry on business as a collective investment Scheme; and finally, it must comply with requirements prescribed by the Commission in its Rules and Regulations.

---

[67] Grace, O.A, 'Interrogating The Challenges of Real Estate Development and Secured Credit Financing in Nigeria, (2019)(6) *Journal of Commercial and Property Law*, Department of Commercial and Property Law, 99-100.
[68] (f.n, 67) at 100.
[69] CFRN, 1999,s 44.
[70] ISA,2007, s 153(1)(a)(b)
[71] Orojo, O.J, *Company Law and Practice in Nigeria,* (5th edn, LexisNexis 2008), 413.
[72] ISA, 1999, 125-145.
[73] Orojo, J.O. Op. Cit. 412.
[74] ISA, 2007, s 154 (1) (a)(b)(c).
[75] Apinega, S.A, 'Annotation to Unit Trust Scheme Provisions under the Nigerian Investments and Securities Act, 1999' (2003-2005) (2) (1) *Journal of Commercial Law*, Department of Commercial Law, Faculty of Law, ABU, Zaria, 66.
[76] (f.n,75) at 68.
[77] CAMA, 2020; ISA, 2007.
[78] CAMA, 2020, ss 36,37,39,40, & 41.
[79] CAMA, 2020, s 42.

 ISSN: 2736-0342

SEC provides the regulatory framework for operation of REITs in Nigeria. The SEC is a forum for medium to long term development finance.[80] It is empowered to approve, register and regulate REITs in Nigeria[81] as the apex regulatory body saddled with responsibility for investors' protection, and development of the capital market.[82] It has also been given powers to resolve disputes among operators in the capital market and to sanction breaches of the laws, rules and regulations.[83] The SEC Rules and Regulations, 2011, contain both rules of general and specific applications governing the operation of collective investment schemes in Nigeria pursuant to Section 313 of the Investment and Securities Act.[84]

However, the rule does not define the scope of the duties of a manager of a REIT who acts as a trustee for the shareholders. Thus, the pertinent question is, what constitutes standard of the duty of 'honesty', 'fairness', 'skill', 'care' and 'diligence' required of the manager as defined in section 155 of the Act[85]? It is submitted that this duty is similar to the general duty of the trustee in equity, and the standard of the duty is that of a professional manager. Under section 155 of the Act therefore, the Manager is required to exhibit high degree of honesty, care, skill, and diligence expected of a specialist in REIT management.[86]

One of the legal processes for regulation of the capital market by the SEC is through registration of capital market operators. It is the most potent tool for REIT regulation by SEC.[87] For a REIT to be registered by SEC, it must meet the following requirements: it must be incorporated[88]; it must have capital and reserves as prescribed by the Securities & Exchange Commission, it must carry on business as a Collective Investment Scheme solely in real properties[89], and comply with certain requirements prescribed by the Commission through its rules and regulations.[90]The rules and regulations governing the operation of the REITs in Nigeria are outlined in the Securities and Exchange Commission Rules and Regulation, 2013 and its amendments.[91]

It is important to note that REITs in Nigeria are subject to tax laws as they are still required to pay Companies Income Tax (CIT) at the rate of 30%.[92] The Companies Income Tax Act does not

[80] Agom, A.R. 'Investment and Securities Tribunal: A Veritable Tool for Development and Growth in the Nigerian Capital Market, (2016-2017) (8)(1) *Journal of Commercial Law*,, Faculty of Law, Ahmadu Bello University, Zaria, 63.

[81] Section 154 of the Investment and Securities Act, 2007.

[82] Iloba-Aninye, O, 'Regulatory and Enforcement Institutions under the Investment and Securities Act, 2007: An Introspective Analysis', (2013) *Journal of Commercial Law*, Department of Commercial Law, 193.

[83] (f.n,82) at 197.

[84] Herein after referred to as ISA.

[85] ISA, 2007.

