

CHALLENGES FACING FORMATION OF MORTGAGE FINANCING OVER UNREGISTERED LAND IN TANZANIA

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ABSTRACT

The Right of occupancy is the main form of land ownership in Tanzania. Right of occupancy can over a registered land or unregistered land. Registered land these are the land registered as per the provisions of the Land Registration Act [Cap 334] and it includes the granted right of occupancy, derivative right and registered leases. Other lands which are not registered as per Cap 334 of Laws of Tanzania are referred as unregistered land. Unregistered land includes the customary right, deemed right of occupancy and short-term leases. Unregistered lands are deemed unsuitable for mortgage financing due to some legal challenges facing unregistered interest. The first and foremost challenge is that the legal regimes are silent on mortgages of unregistered land. This left a gap on the possibility to use unregistered land to create mortgage financing in Tanzania. There are other challenges which are due to the nature of title of unregistered land. These other challenges include the difficulty in proof of ownership of unregistered land; property right is not absolute; lower value of unregistered land; ineffective dispute settlement mechanisms; ineffective monetary policy and ineffectiveness of the village council.

INTRODUCTION

In Tanzania the main land holding system is a right of occupancy. This land holding system is principally of the nature of a lease granted in a form of revocable license. Right of occupancy refers a title to the use land as well as the title to occupy of land in Tanzania.ⁱ It further includes the title of a citizen Tanzania of African descent including those who are using or occupying land according to customary laws.ⁱⁱ The right of occupancy as the main form of land holding is basically in the nature of a lease where a holder of the land occupies a position of a lessee vis-à-vis the superior land lord who is a president.ⁱⁱⁱ At this juncture therefore, any disposition of the land including the creation of mortgage over the land is a tripartite transaction which involving a holder of a land (Mortgagor), the lender/mortgagee and also involving the superior land lord who in this instance shall be the president.^{iv} The commissioner for land is empowered by the law to approve or endorse the notification of any disposition as the case may be on behalf of the president.^v The disposition of land which contravenes the above requirement is void.^{vi} The right of occupancy in Tanzania is categorized into two which are the granted right of occupancy/derivative right and the customary right of occupancy/deemed right of occupancy. Granted right of occupancy is a registered land according to the Land Registration Act^{vii} and the law apply over registered land is the Land Act.^{viii} On the other hand customary right/deemed right of occupancy is categorized or recognized as unregistered land in Tanzania. In this circumstance the laws which apply and operate over unregistered land are the Village Land Act^{ix} and customary law.^x The granted right of occupancy and customary right of occupancy are said to be of equal status and effect.^{xi} One kind of interest in land cannot defeat the other interest in land.

However, despite both categories of land to be of equal status, the registered land is deemed most suitable for mortgage financing. The law depicts that any holder of a registered right of occupancy, lease of a registered right of occupancy or a derivative right may obtain a loan from any bank or financial institution for purposes of developing mortgaged land or investment over land in Tanzania.^{xii} This symbolically depicts that registered interest is superior compared to unregistered land. The Land Act^{xiii} allows the creation of mortgage financing over a registered land. On the contrary the laws governing unregistered land are silent on the formation of

mortgage financing. Actually, the silence of the laws governing unregistered land is due to some challenges facing unregistered interest.

There are legal challenges facing unregistered land to create mortgage financing. The challenges are due to the gap which existed in legal regimes, institutional challenges and the economic challenges. The said challenges make unregistered land unsuitable for mortgage financing in Tanzania. Most lenders opted for a registered land to be used to create mortgage financing. This is because they believe that unregistered land is effective and superior compared to unregistered land. The legal regime is soundless when it comes to the possibility to use unregistered land to create mortgage financing. This is a gap which existed in the verses of law so; this gap needs to be filled. The legal regime governing unregistered land needs address in details the issue of creation of mortgage financing over unregistered land in Tanzania.

REGISTERED LAND IN TANZANIA

Registered land refers to that category of land in respect of which an estate has been registered.^{xiv} For a land to be registered in Tanzania it must be a registrable estate under the Land Registration Act.^{xv} The registrable estate means a freehold estate or a lease, or any estate which is by the provisions of the Land Registration Act deemed to be freehold or lease hold.^{xvi} It is a trite law that any interest falling under registrable estate to be registered by the registrar of titles.

