

FEATURES OF MORTGAGES FINANCING A STUMBLING BLOCK TOWARDS ITS DEVELOPMENT OVER UNREGISTERED LAND IN TANZANIA

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ABSTRACT

The Land Act of 1999 stipulated the features of mortgage financing in Tanzania. It is endowed under the Act that for a mortgage financing to be enforceable, valid, operative and effectual it must be in writing, there must be a notification of the commissioner for lands, mortgagor must make a declaration that the loan shall be invested in Tanzania, a mortgage must be registered and lastly the mortgagor has to make a report on the utilization of the mortgage money. A mortgage is not enforceable if the formalities are not complied with. The said formalities are not achievable by a holder of unregistered land. The features on the formation of mortgage financing can only be complied with by a holder of registered land because of the applicability of the Land Act of 1999. Land Act is not applicable to unregistered land hence there is no law governing creation of mortgage financing over unregistered land. In that sense the said features impede the development of mortgage financing over unregistered land.

INTRODUCTION

The Land Actⁱ permits for the formation of mortgage financing in Tanzania. It is stipulated under the Act that a person may mortgage his land or any part of his land therein to obtain money from local or foreign bank or financial institution for the purposes of developing his land or for any other investment.ⁱⁱ Principally, the Land Act of 1999 is the main and principal law which establishes and governs the whole concept of mortgage financing in our country.

Mortgage financing is the concept where a person can mortgage his land to obtain the loan from a bank or financial institution to be utilized for further development of land or for investments in case the mortgaged land is developed.ⁱⁱⁱ In case the mortgaged land is undeveloped or underdeveloped, a loan to be utilized to develop part or whole of such mortgaged land.^{iv} The law imposed the condition that the money obtained from mortgage must be invested in Tanzania.^v It is also the condition under the law that the mortgagee must submit to the commissioner for lands a declaration that the money obtained from the mortgage is invested in Tanzania.^{vi} It is important to consider that the money obtained is basically for the purpose of development in the mortgaged land or for the purpose of investment over the mortgaged land.

The provisions which establish a mortgage financing under the Land Act 1999 are not applicable to unregistered land in Tanzania.^{vii} The disposition of unregistered land is governed by two legal regimes which are the Village Land Act of 1999 and customary law.^{viii} However, the two legal regimes are silent on the formation of mortgage financing. There are no any procedural requirements stipulated under these two legal regimes operating over unregistered land on the possibility to create a mortgage financing. In this sense there is a gap under legal regime governing unregistered land particularly on the formation of mortgage financing over the land which were not registered.

The formalities stipulated under Land Act of 1999 hinder a mortgage of unregistered land to flourish. The stipulated formalities cannot be attained in anyhow by a holder of unregistered land, in the sense that the Land Act is not applicable to unregistered land. Furthermore, the institutions supervising registered and unregistered land are different. The disposition by way

of mortgage of a registered land is supervised by the commissioner for lands and the registrar of titles while disposition of unregistered land is undertaken by village council. So, in this basis it is not possible to use unregistered land to create enforceable, valid and effectual mortgage because of the technicalities imposed in the provisions of the law.

FORMS OF MORTGAGE

Forms of Mortgages at Common Law

The forms of mortgage at English law are commonly categorised into two that is a Legal Mortgage and/or an Equitable Mortgage. The two forms of mortgage are capable of being created.^{ix} In fact forms of mortgages at common law were basically recognized and applicable in Tanzania. The two forms of mortgage were recognised in the country before the enactment of *Land Act*.^x

Currently the *Land Act* recognises the applicability of English common law and doctrine of equity in Tanzania.^{xi} The forms of mortgages created at common law are also applicable in Tanzania due to the applicability of the common law. The Land Act established its own version of mortgages but still the said version of mortgages falls under legal or equitable mortgage as recognised under English law. Moreover, the common law are used by the court in implementing, interpreting and determining mortgage dispute arising under the *Land Act*.^{xii} These two forms of mortgages under common law were as described hereunder: -