[86] Ezejoifor, G, 'Appointment, Powers, and Duties of Trustees' in Utuama, A.A. and Ibru, G.M (eds.) *The Law of Trusts and their Uses in Nigeria.* (Malthouse Press Limited, 2004), 19.

[87] Akume, A.A, A Critical Analysis of the Exercise of the Securities and Exchange Commission's Powers to regulate the Nigerian Capital Market. (2006-2007)(3)(1)*Journal of Commercial Law*, Department of Commercial Law, 195.

[88] Companies and Allied Matters Act, 2020.

[89] ISA, 2007,s 193.

[90] Section 194 of ISA,s 194.

[91] Kruger- Levy, N. and Bertoldi, A. (2017) *Residential REITs and their Potential Top Increase Investment and Access to Affordable Housing in Africa*, (Centre for Affordable Housing Finance in Africa, 2017), 30. < www.housingfinanceaferica.org/ appleploads/cahf-real-estate-investment-first-study-2017.02. Pdf> Accessed on 17/15/2020 at 1:18pm.

[92] Companies Income Tax Act, Cap.C21, LFN, 2004, s 40.

provide incentive or relief for REIT.[93]However, certain tax reliefs are provided such as tax waiver on assets and mortgage backed securities.[94] More so, the dividends of REITs that are publicly traded are exempted from Withholding Taxes (WHT) in the hands of investors.[95]Value Added Tax (VAT) and Capital Gain Tax (CGT) do not apply on sales of units or securities of REITs.[96]

REITs in Nigeria enjoy tax exemption under the Companies Income Tax Act provided they fulfil the following conditions: 1. Minimum of 75% percent of dividend and rental income is distributed to shareholders and 2. Distribution of dividend or income is made within 12 months of the end of the financial year in which the dividend or rental income was earned.[97] Fulfilment of these conditions entitle REITs to tax exemption, and failure to fulfil both or any conditions will attract tax to be paid on the dividends or rental income received by the REITs on behalf of the shareholders. The Finance Act[98] seems to have adopted the conditions stipulated in the SEC Rules, 2017 with minor modifications. While the Rules provide that dividends shall be distributed annually,[99] the Finance Act, is more specific that such distribution of dividends must be made within 12 months of the financial year in which the income or dividend was earned.

Thus, it may be argued that the conditions stipulated by SEC rules[100] regulate REITs in the capital market while the conditions in the Finance Act apply when tax reliefs for REITs are being considered. The Finance Minister, noted that the philosophy behind the reliefs to REIT is to reward the investors for fulfilling their promises by actually investing in real estate, and not to reward investors for mere intention to invest.[101] The relief will be granted where the regulatory body is satisfied that specific investments have been made in the real estate. However, investors in REITs are not exempted from tax on the dividend or rental income received from REITs. Therefore, the investors are required to pay tax on the dividends received from the REITs.[102] Similarly, REITs are also required to pay tax on the management fees, profits or any other income earned by the company on its own account.[103]

However, REITs are empowered to raise funds from capital market through the issuance of securities with specific advantages to the investor such as a right to a share of the income of any property and voting rights in the management of the company.[104] These are some of the rights of a shareholder or investor in a REIT in Nigeria. The law permits REIT to invest its funds in accordance with the provisions of the trust deed or custodial agreement and in investing the funds,