Registrable estate does not include a lease for an unexpired term of five years or less unless such lease contain an option whereby the tenant can require the land lord to grant him a further term or terms which, together with the original unexpired term exceeds five years.^{xvii} Moreover, registrable estate does not include periodic leases, and the customary tenure.^{xviii} The periodic leases and the customary tenure fall under unregistered lands which are land other than registered land.^{xix} The registered land is suitable for mortgage financing. The registered estate is principally regulated by the Land Act^{xx} under which the concept of mortgage financing was established. The law is not applicable on unregistered land. Further, the laws governing unregistered land are silent on the formation of mortgage financing.

Granted Right of Occupancy

This is the right to occupation of land to citizen or to group citizens formed an association under the Land Act or any other law, or who formed a partnership or a corporate body may enjoy.^{xxi} This kind of right of occupancy is conferred in compliance to part VI of the Land Act.^{xxii} It is the registered land in Tanzania is granted by the president^{xxiii} over a surveyed general or reserved land.^{xxiv} The granted right of occupancy is valid once registered as per the provisions of Land Registration Act and the Land Act, once registered it becomes indefeasible.^{xxv} It is granted for a period not greater than 99 year for a premium, for an annual rent, subject to any prescribed conditions. It is capable of being disposed by the holder; it can be revoked by the president for good cause or public purposes.^{xxvi}

A granted right of occupancy being a registered land is suitable for mortgage financing in Tanzania. A holder of granted right of occupancy may mortgage his interest to obtain loan from a bank or a financial institution for the purposely of development of land or investment.^{xxvii} A granted right of occupancy is subjected to conditions under the Land Act of 1999. Mortgage financing is allowed to be created over the interest governed under the Act.^{xxviii} It is stipulated that the provisions on mortgage financing under the Land Act shall not apply to land held under the certificate of customary right of occupancy.^{xxix} At this juncture, it is clearly established that a granted right of occupancy is appropriate and suitable for mortgage financing in Tanzania.

Derivative Right

The derivative right refers to right to occupation of land and use created from a right of occupancy which includes a lease, a licence and a usufructuary right.^{xxx} It further includes any interest analogous to lease or licence.^{xxxi} Derivative right is obtained by natural person or group of persons who either formed into a corporate body under the Companies Act or not.^{xxxii} It is the right conferred to a person who is or are non-citizens which includes a body corporate the majority of the shareholders are non-citizens.^{xxxiii} A foreigner/not citizen can obtain a derivative right in Tanzania for the approved investment under the Tanzania Investment Act.^{xxxiv} In the case of *Shaffique Dhiyebi vs. PPRSC*,^{xxxv} in this case the plaintiff who is a foreigner submitted a bid for a purchase of the house in Tanzania mainland. The court maintained that a foreigner could not own the land under granted right of occupancy but the foreigner could enjoy a right for investment purposes under the TIC.

The derivative right is suitable for mortgage financing in Tanzania. It is stipulated that the mortgage financing may be created over a derivative right which is basically granted to non-citizens for investment purposes recognised by the TIC.^{xxxvi} The right is legal interest and registered estate due to the fact that the application for the derivative right is made to the commissioner for lands and is granted by the president. So, the derivative right being one of the registrable estates obtainable by the foreigner is suitable for mortgage financing in Tanzania.

Lease of a Right of Occupancy

Lease refers to a lease or subleases of registered or unregistered land and includes a short-term lease or an agreement to lease.^{xxxvii} Lease inter alia includes a sub-lease and a term created out of land in respect of which a certificate of title is issued. Lease does not include an over land of any rights over mines, minerals and/or mineral oils.^{xxxviii} Once the lease is registered the lessee is issued with the certificate of occupancy which shows his/her interest in that particular estate.

It is further stipulated that for a lease to fall under a registrable estate it must be a long-term lease of more than five years.^{xxxix} A lease is registrable lease if it contains an option in the lease agreement where the landlord and the tenant agreed on further term which together with the original term year five years.^{xl} The lessee who occupies a registered lease has the right to enjoy his interest which subsists over the land. For that matter the lessee or tenant may create a mortgage over the lease subject to the consent of the lessor (landlord).^{xli} The implication here is that the registrable leases are suitable for the formation of mortgage financing in Tanzania.^{xlii} It is common knowledge that when creating a mortgage financing, the lessee has to observe the formalities provided under the law to form a mortgage financing.

UNREGISTERED LAND IN TANZANIA

Unregistered land refers to all land apart from a registered interest in Tanzania.^{xliii} The estate which is not registered as per the requirements of the Land Registration Act^{xliv} is unregistered land. The customary tenure and/or deemed right of occupancy are unregistered land in Tanzania. There is no law which provides for the formation of mortgage financing over

unregistered land. This study examines why is not possible to create mortgage financing over unregistered land in Tanzania.