Legal Mortgage

This is a mortgage of the legal interest in land^{xiii} which is created by execution of a deed.^{xiv} Legal mortgage is a freehold or a leasehold title. A holder of a legal interest in land can create a legal mortgage. Legal mortgage is a conveyance or assignment of the whole or part of estate or interest or interest of the debtor.^{xv} The estate or interest of a debtor can be real or personal property of which he is the legal owner or some legal estate or interest which he has the power to transfer.^{xvi} It is called legal mortgage because it is created by demise for a term of years or by way of charge which is normally subject to a provision for cesser on redemption.^{xvii}

Moreover, a legal mortgage is created by vesting a legal interest or legal estate to mortgagee. At common law a mortgagee may enter possession immediately once the estate is vested to him with the condition that the mortgagor may re-enter possession and is entitled to a reconveyance upon fulfilment of mortgage terms.^{xviii} In the case of London County and Westminster Bank Limited vs. Tompkins,^{xix} it was provided that a mortgage can be legal where the lawful title to the property is reassigned to the lender. The legal mortgage is created where the formalities of creation of mortgage are observed.

At this juncture, we might possibly say that it is possible to create a legal mortgage in Tanzania. Legal mortgage in Tanzania is basically a creature of statute offered to be created over legal interest. Legal interest in Tanzania includes the granted right, derivative right, customary right, deemed right and/or a lease of right of occupancy. For a mortgage to be legal it must be created by observing/by following the formalities which are; the requirement of mortgage to be in writing in order to be enforceable by law; the requirement to notify of the commissioner for land for the mortgage to be operative; and the requirement to register the mortgage for it to be operative.^{xx} In the case of Abually Alibhahi Aziz vs. Bhatia Brothers,^{xxi} it was held that the right of occupancy in Tanzania is a tripartite transaction involving the president who is a superior landlord, the purchaser and the donee. The holder of land acquires something in a nature of lease where the holder shall be a lessee and the president is the superior landlord.^{xxii} The disposition of land can be proper between the parties but if there is no consent of the superior landlord is inoperative. The disposition without the consent/notification of the commissioner is enforceable between the parties but void as it prejudices the interest of the paramount landlord.

It is stipulated that the essence of legal mortgage is to vest the legal interest to the mortgagee together with an immediate right of redemption.^{xxiii} As a consequence when the mortgagor paid the outstanding debt at the fixed duration shall have the right to enter or entitled to a reconveyance.^{xxiv} Legal mortgage is called legal because the legal title of the property is vested to the mortgagee. Legal mortgage in Tanzania is created by observing the formalities watered down by the law and/or mortgage created over a legal interest in land.

Equitable Mortgages

Equitable Mortgage is created through an equitable interest. It can also be formed through delivering to the mortgagee the document(s) of title relating to the mortgagor's land provided there is intention to treat the said interest as security.^{xxv} In the case of London County and West Minister Bank Ltd vs. Tompkins,^{xxvi} where it was stipulated that equitable mortgage is when there is no transfer of legal interest but inferred by the intention of the parties.

Equitable Mortgage is created where the legal title to land remains to the owner or to other person like a trustee or first mortgagee and the security can consequently only be enforced under the equitable jurisdiction of the court, which carries it into effect either by giving the creditor immediately the appropriate remedies, or by compelling the debtor to execute a security in accordance with the contract.^{xxvii}

Legal owner can create an equitable mortgage when confers a legal title insufficiently to the mortgagee. The owner has to demonstrate his intention to create binding security in mortgagees favour.^{xxviii} Equitable mortgage is determined by looking at the intention of the parties that the parties intended to create a binding legal relation but process is not complete. Here the equity regard done what ought to be done by the parties.