---

93 Abdulrazaq, M.T.(2010)*Revenue Law and Practice in Nigeria*, (2nd edn, Malthouse Press Limited,2010) Lagos, 180.
94 (f.n,91) at 31.
95 (f.n, 91) at 31.
96 (f.n,91) at 31.
97 CITA, 2004, s 23 (1)(s) amended by Finance Act, s 10. 2020 published in the Federal Republic of Nigeria Official Gazette, Vol.107, No.6, 14th January, 2020.
98 CITA, s 23(1) (s) as amended by section 9 of Finance Act, 2019.
99 Rule 510 of SEC Rules, 2017.
100 (f.n,99)
101 <https://www.youtube.com/watch?v=auceOCR9Rak&t=94s>. Accessed on 13/7/2021 at 12:00pm
102 CITA, s 23(1B)a of the as amended by Section 9 of the FA, 2019.
103 CITA, Section 23(1B)b as amended by Section 9 of the FA, 2019.
104 Keke, O.V and Emoh, F.I, 'Real Estate Investment Trust (REITs) and Mortgage Backed Securities (MBS) as Emerging Trends for Financing Real Estate Development in the Nigerian Capital Market. (2015)(3)(2) *International Journal of Civil Engineering, Constructive and Estate Management,* 2.

it is required to do so in accordance with the provisions of the Act.[105] The foregoing area in which REIT fund can be invested which will ensure fair returns on investment. The list of the areas is however not exhaustive as the SEC has power to prescribe instruments which a REIT can invest into.[106] For the purpose of complying with the guideline as to the quality of instruments that the REIT can invest into, the manager considers the risk rating of instruments that has been undertaken by a rating company registered under ISA.[107]However, the instruments provided by ISA are subject to the guidelines issued by the SEC from time to time. It is thus difficult to understand why the express provisions of ISA will be made subject to the guidelines to be issued by SEC. The implication is that the guidelines issued by SEC supersede the provisions of ISA on the instruments REITs can invest into. In any case, the fund of the REIT shall be invested in accordance with the provisions of the Trust deed or custodial agreement.

SEC issued the first set of registration and operation requirements and guidelines which culminated into the establishment of REITs in Nigeria,[108] and these followed the enactment of ISA[109]. Rules 250- 281 of the SEC Rules which provide for Real Estate Investment Schemes (REIS) were made pursuant to the SEC Rules and Regulations.[110] The SEC Rules[111] did not take into cognisance the Real Estate Investment Company or trust provided for under Section 193 of the ISA.[112] However, subsequent amendment of the SEC Rules and Regulations made ample provisions for Rules regulating REITs in Nigeria. [113]The underlying idea behind the SEC Rules and Regulations is that members of the public and investors who are offered company securities are entitled to full disclosure of the nature of the offer before they make financial commitment, and to remedies to redress loss suffered arising from failure on the part of the company to make complete and accurate disclosure.[114]

1.5 **Challenges Militating against Effective Operation of REITs in Nigeria.**

Certain factors and challenges account for poor performance of REITs in Nigeria but the major challenge is poor access to finance. It has been observed that real estate is a capital- intensive investment and developers often face challenge in accessing finance to complete real estate development process.[115] . In fact, finance has been described as a major challenge to real estate development in Nigeria because critical components of REIT involve infrastructural development such as good road network, and social amenities.[116] Real estate financing requires huge capital and

---

105 ISA, 2007,s 171(1)(2).

106 ISA, 2007,s 171(3)(4).

107 ISA, 2007,s 171(5).

108 Olanrele, O.O et al, 'Comparison of Reit Dividend Performance in Nigeria and Malaysia', (2015)(9)(6) *African Journals Business Management,* 609.

109 Olanrele, O.O et al, 'An Evaluation of the Performance and Acceptability of REIT in Nigeria', Paper Presented at 15th Afres Annual Conference, (2015) 271.

110 SEC Rules and Regulations Amendments, 2006(2)

111 SEC Rule, 2013.

112 Fund Managers Associated of Nigeria, *5- Year Strategic Master Plan and Roadmap (2013- 2018),*(2017), 22. < www.sec.gov.ngs>uploads 2012/02>. Accessed on 14th June, 2021 at 5:40pm.

113 Davies, P.L., Gower's *Principles of Modern Company Law*, (6th edn, Sweet& Maxwell, London 1997), 394.

114 (f.n,113) at 394.

115 Olayinka, C.O et al, 'Problems and Prospects of Forward Sale in the Nigerian Housing Market: A Critique of Policy and Modus Operandi' (2017)(7)(4) *International Journal of Academic Research in Business and Social Science*, 547.

