

THE LAND HOLDING SYSTEM AND THE DEVELOPMENT OF MORTGAGE INDUSTRY IN TANZANIA: AN EVALUATION OF THE LAW AND PRACTICE

Written by Edward Emmanuel

LLM Student, St. Augustine University of Tanzania, Mwanza, Tanzania

ABSTRACT

In Tanzania all land is public under the trustee of the President.¹ Therefore an individual person occupies interests in land or other derivative rights, these interests may either be acquired through the granted right of occupancy or customary right of occupancy. Thus, the law empowers the President to grant the right of occupancy, to change the use of any land, and to revoke or acquire any right of occupancy for good cause or public purposes even if the land is encumbered by mortgage. It is therefore argued that the land tenure in Tanzania impedes the development of mortgage industry. This is due to the fact that mortgage is a long-term investment in land and that security of tenure is a central factor for mortgage industry to flourish.

INTRODUCTION

This article evaluates the Tanzania land holding system; the intention is to discover how landholding system impedes the development of mortgage industry. The evaluation is made from pre- colonial era to post independence period. The evaluation is further based on the legal regime of land laws both substantive and procedural as influenced by economic and social demands.ⁱⁱ

It is a reality that land has many uses towards human livelihood. However, human economic and social needs have resulted to a new demand of using land as collateral to secure loans from banks and financial institutions.ⁱⁱⁱ

The government on ensuring smooth dealings in land has enacted several laws including the Land Act of 1999 which is the supreme source in land matters,^{iv} the Village Land Act of 1999 and, thereafter, the Land Regulations which were there to support the Land Acts.

It was the expectations of land holders that the enactment of the above laws could have addressed the question of land tenure and land as security in the country. However, this expectation is made a nullity even though the many amendments which have been done on the Land laws.^v

HISTORICAL BACKGROUND OF LAND TENURE IN TANZANIA

The historical background of land tenure in Tanzania can be discussed basing on three eras including, the pre- colonial era, colonial era and after independence. In most cases the land tenure in the three eras though differs but resemble in some aspects.

Land Tenure in Pre-colonial period

The land ownership in pre- colonial societies was influenced by the mode of production. In the most African societies land was owned by the community.^{vi} This means that every individual member of the society had a right to occupy and use land as usufructuary rights.^{vii}

Thus, in pre-colonial era, individual ownership of land was not recognized hence land belonged to the family or community at large, and that any person who occupied land did so for the purpose of occupying and using the land only.^{viii} This position is illustrated in the case of Amodu Tijani V. The Secretary of Southern Nigeria^{ix} where the Privy Council of the House of Lords among other things held that, under customary law individual ownership of land is not recognized hence the right to hold land is that of usufructuary in nature.

The Land Tenure during German Rule

Tanzania then Tanganyika was under German rule from the year 1885 to 1914. The German administration on ensuring control of land passed the Imperial Decree on Land Matters of 1895 which among other things, it expressly declared all land in the territory to be Crown land under the Germany Kaiser, whom was empowered to grant freehold and leasehold titles.^x

Later on the German government passed the Land Registration Ordinance of 1903 which regulated the registration of the granted titles, and it established the land registry system under which title to land had to be registered and documents of titles were issued.^{xi} However one thing to note is that the German rule recognized and allowed continuation of titles of occupying land under customary laws. This implies that the German rule introduced the dual system of land titles.^{xii}

Even though the German government introduced the dual system of land titles to be applicable in the territory, the implication was on the need of documentary proof of ownership when it came to customary occupation of land, this directly shows that there was favoritism over a certain category of people specifically, white settlers who could get grants either from the German administration or Chiefs.^{xiii}

The important thing to be understood is that, the German government passed the stated laws above for their benefits, whereby the main purpose was to facilitate land alienation for the benefit of the white settlers in order to fulfil the industrial needs in their metropolitan countries than the natives.^{xiv}

The Land Tenure during British Rule

The British took and colonized Tanganyika now Tanzania after the World War 1 in 1914 after the decision of the League of Nations to dispossess German of her colonies. British acted as a custodian to prepare Tanganyika for its political independence. The British government established the governance system that defines Tanzania government system today through the Tanganyika Order in Council of 1920,^{xv} which was considered to be the first constitution of Tanganyika.