An equitable mortgage may also be created through the deposit of a receipt for purchase money which contains the term in the agreement for sale in case there is no title or conveyance in the depositor's possession.^{xxix} Sometimes the depositor has no even the map of the property,^{xxx} but not by the deposit of an unattested copy of a deed.^{xxxi} This kind of mortgage is basically created without deposit of an instrument or memorandum. It is of kind which is/are created informally without giving the original security.

Forms of Mortgages in Tanzania

The *Land Act*^{xxxii} establishes for the several forms of mortgages that are recognised in Tanzania. The varieties of mortgages conceded under the Land Act were neither legal mortgage nor equitable mortgage. The Act encompasses all forms of mortgages that were previously recognised as legal and equitable mortgage by the common law. Determining kind of

mortgages is of paramount in this chapter to explore the variation in terms of formalities and enforcement of mortgages. This will provide a way forward particularly on creation of mortgage financing in unregistered land. The forms/kinds of mortgages recognised under the Land Act are as explained herein below: -

Formal Mortgage

The holder of a land and a lease of land may mortgage his land to secure the loan through an instrument in the prescribed form subject to variation and/or additional circumstance required.^{xxxiii} The interest in land basically secures the payment of the existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition expressly or impliedly given. Formal mortgage is created in a prescribed instrument and it is also known as ordinary mortgage.

Ordinary mortgage as a kind of mortgage may be created by any holder of the right of occupancy or a lease. In Tanzania the right of occupancy is categorised into two which is granted right/derivative right and the customary right/deemed right of occupancy. The right of occupancy and a lease of a right of occupancy are suitable for formal mortgage.^{xxxiv} The formal mortgage is created over a legal estate. It is further stipulated that the granted right and customary right of occupancy are of the equal effect and status.^{xxxv} Thus formal mortgage is created in a legal interest in land subject to other condition stipulated under the law.

Mortgage requires registration to be effectual. Mortgage is registered in accordance with the provisions of the *Land Registration Act*.^{xxxvi} Thus the mortgage of a registered land shall take effect only when are registered in a prescribed register.^{xxxvii} In respect of a mortgage of registered land a mortgagee shall not be entitled to exercise any of his remedies under that mortgage if it is not registered.^{xxxviii}

Despite the fact that both right of occupancy to be the equal status and effect, still the law is silent the creation of mortgage financing over unregistered interest. The absence of legal regime governing mortgage financing over unregistered land hinders the mortgage financing to flourish in Tanzania. Considering the fact that the unregistered land is a legal interest, there

is the need to examine the likelihood of using unregistered land to create mortgage financing. This study suggested the way forward.

Informal Mortgage

This is a written and witnessed undertaking offered by the borrower and accepted by the lender showing the clear intention of charging the borrower's land with the repayment of money or money's worth obtained from the lender.^{xxxix} The Land Act under section 113 (5) (a) provides as hereunder: -

Nothing in this section shall operate to prevent a borrower from offering and a lender from accepting a written and witnessed undertaking, the clear intention of which is to charge the borrower's land with the repayment of money or money's worth obtained from the lender.^{xl}

This can also be a form of a charge created over a legal interest. The mortgage financing cannot be created in a form of charge. This is because the law specifically the regulation of 2019 watered down the procedural requirements which hinder other interest in land other than GRO to be subject of mortgage financing. This other requirement other than the intention of the parties include the requirement to obtain the notification of the commissioner and requirement to register the disposition.

Third Party Mortgage

A third-party mortgage is kind of mortgage executed securing a debt of another. This is the kind of security created by the third party to secure the payment of loan granted to mortgagor. The debt/loan secured by mortgage can either be existing debt, or future or a contingent debt. A person who is not a mortgagor (third party) fulfils the conditions of the mortgage whether or not in common with the mortgagor.^{xli} Third party mortgage involves three parties who are the mortgagee (lender), the borrower and the mortgagor (third party to mortgage).^{xlii} The *Land Act*^{xliii} recognises and allows the creation of the third-party mortgage.^{xliv}

The power to create mortgage in Tanzania basically include the power to form or create third part mortgage.^{xlv} The law further ensures the creation of second and subsequent mortgage. It

might be a third-party mortgage but a holder of land can create a second or subsequent third-party mortgage.