Customary Right of Occupancy

This is unregistered land which not subject/suitable for mortgage financing. The Land Act allows the land tenure held under the granted right of occupancy suitable to create mortgage financing. This hinders the development of mortgage financing particularly over unregistered land. It is undisputable fact that more than 70% of lands in Tanzania are held under customary right of occupancy.^{xlv}

The Land Act of 1999 is shall not apply to the mortgages of unregistered.^{xlvi} The customary land is subject to stipulations under the Village Land Act.^{xlvii} It can be conferred over the general or village or reserved land.^{xlviii} The applicable laws to land held under customary tenure are the customary law and the Village Land Act.^{xlix} The rules of customary law applicable to unregistered land shall have taken into consideration the customs, traditions and practices of the community under which concerned mortgage is created. The applicability of the customary law must be in accordance to the fundamental principles of land as stipulated under the National Land Policy¹ as well as other written law on land.^{li}

It is only the Land Act of 1999 which recognises, governs and allows the formation of mortgage financing Tanzania. The provision in respect to mortgage financing under the Land Act do not apply to land held under customary tenure.^{lii} For that matter the provisions of the Land Act exclude the customary land to be subjected to mortgage financing. Moreover, the customary law is silent on the formation of mortgage financing over unregistered land. This deteriorates the development of mortgage of unregistered land in Tanzania. There is the need of the legal regime to recognise the formation of mortgage financing over unregistered land. The study provides the way forward to enhance mortgages financing over unregistered land in Tanzania.

Deemed Right of Occupancy

This kind of occupancy is not granted by the village council. This category of land tenure consists of land occupied and used by an individual or land used and occupied by a family or group of persons in accordance with the customary laws.^{liii} The deemed right cannot be allocated by the village council because it has previously occupied.^{liiv} It can be acquired through

inheritance, adverse possession, gifts, clearing virgin forest and through allocation by the heads of the clan or family.^{lv} This is held subject to condition provided under the customary law as well as conditions provided under the statutory laws modifying customary law.

Deemed right of occupancy is unregistered land governed by customary law. It is not suitable for mortgage financing in the sense it is not registered land governed by the Land Act. The reason for the limitation is not stated in the provisions of the laws. This category of land tenure being of equal status with the registered land needs to be included in the formation of mortgage financing. The legal regimes in Tanzania shall have to provide the mechanism to ensure the formation on mortgage financing over unregistered land. This will ensure the development of mortgage industry in our country.

Short Term Lease/Unregistered Lease

This kind of leases composed unregistered land in Tanzania. Short term lease these are lease not exceeding five years. This kind of lease is not registered as per the provisions of the Land Registration Act.^{lvi} Thus because a short-term lease is not a registrable interest a holder of it cannot create mortgage financing over it. Thus, as far as legal challenges facing unregistered land is concerned, short term lease fall under unregistered interest in land.

LEGAL CHALLENGES FACING UNREGISTERED LAND IN CREATION OF MORTGAGE FINANCING

Unregistered land refers to all land in Tanzania other than the registered land/interest.^{lvii} Basically unregistered land is comprised of all lands which are not registered as per the provisions of the Land Registration Act.^{lviii} Unregistered land inter alia includes; a customary right of occupancy, a deemed right of occupancy and short term leases of below five years or periodic leases which do not exceeding five years.^{lix} Unregistered land is the category of all land which covers more than 70% of all lands in Tanzania.^{lx} Despite covering larger part, unregistered land is deemed unsuitable for mortgage financing. The land is destined unfit for mortgage financing due to existing challenges which subsist over it. The whispered challenges make unregistered land unsuitable for mortgage financing. The legal challenges are examined

in details herein under. The challenges are on the basis of administration bodies supervising unregistered land and the applicable laws and practices on unregistered land as hereunder:

Absence of Sound Legal Regime(s) on Mortgages of Unregistered land

In Tanzania the main laws operate over the disposition of unregistered land are the Village Land Act^{lxvi} and Customary law.^{lxvii} The customary law which will apply to mortgages of unregistered land in Tanzania are the customary laws that apply over the land in which the mortgage of that particular unregistered land is created.^{lxviii} However, the two regimes operating over unregistered land are not effective on the formation of mortgages of unregistered land. The legal regimes did not provide for the general regulation of mortgages of unregistered land. Lack of comprehensive and effective laws holds back the development of mortgage financing over unregistered estate in Tanzania.