In ensuring land control the British government passed the Land Ordinance of 1923 which affirmed all land to be public under the trustee of the Governor,^{xvi} who was empowered to grant certificates of occupancy for a time of, but not exceeding ninety years.^{xvii} All grants above five years were compulsory to be registered to the registrar of titles.^{xviii}

Like Germany colonial government, the British colonial government also recognized and allowed the continuance of occupying land under customary laws which were considered to be usufructuary only. This means that the dual system of land tenure maintained its existence under British rule.^{xix}

The Land Tenure after Independence

After independence the government of Tanzania opted for building a socialist state which was affirmed through the Arusha Declaration of 1967. The Arusha Declaration declared communalization of all means of productions including land. This means that the government monopolized the economy of the country.^{xx}

The important thing to be noted is that, the independence government in most cases did not divert much from the land tenure that was introduced by the British colonial government. The same land tenure was retained which resemble to leasehold but with a different name called the right of occupancy.^{xxi}

The Land Act,^{xxii} defines right of occupancy to mean “a title to use and occupation of land including the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using and occupying land in accordance with customary law.”

It can, therefore, be said that, land tenure and estate is relevant in Tanzania because it answers the questions on how land is held, for how long and conditions does someone holds land.^{xxiii}

Individual ownership of land is not recognized in Tanzania that is an individual person occupies land after he or she is granted or deemed to have been granted such a right by the President. This position was illustrated in the case of Attorney General V. Lohay Akonaay and Another^{xxiv} where the court of law held that the President been a trustee of land on behalf of the public has a duty to hold land for the benefit of the public and not for his own interests.

By its nature the right of occupancy is granted with certain limitations and prohibitions such as the estate is granted subject to revocation by the President on good cause^{xxv} or public interests.^{xxvi} The power of the president to revoke or acquire estates is not limited because it extends to mortgaged or leased land. This position was held by the court of law in the case of Manyara Estates Ltd V. National Development Corporation Agency^{xxvii}

MORTGAGE OF A RIGHT OF OCCUPANCY

Mortgage is defined to mean an interest in a right of occupancy or a lease securing the payment of money or money's worth or the fulfilment of a condition and includes a sub-mortgage and the instrument creating a mortgage.^{xxviii} According to this definition right of occupancy that can be secured for payment of loan includes the Granted Right of Occupancy, Customary Right of Occupancy, and Deemed Right of Occupancy and/or lease of a right of occupancy. All these interest in land is used to secure the payment of loan or any other fulfilment of condition.

It is elaborated there above that the land tenure of Tanzania is that of occupying and using land for a specific period of time which does not exceed ninety-nine years. This means that the forms of mortgage capable of being created resemble to that of leasehold. Whereby, occupiers of estates can create mortgages depending on the length of their interests in land.^{xxix} However, there are formalities to be fulfilled when creating mortgages, such requirements include the need of writing, notification and registration. The formalities are creature of laws whereby failure to fulfil, the transfer of an estate becomes ineffectual.

The Need of Writing

The Land Act^{xxx} requires for a created mortgage to be in a prescribed form, this implies that the created transaction should be deduced into writings, this position was also held in the case of Russel v Russel^{xxxii} where the court held that a deposit of title deeds alone without a written contract would only create an equitable mortgage. However, the requirement of writing is not a pre-requisite in short term lease, disposition by order of a court and disposition by operation of laws.^{xxxii}

The Requirement of Notification

Notification to the Commissioner for lands^{xxxiii} before a mortgage transaction is created was introduced by the law with the main purpose of ensuring that, the government has full control over land disposition. The effects for failure to fulfill the requirement of notification was elaborated in the case of Abualy Alibhai Azizi and Others V. Bhatia Brothers Ltd^{xxxiv} where the court of law held that any transaction which did not fulfill the enquired formalities does not become void; however, its enforcement is only possible if it does not affect the interests of the superior landlord.