Third party mortgage this is an arrangement where a lender may seek a third-party security. The said security from third party can be treated as guarantee. The third party who shall be a guarantor assumes loan liability of the mortgagor (borrower). The Mortgagor shall be the principal debtor of the loan in the event of default.^{xlvi} In the case of Bank of Africa Tanzania Limited vs. Rose Miyago Assea,^{xlvii} where the plaintiff Bank bring an action against the defendant who mortgage Plots No 662/1, 662/1, 689/1 Block C Ukonga Sitaki Shari Dar es salaam to secure the third-party loan. The outstanding loan was secured by a third-party mortgage. Furthermore, in the case of Balton vs. Salmon,^{xlviii} where the court considers the distinction which subsists between third party security and direct security. The court rests that the distinction is on the applicability of guarantee and indemnity rights, also the duties and protections to a third-party security provider.

The third-party mortgage could be a formal mortgage, informal mortgage, mortgage by lien of deposit of documents and/or a customary mortgage. As it was previously stated the difference is that the third-party mortgage involves three parties namely the borrower, mortgagee and mortgagor. The possibility to create third party mortgage was included in the *Land Act* in 2004 through *Land (Amendment) Act*.^{xlix}

Lien by Deposits of Documents

This kind of mortgage is created through deposit of a certificate of GRO, certificate of CRO, a lease agreement, or any other document signifying the ownership of land by the mortgagor to the mortgagee or lender. The mortgagor may offer and deposit the document signifying the ownership of land. The borrower may offer the certificate of occupancy either granted right or of customary right, a lease document, or other document evidencing ownership.¹ These documents of ownership may be deposited to secure the payment of loan.

Despite the establishment of the mortgage by lien by deposit of document, the law is silent on the requirement of writing, notification, and registration. Thus, it is also clear that the mortgage

financing cannot be created through lien by deposit of document. This is due to the reason that deposit of document includes the deposit of documents of unregistered land. The regime in Tanzania is dumb when it comes to creation of mortgage financing over unregistered land. The law left the creation of this kind of mortgage at the intention of the parties without providing any conditions or formalities to be observed.

Customary Mortgage

This is basically the mortgage of a customary title. The customary law regulates the creation and operation of customary mortgages in Tanzania.^{li} The customary law applicable to mortgages of customary land is the law in which the said mortgage is created.^{lii} If there is a gap under the customary law the Land Act applies. In case there is no system of customary law to address the matter under customary mortgage then the *Land Act* shall apply.^{liii} The rules of customary law are used to determine rights and duties in customary mortgage. The duties and rights under customary laws are imposed or acquired by usage in the community. The customs and practices have the force of law in that particular community. The rules of customary law include any declaration or modification under section 12 of the *JALA*.^{liv}

Mortgagee or mortgagor under customary mortgage can make the use of village land council where there is any dispute. The council normally mediate on the matter and hence provide for the available remedy that is deemed fit. Once the meditation is unsuccessful the mortgagor may re-open by making the application to a village council. The grounds for re-opening the case are like the unfairness of the mortgage, unreasonable departure from the normal terms of a customary mortgage applicable in the area where the land is located.^{lv} The mortgagor is further given the right to reopen the matter to a village land council in case the terms of the mortgage are disadvantageous to his interest or interest of the dependents.^{lvi}

In Tanzania customary laws are unified and codified by the *Local Customary Law (Declaration) Order*.^{lvii} The codified law fall short of land law matters concerning mortgages as it does not provide any guidance or regulation on mortgages. In customary law investigation revealed that land can be communal land or individual ownership. This was set out in the case Muhema Bin Said vs. The registrar of title,^{lviii} where the issue of individual ownership was

discussed. The court determines on whether Sukuma customary law recognises individual ownership of land in a form of free hold title. It was held that the Sukuma customary law did not have concept of ownership of land by an individual in the form of free hold title. This implies that the customary laws governing land matters in Tanzania was not codified. The customary law of the respective community applies in determination of rights under customary mortgage. Land Act applies to customary mortgages when there is a gap under the customary law.