The Village Land Act^{lxix} is silent on formation of mortgage financing over unregistered land. Despite the fact that more than 70% of land is unregistered, still there are no stanzas of law which provides for the mortgages of unregistered land. The Land Act^{lxx} stipulates that provisions concerning mortgage financing shall not apply to unregistered land.^{lxxi} In this sense there is no law governing mortgage financing over unregistered land Tanzania. The legal regimes need to be amended to include the provisions which guide the creation of mortgage financing over unregistered land in Tanzania.

Proof Ownership of Unregistered Land

The proof of ownership of unregistered land is difficult compared to proof of ownership of a registered land. The complexity in confirming title of unregistered land makes it un-preferable for mortgage financing. It is difficult to prove ownership of unregistered land because in most case there is no certificate of title. For a registered land a holder of right of occupancy is issued with a certificate of occupancy which proves the ownership of an estate.^{lxxii} Certificate of Occupancy is not the right of occupancy itself, but it is a document evidencing the right.^{lxxiii} In this sense for a registered land a lender may conduct an official search^{lxxiv} and a due diligence^{lxxv} to inquire the title of the borrower unlike for unregistered land.

The difficulty in proving the ownership of unregistered land it is legal challenge to intricate. For a land security to be suitable for loan it is important for a holder to prove his/her tenure

therein. The absence of certificate of occupancy and effective land register for land held under customary tenure is a challenge which makes the tenure unsuitable for mortgage financing. It is not easy to access information of unregistered land due to absence of efficient system which keeps record and memorials which subsists over unregistered land.

Features of Mortgage Financing over Unregistered Land

Nonexistence of highlighted feature to form a mortgage of unregistered land is another legal challenge facing creation of mortgage financing. There are no any procedural requirements watered down to form mortgage of unregistered land. Absence of procedural requirement leads to a lot of uncertainties on whether unregistered land is suitable for mortgage financing or not. On the other hand, the lack of formal procedures makes it difficult to protect the interest of the parties in case of any catastrophe. Thus, even if the mortgage is creating over unregistered land the rights of the parties will at stake due to lack of legal protections.

The Land Act of 1999 stipulates the procedures to be observed when creating mortgage over registered land.^{lxxi} Neither of the said procedures of a mortgage of registered land as stipulated under the Land Act is relevant to mortgage unregistered land. Additionally, the said formalities are not enshrined by the legal regimes governing unregistered land. This gap in the stanzas of the law hinders the development of mortgage financing over unregistered land. There is the need to establish effective and efficient legal regime that will govern the formation as well as enforcement of mortgage financing over unregistered land. Taking into account the fact that both right of occupancy are equal status^{lxxii} there need of a land held under customary tenure to be subjected to mortgage financing. The legal regimes have to be designed to include procedures for the formation of mortgage financing over unregistered land.

Search or Inquiry of Unregistered land

Impenetrability in acquiring information about unregistered land is also a challenge. This is because in most case the information about unregistered land is not centred or not preserved in formal documents. It this sense it is difficult to identify any encumbrances which subsists over unregistered land. The difficultly to acquire information about any existing memorials over unregistered land makes it unacceptable for mortgages. It is not easy for the lender to give the loan over the security which its information is not properly recorded and kept.

For instance, it is easy to get the information about registered land because there is land register. The information existed in the land register is valid and indefensible.^{lxxiii} It is stipulated further that the registration of land serves a notice to general public that the person whose names appear in the land register is the lawful owner of that particular piece of land.^{lxxiv} When any interested person inspects the land register the information found in the report is normally final and conclusive concerning that particular piece of land over which search is conducted.^{lxxv} The owner of the registered land takes precedent over all other interest. For unregistered land the information is not easily obtainable because not all information's are recorded. Moreover, there is no register effective land register for land held under customary tenure. In practice there is the village land register which kept in the village. However, the land register which existed in the village is not effective. This is because the issue of registering customary land is not seriously considered by the community. Thus, at this juncture, there is a need to establish effective land register in the village.

Property Right in Tanzania is not Absolute

All lands in Tanzania are public land remain vested to the president as a trustee for and on behalf of all citizens of Tanzania.^{lxxvi} The president is the one who have a superior title (absolute title) of all lands in Tanzania. A person who wants to hold land in Tanzania acquires leasehold called right of occupancy. The president can acquire or revoke a right of occupancy for public purpose^{lxxvii} or for good causes.^{lxxviii} The revocation of land for good cause may be due to; disposition of land to a foreigner contrary to law, issue of abandonment of land, and failure to develop the land, disposition contrary to law, breach of any condition in the title deed, breach of any land regulation and contravention to section 120A and 120B of the Act.^{lxxix} Moreover, the president may revoke interest in land, if in his opinion the land is needed for public purpose.^{lxxx} From the fore stipulation it is clear that the property right is not absolute in Tanzania. A person may hold the land subject to the wishes of superior landlord. Thus, the right to land in Tanzania is in a form of revocable licence.