The Requirement of Registration

This requirement provides that once a mortgage is created have to be registered in accordance with the provisions of the *Land Registration Act*.^{xxxv} The requirement is regulated by different laws including the *Land Act*^{xxxvi} and other Land Regulations which was passed to support the Land Acts. The right to create mortgage includes also the right to create second and subsequent mortgages,^{xxxvii} and the law requires all to be registered in accordance with the provision of the laws. Once registered mortgages shall rank according to the order in which were registered and not in their creations.^{xxxviii}

Forms of Mortgages

The main source of law on mortgage of land in Tanzania is the Land Act of 1999 specifically its PART X. This means that the enactment of the Act had great impact so far as mortgage

industry is concerned in Tanzania. The following are the forms of mortgage capable to be created in Tanzania.

Formal Mortgage

This is the form of mortgage which is governed and regulated by *the Land Act*,^{xxxix} it is created only if all required formalities have been fulfilled such as, the need of writing, notification and registration. The right to create formal mortgage includes also the right to create second and subsequent mortgages. Whereby, once registered mortgages rank in accordance to their registration and not according to their creation.^{xl}

Informal Mortgage

This is the form of mortgage which is created through a witnessed memorandum of understanding between the parties. This means that there is no specific form provided, parties may design a simple document of their own.^{xli} The consideration is on the intention of the parties whereby a debtor charges his interest in land with intention of using it as a collateral for securing the payment of loan, and the creditor has accepted to receive the property as security to secure the advanced loan.^{xlii}

Lien by Deposit of Documents

This is the form of mortgage which involves holders of certificates of occupancy or any other documents which proves title of ownership, been deposited by holders to the creditor as collateral for payment of money or fulfilment of other conditions.^{xliii}

Before the Land Act of 1999 came into force, lien by deposit of documents once created could result into equitable mortgage.^{xliv} The provision of the Act is to the effect that, a deposit of document with the aim of using it as collateral is capable to transfer interests from debtor to the creditor.^{xlv} The lien by deposit of documents accord to the provisions of the *Land Registration Act*.^{xlvi} For the purpose of making clear and avoidance of doubts all documents which could be deposited and create lien by deposit of documents includes, a certificates of a granted right of occupancy and customary right of occupancy, lease and any other documents evidencing occupancy of title in land.^{xlvii}

Customary mortgage

The Land Act of 1999 recognizes customary mortgage and has allowed its continuation.^{xlvi} This signifies the possibility of occupiers of estates or interests in land to create a customary mortgage in Tanzania. However customary mortgage might differ from one society to another even though, there are certain common traits which are capable to identify that a particular system of customary mortgage operates in a country. Customary mortgage is governed and regulated by customary law of a particular society. For effective dealings in land the Land Act of 2009 provides that, whenever a lacuna is discovered in a particular customary law part X of the Act would be adopted so as to cure the gap.^{xlix}

Third Party Mortgage

This is considered to be a new form of mortgage because acquired its legal recognition after the Land Act of 1999 was passed and came into force. Third party mortgage is created to secure the debt of another.¹ This kind of mortgage involves three parties including the mortgagor, mortgagee and borrower.^{li}

THE EXTENT OF LAW GOVERNING MORTGAGE IN TANZANIA

Uncertainty of Title

The nature of the right of occupancy raises many legal questions. For instance, it is not clear as to whether the right of occupancy is a licence or lease. The reason behind is that under lease occupiers enjoy exclusive occupation and use of land for a certain definite period of time subject to payment of rent to the landlord. This position is contrary under the right of occupancy whereby occupiers of estates or other interests in land do not have such exclusive rights because the President at any time may disturb the estate by revocation, change the use of land or acquire the estate for public use.

Therefore, this article discovered that the effect of uncertainty of title of the right of occupancy has direct effect to the development of mortgage industry in Tanzania hence it affects security of tenure which is the central factor for mortgage industry to flourish.