Moreover, tenure held under customary certificate of occupancy and all unregistered land shall not be subject to mortgage financing because the Land Act is inapplicable. In this circumstance the creation of mortgage financing is tied up with a lot of technicalities which make difficulties to any person who own unregistered land to access it. These trivialities include the requirement of mortgage financing to be in writing, require the notification of the commissioner for lands, registration by the registrar of title, declaration to the commissioner that the money shall be invested in Tanzania and lastly mortgagor has to make a report on the utilization of mortgage money.

The formalities for the formation of mortgage over unregistered land are not provided by any law. This implies that there is no any procedural requirement to be observed by the holder of unregistered land to create a mortgage. The formalities to create mortgage under the Land Act cannot be attained by any holder of unregistered because the interest is not registrable by the registrar of title. The customary law and the Village Land Act are the main legal regime governing unregistered tenure. The Legal regime despite being the main laws over unregistered land still there no any formalities watered down by the Act.

Mortgage of Matrimonial Homes

It is the kind of mortgage created over a matrimonial home. Matrimonial home is a building where the husband and wife normally reside together.^{lix} Matrimonial home include the building and it is cartilage used for residential purposes by the spouses and any outbuildings thereon.^{lx} It further includes a building occupied in conjunction with agricultural land or pastoral land, any land allocated by the husband or the wife, as the case may be, to his or her spouse for her

or his exclusive use.^{lxi} Mortgage of matrimonial homes includes the mortgage created in or over a matrimonial home/property. This kind of mortgage can be ordinary mortgage, informal mortgage, customary mortgage, third party mortgage, of mortgage by lien of deposits of documents.

Mortgage of matrimonial home is of kind that mortgage finance can be created over it with the condition that the land is a registered land. In case it is the matrimonial homes situated in unregistered land it shall be unsuitable for creation mortgage financing. This simply means that matrimonial home held under unregistered land is not subject to mortgage financing. The restriction to used unregistered interest impedes the growth of mortgage finance. The limitation needs to be alleviated to let unregistered land worthy in the creation of mortgage finance in Tanzania.

The procedures for creating mortgage of matrimonial home of a registered land are stipulated under the *Land Act*^{lxii} and *Land (Mortgage financing) Regulations of 2009*.^{lxiii} There are extra conditions imposed by the law for the mortgage of a matrimonial home to be operative, effectual and enforceable by law. These extra conditions are provided by the Act and the regulation that the mortgagor has the duty to ascertain his/her marital status and the duty of the mortgagor to seek the consent of the spouse(s).^{lxiv}

In the case of *Idda Mwakalindile vs. NBC Holding Corporation*,^{lxv} where it was provided that the husband and wife have an interest over matrimonial home. The spouse cannot alienate the interest over matrimonial home without the consent of the other spouse. The spouse has the right to reside over the matrimonial home until the marriage between them is dissolved. In the subsequent case the marriage between the parties subsists but the appellant failed to file the caveat to protect her interest.

FEATURES OF MORTGAGE FINANCING

The law imposed several conditional precedents to be observed when creating a mortgage financing. These conditions are stipulated for under the Land Act of 1999 to apply specifically

for a registered land. In fact, the condition imposed by the law hinders the formation of mortgage financing of unregistered land.

For a mortgage of a land to be valid, effectual, operative and enforceable there are formalities provided by the law. The formalities range from the general regulation on disposition affecting land,^{lxvi} general regulation on disposition of right of occupancy^{lxvii} and specific regulation on mortgages.^{lxviii} Formation of mortgage is a process which passes through various stages/formalities. These formalities facilitate the creation of mortgage of a legal interest. Thus, to affect the disposition by way of mortgage the formalities must be observed so as to have a formal security/legal mortgage.