116 Ezimuo,P.N. et al, 'Sources of Real Estate Financing and their Impact on Property Development in Nigeria: A Case Study of Mortgage Institutions in Lagos Metropolis',(2014) (2)(2) *British Journal of Environmental Research,*.35.

is always a challenge for investors who are charged high- interest rates with cumbersome repayment conditions.[117] Nigerian Bank Lending rate was reportedly at 11.240% pa in April, 2021 which represents an increase from the previous number of 11.130 % pa in March, 2021[118], and in September, 2022, it was increased to 15.5%.[119] This has negatively affected access to finance by investors who want to invest in real estate market.

Thus, financial strategies for access to funds have become efficient process for providing real estate developers/ investors with the necessary financial proficiency to actualize the proposed development and enhance their operation.[120] The ability of a developer to mobilize enough funds for the project determines largely the success of the project.[121]The performance of real estate investment financing will depend primarily on the volume and nature of funds within the economy and the proportion of it to be spread, mobilised or even dedicated for housing.[122] In many parts of the world, especially the developed countries, the source of housing finance is from government, individual savings, life insurance reserves, commercial banks, savings and loan institutions.[123] In Nigeria, the main sources of housing finance are government by way of loan and grants.[124] Thus, one of the challenges of REIT is the poor availability/ accessibility of low credit facilities.[125]

The second challenge is the inadequate provision of land for real estate development. For REIT, the need for availability and access to land for development cannot be over emphasised. By the provision of the SEC Rules, "a Real Estate Investment Trust can and shall wholly acquire and hold legal title to property or choose to hold equitable and beneficial title to such property vide a Trust Deed or such other structure as may be acceptable to SEC".[126] This provision underscores the importance of land to operation of REIT, and the need for REIT to acquire land for development and investment. However, Land acquisition for development in Nigeria is characterised by title registration which goes through arduous processes of documentation. More so, the strict provisions on consent of the Governor and administrative bottlenecks have made it difficult for Nigerians and investors who cannot get allocation from government to acquire same from individuals.[127] Similarly, cost of registration of title especially when there is change of ownership is high which may discourage investors in real estate development.[128] For example, the Managing

---

117 (f.n, 3) at 30.

118 < https://www.ceicdata.com/en/indicator/nigeria/bank-lending-rate> Accessed on 20/6/2021 at 1:45pm.

119 < https://www.vanguardngr.com/2022/09/cbn-raises-interest-rate-to-15-5/> Accessed on 23/11/2022 at 11:09am.

120 (f.n,115) at 547.

121 Ogedengbe, P.S. and Adesope, A.A, '*Problem of Financing Real Estate Development in Nigeria*. (2003)(14)(6) J. Hum. Ecol., 14(6), 426.

122 (f.n,121) at 426.

123 Ayedun, C.A. and Oluwatobi, A.O. 'Issues and Challenges Militating Against the Sustainability of Affordable Housing Provision in Nigeria' (2011)(1)(4)*Business Management Dynamics,* 4.

124 (f.n,123) at 4.

125 Mubor, P.K, Challenges of Housing Finance and Its Implications on Home Ownership by the Low and Modern Income Earners in Nigeria (A Case Study of Port Harcourt, Rivers State) (2017)(11)(6)*Journal of Environmental Service, Toxicology and Food Technology*, 80.

126 Rule 509(1).

127 Madaki, A.M. and Magashi, S.B, Availability of Land to Every Nigerian under the Land Use Act: Rhetoric or Reality? (2018) (9)(2)*Journal of Private and Comparative Law*, Department of Private Law, ABU,Zaria,362.