The Status of Residential Licence and Its Incidents

The Land Ac,^{lii} establishes and recognizes the grant of the licence in non- hazardous areas as a temporarily way of solving the problem of squatter. However, the right is granted with some limitations and prohibitions of non-assignable by mortgage or lease.^{liii}

This article discovered that by prohibiting the assignment of residential licence makes the Tanzania land tenure not effective for development of mortgage industry in Tanzania. Hence the prohibition denies holders of residential licence with the right to access loans from money lenders by using the interests as collateral, but also reduces the number of participants in the mortgage industry.^{liv}

The Right of Occupancy is easily Revocable

This article discovered that the right of occupancy can easily be revoked due to the fact that, the President who is the trustee can revoke any estate at any time on the ground of good cause or by compulsory acquisition for public purposes. This power of the President is not limited because it can be implemented even to the mortgaged land. This was discovered to affect security of tenure which is the central factor for mortgage industry to flourish.

The Requirement of Notification to Mortgage and Its Attendant Problems

The required formalities were discovered by this article to affect the development of mortgage industry. The requirement of notification to mortgage is unnecessary because it prolong the procedure to create mortgage. Also sometimes is used as a ground for promoting corruption practices in the mortgage sector.

The Question of Compulsory Acquisition of Lands and its Effect

This aspect was discovered to be a drawback to the development of mortgage industry in Tanzania, the reason behind is that it affects security of tenure which is the central factor for the development of mortgage industry in Tanzania.

The Tension between the Granted Right of Occupancy and Customary Right of Occupancy

This is discovered to be a factor among the hindrance of mortgage industry to flourish, the main reason is that in practice the granted right of occupancy and customary right of occupancy are not of equal respect and status as provided by both land laws and court's decisions.^{lv} The granted right of occupancy when comes into practice is superior to the customary right of occupancy. This was illustrated in the case of Mwalimu Omary and Another V. Omary Bilali.^{lvi}

CONCLUSION AND RECOMMENDATIONS

Conclusion

After evaluation of the law and practice so far as land holding system and the development of mortgage industry is concerned in Tanzania. This article has discovered that the right of occupancy system is not effective for the development of mortgage industry, because the laws have a number of weaknesses. The weaknesses are pertaining to security of tenure which is a central factor for development of mortgage industry in Tanzania, hence mortgage is a long-term investment in land.

Recommendations

The article recommends that the Tanzania land tenure needs to be changed. It is discussed there above that the Tanzania land tenure resemble to leasehold but with a different name called right of occupancy. The land laws clearly declare that all land in Tanzania is public vested under the trustee of the President.^{lvii}

The President been empowered to grant the right of occupancy, to change the use of any land, to revoke the right of occupancy on ground of good cause or acquire any land for public use even if encumber by mortgage. All the stated power of the President causes the Tanzania land tenure not effective for mortgage industry to flourish. The reason behind is that powers of President in land ownership and occupation affect right to property or security of tenure which is a central factor for mortgage industry to flourish, hence mortgage is a long-term investment

in land. Therefore, Tanzania needs to adopt the freehold tenure because it ensures security of tenure.