Lack of absolute property right is a legal challenge facing formation of mortgage financing over unregistered land. The right to own land particularly for unregistered land is not absolute. The interest is subject to revocation or acquisition for public purpose or any other reason as the superior landlord may deem fit. This affects the development of mortgage financing in

unregistered land because lenders are worried on the extinction of security. Once the security is extinguished the loan become unsecured loan, although the obligation of a mortgagor to repay money remains. In the case of Mansoor Industries Ltd vs. CRDB Bank Ltd,^{lxxxii} it was stated that even if the security was extinguished it does not bring to an end a mortgagor's liability to repay the loan.

Moreover, most of the customary laws in Tanzania did not recognise the individual ownership of land. The land was owned by the community. In the case of Muhena Bin Said vs. The Registrar of Titles,^{lxxxiii} the issue for the determination was whether the Sukuma customary law understands and recognises the individual ownership of land in a form of freehold title. It was held that the customary law did not understand the concept of ownership of land by an individual in the form of freehold title. The nature of jurisprudence under customary tenure is that the land was owned by the community and never by individual.^{lxxxiii} The individual has only usufructuary right. Thus, in this sense we can confidently state that the property right specifically over unregistered land is not absolute. The lack of absolute title makes the unregistered land unfit for mortgage financing.

Ineffective Dispute Settlement Mechanisms

Good dispute settlement mechanism is of paramount for a sound securitization process. A good system of dispute settlement has a positive impact to the development of mortgage. In Tanzania the dispute settlement machinery that deals with dispute arising from unregistered land are the same with the machinery that settle the dispute arising from registered land. However, the challenge is this aspect may be associated with the applicable law.

The laws governing disputes settlement over unregistered land are the Village land Act and customary law. Unregistered land in most cases is owned informally, so the system of dispute settlement is informed. There are no any standard prescribed procedures for dispute settlement mechanisms of unregistered land. The customary law commonly applies in dispute settlement arising over unregistered land. The customary law applicable in dispute settlement are not prescribed rules but rather the customs, traditions and practices of the community concerned.^{lxxxiv} The application of customary law in dispute settlement is a challenge as far as diverse Tanzania community is concerned.

There are varieties of customary laws applicable in land matters in Tanzania. It is application varies from one community to another in the sense that the customs, traditions and practices of the community are not the same. This variation causes absurdity and uncertainty on land issues arising from the community. At this point we can confidently say that the dispute settlement mechanisms for unregistered land are not effective and efficient at all. This is due to absence of stipulated standards for the application of customary laws. The customs, traditions and practices are not prescribed. There are no any stipulated procedures for the application of customary laws.

Monetary Policy

The absence of effective monetary policy is another challenge facing formation of mortgage financing in unregistered land in Tanzania. In Tanzania we have in place the National Microfinance Policy,^{lxxxv} which basically provides for the financial system. The policy did not provide anything about issues of security for loan in the country. The policy creates an effective and efficient financial system through ensuring the banking financial institutions to function on commercial foundations, undertake the business and decision management.^{lxxxvi} The issue of security was left uncovered under the Monetary Policy.

The development of mortgage financing of unregistered land highly depends on good monetary policy. The monetary policy we have in place is not effective to the extent of addressing the issue of security. The policy did not manage to identify the criteria of good borrower in terms of kind of security he has. This eventually affects the formation of mortgage financing over unregistered land in the sense that the practice has made only registered land suitable for mortgages.