128 Ajibomi, M.O. et al, Op. Cit. (2009)63-64.

Director of UBN properties disclosed that while applying for the planning approval for a piece of land which his company acquired at Lekki phase1, Lagos State government demanded N16,000,000.00 after which he was asked to go to the New Town Development Authority for clearance.[129]

Third critical challenge to REIT in Nigeria is the deplorable state of infrastructure.[130] It is the responsibility of government to provide infrastructure and basic amenities to the people which will in turn attract investment, especially in the real estate sector. Unfortunately, Nigeria has huge infrastructural deficit and this makes investment in the real estate sector difficult and unattractive because the real estate investment is capital intensive. Infrastructure like good roads network, electricity supply, water, hospitals, and educational facilities are drivers of economic growth. The quality of infrastructure available within any environment plays an important role in attracting new investments.[131] Therefore, poor road networks and social amenities are facilities that REITs have to contend with to meet the demands and satisfaction of occupiers. In a study conducted on effect of poor road network on rental value of residential property values in Minna, Niger State it was found that the rental value in Tunga area was higher than Bosso area due to better state of infrastructure at Tunga area in Minna, Niger State.[132]

Finally, SEC is the apex body responsible for the regulation of the capital market, and investment and securities business in Nigeria.[133] One of the functions of the SEC is to promote education of the investors and training of all categories of intermediaries in the securities industry.[134]However, the level of awareness of benefits of REIT by investors has not been impressive. It has been observed that many individual investors are not aware of benefits of REITs as an investment option; even the few institutional investors who are knowledgeable about REITs still have a poor perception about it and are not generally ready to invest fully in the scheme.[135] These challenges traceable to numerous laws have negatively affected performance of REITs in Nigeria

1.6 Conclusion

Real Estate Investment Trust offers an alternative as a formidable investment vehicle in the real estate sector since its introduction in Nigeria. It is one of the investment vehicles driven by the principle of trust which provides opportunities for all categories of investors to enjoy the benefits and advantages of investing in real estate without financing the entire real estate development. However, it is a finding of this research that the classification of REITs into Equity, Mortgage, and Hybrid REITs in Nigeria is without legal basis because ISA does not classify REITs into these categories. More so, the Nigerian REITs are not performing well like REITs in other jurisdictions

[129] Ogiji, L.O, 'The Land Use Act and the Challenge of Restraints in Transfer of Land Rights', (2015)(29-35) *Ahmadu Bello University Law Journal*,6.

[130] Kari, U. et al, 'The Challenges of Infrastructural Development in Nigeria: An Assessment of the Pains and Gains' (2019) (7)(4) *International Journal of Political Science and Development*,106.

[131] Orekan, A.A, 'The Impact of Infrastructural Facilities on Residential Property Development in Ota, Ogun State' (2015)(3)(2) *Covenant Journal of Research in the Built Environment*, 3.

[132] Ajayi, M.T.A. et al, 'Effects of Infrastructural Development on Residential Property Values in Minna' (2014) (7)(4) *Euthopian Journal of Environmental Studies and Management*, 458.

[133] ISA, 2007, s 13(a).

[134] ISA, 2007, s 13(s).

[135] <Https://www.globallawexperts.com/NewsArticle.aspx?PID=2007> Accessed on 11/07/2021 at 6:25pm.

because of the numerous laws such as Land Use Act, ISA, CAMA, and Finance Act that negatively impact the REIT industry in Nigeria which have made it difficult for the industry to meet its expectation. This is evidenced by the absence of a comprehensive legislation that will regulate REITs in Nigeria to stimulate real estate development in Nigeria.

It is thus proposed that government should enact a comprehensive legislation that will consolidate laws that apply to REITs and also provide the adequate legal framework for operation and regulation of REITs in Nigeria. Additionally, the Securities and Exchange Commission should be strengthened to provide the regulatory support to investors who are interested in the real estate sector. The Land Use Act should also be amended to make it easy and affordable for REITs to have access to land for real estate development, and obtain Governor's consent while stakeholders should be given more incentives to attract investment in the REITs industry.

.

 ISSN: 2736-0342