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- ⁱ Section 4(1) of Cap. 113 R.E 2019.
- ⁱⁱ MWAISONDOLA Nathan George, *The Modern Law of Mortgages in Tanzania: the Role of the Land Act, 1999*, A thesis submitted to the School of Law of the University of Birmingham for the degree of Doctor of Philosophy December 2007 at p. 1 to 2.
- ⁱⁱⁱ Loc. cit.
- ^{iv} Section 181 of Cap 113 R.E 2019.
- ^v MWAISONDOLA, Nathan George (2011), *Dilema in Land Law Reform: Tanzania Experience*, St. Augustine University Law Journal, Vol 1, No. 1.
- ^{vi} MWAISONDOLA, Nathan George at p 74 to 75, op cit.
- ^{vii} Loc. cit.
- ^{viii} Loc. cit.
- ^{ix} [1921] AC 399.
- ^x RWEGASILA, Abdon (2012), *Land As a Human Right, A History of Land Law and Practice in Tanzania*, Mkuki Na Nyota at p. 44 to 60.
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- ^{xii} Loc. cit.
- ^{xiii} Loc. cit.
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- ^{xv} Articles 6 and 7 of the Mandate Agreement which were similar to Article 8 of the Trusteeship Agreement.
- ^{xvi} Section 3(1) of Order No. 3 of 1923; also see TENGA W. R and MRAMBA S. J (2014), *Theoretical Foundations of Land Law in Tanzania*, LawAfrica at p. 45.
- ^{xvii} Section 7 of Oder No. 3 of 1923.
- ^{xviii} JEHOVANESS, Aikaeli and THOMAS, Markussen (2017), *The Effects of Land Titling in Tanzania*, WIDER Working Paper, Vol.168, United Nations University at p 3 to 4.
- ^{xix} Loc. cit.
- ^{xx} MWAISONDOLA, Nathan George at p. 122, op cit.
- ^{xxi} Section 22 (1) (e), 32 (1) (a) and (b) of Cap. 113 R.E 2019..
- ^{xxii} Section 2 of Cap. 113 R.E 2019.
- ^{xxiii} ROBERT, Megarry and WILLIAM, Wade (2000), *The Law of Property*, London, Sweet and Maxwell at p 40.
- ^{xxiv} [1995] TLR, 80.
- ^{xxv} Section 45 of Cap. 113 R.E 2019.
- ^{xxvi} Section 3 of Cap. 118 R.E 2019; see also ROBERT, Megarry and WILLIAM, Wade at p 40, m op cit.
- ^{xxvii} [1970] EA 177.
- ^{xxviii} Section 2 of Cap 113 R. E 2019.
- ^{xxix} MWAISONDOLA, Nathan George at P.109 to 110, op cit.
- ^{xxx} Section 64(1) (a) and (b) of Cap. 113 R.E 2019.
- ^{xxxi} 28 ER 1121.
- ^{xxxii} Section 64 (4)(a) to (c) of Cap. 113 R.E 2019.
- ^{xxxiii} Section 36 to 40 of Cap. 113 R.E 2019.
- ^{xxxiv} [2000] TLR. 288.
- ^{xxxv} Section 41 (2) of Cap. 334 R.E 2019.
- ^{xxxvi} Section 62 (2) of Cap. 113 R.E 2019.
- ^{xxxvii} Section 117 (1) of Cap 113 R.E 2019.
- ^{xxxviii} Section 60 (1) of Cap 334 R.E 2019.
- ^{xxxix} Section 113(1) of Cap. 133 R.E 2019.
- ^{xl} Section 113(2) of Cap. 113 R.E 2019.
- ^{xli} Section 113(5) of Cap. 133 R.E 2019.
- ^{xlii} MWAISONDOLA, Nathan George at p.134, op cit.

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- ^{xliii} Section 2 of Cap. 113 R.E 2019.
^{xliv} MWAISONDOLA, Nathan George at p.135, op cit.
^{xlv} Section 113 (6) of Cap. 133 R.E 2019.
^{xlvi} Section 64 (1) of Cap. 334 R.E 2019.
^{xlvii} Section 113(5) (i) to (v) of Cap. 133 R.E 2019.
^{xlviii} Section 115(1) of Cap. 113 R.E 2019.
^{xlix} Section 115 (4) (a) and (b) of Cap. 113 R.E 2019.
^l Section 112 (2) (b) and 1113 (2) of Cap. 113 R.E 2019.
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^{lii} Section 23 of Cap. 113 R.E 2019.
^{liii} Section 23(4) of Cap. 113 R.E 2019.
^{liv} Loc. cit.
^{lv} Section 18 of Cap 114 R.E 2019.
^{lvi} [1999] TLR, 432.
^{lvii} Section 4(1) of Cap. 113 R.E 2019..