Institutional Challenge

The village council, village land council and village assembly are the institutions established to regulate village land in Tanzania. The village council shall be responsible for the management of all village land.^{lxxxvii} The council is an institution established and vested all executive power in respect of all affairs and business of a village.^{lxxxviii} Particularly it deals with the allocation of customary right of occupancy to citizens.^{lxxxix} When exercising it is power the village council must act in accordance with the principles applicable to the trustee managing

property on behalf of a beneficiary as if the council were a trustee of, and the villagers and other person resident in the village were beneficiaries under a trust of the village land.^{xc}

The institutions established thereon are not effective in the management of unregistered land. The institutions are composed of unskilled personnel on land matters. This leads to poor record keeping of the customary tenure. In most places the person who composes the village council did not read or write but they are included for the reason that they are experienced in customs, traditions and practices of the community. Thus, the reason that the village council is composed of unskilled person is a challenge which make the institution ineffective on land and mortgages. The village council is not effective due to absence of effective laws which push for performance of it is function. The village register is not effective, lack of skilled personnel on land matters and corruption are other legal challenges presence of effective institutions. Village council deals with supervision of unregistered land while the land registry generally deals with the supervision of registered land. The two basic categories of right of occupancy are governed by these institutions but when it comes to the effectives on performance of it is function the two institutions are not the same.

Moreover, the village council is not effective because there is no land register for customary tenure. The institution implements the disposition of land informally. The absence of effective institution to supervise unregistered land is a legal challenge facing formation of mortgage financing over unregistered land in Tanzania. There is a need to design the institution in a way that complies with the formal procedures on land disposition through enacting effective laws which provides for it is functions and powers, hiring skilled personnel and establishing effective land register for land held under customary tenure.

Land Value

Unregistered land is deemed to be of lower value compared to a registered land. In Tanzania the market value of registered land is higher because the land is surveyed, registered, and a holder is given a certificate of occupancy. This ensures the security of tenure of registered land contrary in unregistered land. Thus, some of the factors which make market value of unregistered land to be down is due the sense that the land is not surveyed, not effective register, no strong proof of ownership and so on. There is the need of the effective legal regime which will address the aforementioned challenges.

RECOMMENDATIONS

Recommendations to the legislature

The laws governing unregistered land tenure in Tanzania should be amended or enacted to fill the gap of the formation of mortgage as well as mortgage financing in unregistered land in Tanzania. The Village Land Act^{xci} provides for the procedures for application, determination and grant of unregistered land. However, the Act is silent on the creation of mortgage of unregistered land. This deteriorates the mortgage of unregistered land. Furthermore, the customary law is silent on issues of mortgage. The practices on formation of mortgage in unregistered land involve informal procedures. This makes the enforcement of unregistered mortgage created over unregistered land to be very difficult.

Furthermore, is the need to codify the customary law on mortgage in Tanzania. The applicability of different type of customary law hinders the development of mortgage financing over unregistered land in Tanzania. Its operation is very informal and obsolete which makes it difficult to cope with the current situation. In this sense there is a need to codify the customary law so that can accommodate the imaging situation on issues of land and mortgages as well.

Moreover, there is the need to enact a monetary/financial policy that will suggest the kind of security suitable in lands tenure in Tanzania. The current monetary policy is lacking the aspect which suggests for the efficient securities that are suitable on creation of mortgage to ensure financial security.

Recommendations to the State

Firstly, the state should ensure the security of tenure in Tanzania. The issues like compulsory acquisition and revocation of right of occupancy by the president for either good cause or for public interest make the land security unsafe for lenders. This is because the higher authority can revoke the ownership of any holder of land. Thus, to make the land security safer for mortgage, the security of tenure should be absolute to avoid unnecessary interference from the state.

Also, the state should ensure the risk-free environment for both lenders and borrowers like to ensure the creation of financial policies, provide awareness and knowledge to it is people on

issues of mortgage and security for mortgages. It is undisputed fact that the government is the initiator for policy which leads to the enactment of laws in the country. Thus, the government should use this power to create safer environment for the mortgage industry to flourish in Tanzania.

Thirdly, state has to ensure credit rating system between the borrower and a lender. There should be a mechanism that will ensure to identify a good borrower and bad borrower, a good lender and bad lender.

Fourthly, to establish the strong and effective administration bodies that will keep the register of unregistered land. This will ensure the access to information about the land and all subsisting memorials over it. This will lead to increase of value of unregistered land hence will be suitable for mortgage financing.

Lastly, the state should design a mechanism that will provide a certificate of occupancy to a holder of unregistered land to prove ownership of that particular piece of land. Most of unregistered land there is no a certificate of occupancy that easily proves the ownership of the land.

CONCLUSION

Therefore, unregistered land is not effective and suitable for mortgage financing due to some legal challenges. These challenges are the lack of effective legal regime governing mortgage of unregistered land, difficulty on the issue of search and investigation of unregistered interest and absence of documents proving ownership. Most of unregistered lands are located in country side thus the lender sometimes dislikes this kind of land because of the low value. The market value is highly affected by the location of the property. The properties located in town and cities are of high value compared to land located in rural areas.

There are other factors which deteriorates unregistered land suitability to mortgage. There is no effective land register in the village for the registration of the same. The absence of effective land register in the Village makes difficult to discover encumbrances which subsist over the land. In this sense unregistered land becomes un-preferable to lenders. Thus, for this matter is

the need of effective law which will provides for effective customary tenure for mortgage financing.

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ENDNOTES

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- ⁱ Section 2 of the Land Act Cap 113 R. E 2019.
- ⁱⁱ Section 2 of Cap 113 R. E 2019.
- ⁱⁱⁱ *Abualy Alibhai Aziz vs. Bhatia Brothers* [2000], T. L. R 288.
- ^{iv} *Op. cit.*
- ^v Section 10 (2) and (3) and section 37 Cap 113 R. E 2019.
- ^{vi} Section 36 (1) Cap 113 R. E 2019.
- ^{vii} Cap 334 R. E 2019. Section 22 (1) of Cap 113 R. E 2019.
- ^{viii} Long title to Cap 113 R. E 2019.
- ^{ix} Cap 114 R. E 2019.
- ^x Section 62 (2) and (3), section 115 (1) of Cap 113 R. E 2019 and Section 20(1) of Cap 114 R. E 2019.
- ^{xi} Section 18 of Cap 114 R. E 2019; See also the cases of *Methuselah Paul Nyagwaswa vs. Christopher Mbote Nyirabu* [1985] TLR 103 and *Mwalimu Omary and Another vs. Omary Bilali* [1999] TLR 432.
- ^{xii} Long title and section 120A & B to Cap 113 R. E and Regulation 2 of G. N. No. 345 of 2019.
- ^{xiii} Cap 114. R. E 2019.
- ^{xiv} Section 2 of Cap. 334 R. E 2019.
- ^{xv} Cap. 334 R. E 2019.
- ^{xvi} Section 8 (1) of Cap. 334 R. E 2019.
- ^{xvii} Section 8(1) (a) of Cap. 334 R. E 2019.
- ^{xviii} Section 8 (1) (b) and (c) of Cap. 334 R. E 2019.
- ^{xix} Section 2 of Cap. 334 R. E 2019.
- ^{xx} Cap. 113 R. E 2019.
- ^{xxi} Section 19 (1) of Cap. 113 R. E 2019.
- ^{xxii} Section 2 of Cap. 113 R. E 2019.
- ^{xxiii} Section 22 (1) (a) and Section 29 of Cap. 113 R. E 2019.
- ^{xxiv} Section 22 (1) (b) of Cap. 113 R. E 2019.
- ^{xxv} Section 22 (1) (d) of Cap. 113 R. E 2019.
- ^{xxvi} Section 22 (1) (e-k) of Cap. 113 R. E 2019.
- ^{xxvii} Section 120A of Cap. 113 R. E 2019.
- ^{xxviii} Cap. 113 R. E 2019.
- ^{xxix} Section 120C of Cap. 113 R. E 2019.
- ^{xxx} Section 2 of Cap. 113 R. E 2019.
- ^{xxxi} Section 2 of Cap. 113 R. E 2019.
- ^{xxxii} Cap. 212 R. E 2002.
- ^{xxxiii} Section 19 (2) of Cap. 113 R. E 2019.
- ^{xxxiv} Section 20 (1) of Cap. 113 R. E 2019.
- ^{xxxv} Land Case No. 46 of 2004 HCT at DSM, Kileo J.
- ^{xxxvi} Regulation 2 of G. N. No. 345 of 2019.
- ^{xxxvii} Section 2 of Cap. 113 R. E 2019.
- ^{xxxviii} Section 2 (1) of Cap. 334 R. E 2019.
- ^{xxxix} Section 8 (1) (a) and Section 54 of Cap 334 R. R. E 2019.
- ^{xl} Section 54 (1) of Cap 334 R. E 2019.
- ^{xli} Section 93 (2) (f) of Cap 113 R. E 2019.
- ^{xlii} Regulation 2 of G. N No. 345 of 2019.
- ^{xliiii} Section 2 of Cap 334 R. E 2019.
- ^{xliv} Cap 334 R. E 2019.
- ^{xlv} MWAISONDOLA G. N., (2007), *The Modern Law of Mortgages in Tanzania, the Role of the Land Act of 1999*, PhD of the University of Birmingham.
- ^{xlvi} Section 61 (2) of Cap 113 R. E 2019.
- ^{xlvii} Cap 114 R. E 2019.
- ^{xlviii} Section 18 (1) (b) of Cap 114 R. E 2019.
- ^{xlix} Section 20 (1) of cap 114 R. E 2019.

- ⁱ Policy of 2000.
- ⁱⁱ Section 20 (2) of Cap 114 R. E 2019.
- ⁱⁱⁱ Section 120C of Cap 113 R. E 2019.
- ⁱⁱⁱⁱ JAMES, R.W. & FIMBO G.M., (1993), *Customary Land Law of Tanzania, A source Book*, EALB, Nairobi, 1993 P.3 3-6
- ^{lv} Loc. cit.
- ^{lv} RAULENCIO, P., (2008), *Basic Principles of Modern Land Policy and Land Law in Tanzania*, Institute of Judicial Administration at page 189 – 192.
- ^{lvi} Section 54 of Cap 334.
- ^{lvii} Section 2 of Cap 334 R. E 2019.
- ^{lviii} Cap 334 R. E 2019.
- ^{lix} Section 8 (1) (a), (b) and Section 54 of Cap 334 R. E 2019.
- ^{lx} MWAISONDOLA G. N., (2007) Op. cit.
- ^{lxi} Cap 114 R. E 2019; particularly section 31 (4) (b) (i-iii) provides for mortgages of customary right of occupancy that shall not require the Approval of the village council.
- ^{lxii} Section 61 (2) and (3), section 64 (4) (c) and Section 115 (1) of Cap 113 R. E 2019; it was implied that the creation of customary mortgage shall be in accordance with the customary law applicable to the land in respect of which customary mortgage is created.
- ^{lxiii} Section 115 (1) of Cap 113 R. E 2019.
- ^{lxiv} Cap 114 R. E 2019.
- ^{lxv} Cap 113 R. E 2019.
- ^{lxvi} Section 120C of Cap 113 R. E 2019.
- ^{lxvii} Section 29 (2) (3) of Cap 113 R. E 2019.
- ^{lxviii} Prof. James, Land Tenure and Policy in Tanzania P.117
- ^{lix} Section 34 and 97 of Cap 334 R. E 2019 provides for the procedures of conducting actual notice.
- ^{lxx} This is through conducting onsite visit to identify latent and patent defect; see the case of Wilkes vs. Spooner and another (1911) 1 KB 475.
- ^{lxxi} In this sense section 64, section 37 and section 113(4) of Cap 113 are relevant, as well as section 41 of Cap 334 and Land (Procedures for Mortgage of Land) Regulations, G. N No. 345 of 2019.
- ^{lxxii} Section 18 (1) of Cap 114 R. E 2019.
- ^{lxxiii} Section 22 (1) (d) of Cap 113 R. E 2019.
- ^{lxxiv} Section 34 of Cap 334 R. E 2019.
- ^{lxxv} Section 97 of Cap 334 R. E 2019.
- ^{lxxvi} Section 4 (1) of Cap 113 R. E 2019.
- ^{lxxvii} Section 3 and 4 of Cap 118 R. E 2019; see also case of George Shabwe vs. National Printing Co. Ltd [1995] TLR 262 and case of Nittin Coffee Estate Ltd and 4 others vs. United Engineering Works Ltd and another [1988] TLR 203 where the term public purpose was defined
- ^{lxxviii} Section 49 (1) of Cap 113 R. E 2019.
- ^{lxxix} Section 45 (2) of Cap 113 R. E 2019.
- ^{lxxx} Section 45 (3) of Cap 113 R. E 2019.
- ^{lxxxi} HCT (Commercial Division) at Dar es Salaam, Commercial Case No. 286 of 2004; see also the case of Manyara Estate Ltd vs. NDCA.
- ^{lxxxii} (1949) 16 EACA 79.
- ^{lxxxiii} Mtoro Bin Mwamba vs. AG (1953) 2 Tanganyika Law Report at page 108.
- ^{lxxxiv} Section 20 (2) of Cap 114 R. E 2019.
- ^{lxxxv} The National Monetary Policy of 2000.
- ^{lxxxvi} Paragraph 1.1 of the National Monetary Policy of 2000.
- ^{lxxxvii} Section 8 (1) of Cap 114 R. E 2019.
- ^{lxxxviii} Section 147 (1) of cap 287 R. E 2002.
- ^{lxxxix} Section 18 (1) of Cap 114 R. E 2019.
- ^{xc} Section 8 (3) of Cap 114 R. E 2019.
- ^{xci} Cap 114 R. E 2019.