The mortgage formed by observing the formality makes the transaction enforceable, be operative, effectual and valid in the eyes of the law. It is directed that the mortgage of the registered land to be registered unless the mortgagee shall not be able to exercise his remedies under the mortgage which is not registered.^{lxix} These formalities are prescribed under the law to be used under the registered land only. There are no any procedural requirements provided for the formation mortgages over unregistered interest of land. In creation of other kinds of mortgage apart from formal mortgage or legal mortgage what is paramount is the sanctity of contract. These other kinds of mortgages other than formal mortgage are referred to as equitable mortgage. The rights, duties and obligations of the parties under equitable mortgages are determined and recognised by the equity.

Mortgage finance is fashioned in a registered land which requires the compliance of formal requirement. The formal procedures are what impede the creation of mortgage financing in an unregistered land in Tanzania. The commissioner for lands is not in any how responsible for disposition regarding neither unregistered land nor the registrar of title who is responsible to register the interest which is held under the customary tenure. This being the case the formalities laid down diminishes the use of customary tenure to create mortgage financing.

Mortgage to be in Writing

Disposition of interest in land including mortgage has to be in writing for it to be enforceable. The instrument effecting the disposition shall be in the prescribed forms which are normally specific for each kind of disposition.^{lxx} The instrument effecting disposition to operate has to be registered according to the *Land Registration Act*.^{lxxi} If there is no document or a memorandum written the disposition of mortgage should not be registered. This means that the requirement of writing is of paramount importance in creation of formal mortgage. A contract for mortgage of registered land is enforceable if made in writing and signed by the parties to it.^{lxxii} In case the mortgage did not comply with the requirement of writing shall be unenforceable in a proceeding.

A contract for a disposition of land by way of mortgage may be made using a prescribed form.^{lxxiii} The contract ordinarily contains the express right, duties and obligation of the mortgagee and mortgagor. In case of any breach of any right an aggrieved person may enforce his/her right arising from the breach. The rationale for disposition to be in writing is as well to combat fraud. Written contract is important because it puts the terms of the disposition clearly as it limits room for ambiguity in the event of a dispute.

Notification

The disposition of land by way of mortgage to be valid and operative the commissioner for land must be notified. It is provided that the disposition by way of mortgage shall not require the approval of the commissioner for land but notification.^{lxxiv} Any person who creates mortgage must notify the commissioner before creation of mortgage or during the time of creating mortgage. When the commissioner received the notification should enclose it with his signature and his official seal.^{lxxv} Once the notification is endorsed has to be delivered to the registrar of titles for registration of mortgage.^{lxxvi} Thus as a matter of general rule the registrar shall not register the disposition of land unless he has received an endorsed notification from the commissioner of land.

Land (Disposition of Right of Occupancy) Regulations^{lxxvii} provides for the list of disposition which requires approval and/or notification of the registrar. The disposition by way of

mortgage does not require approval but it requires notification of the commissioner.^{lxxviii} The mortgage of registered land without the notification of the commissioner is void.^{lxxix}

Disposition by way of Mortgage is a tripartite transaction which involves the superior landlord, mortgagee and the mortgagor. The land in Tanzania is public land remain vested to the president as a trustee on behalf of the citizens. In Tanzania the president is the one who have an absolute title; thus, president is the superior land lord. For that matter now the mortgage transaction must involve the process of notifying the superior landlord. The commissioner for lands is the one who is empowered by the president to endorse the notification for the disposition of mortgage to take effect. In the case of Abually Alibhai Aziz vs. Bhatia Brothers^{lxxx} it was held that the mortgage of land requires the consent of the superior landlord. The land in Tanzania is of the nature of a lease where the holder of land is a lessee and superior landlord is the president. When creating mortgage, it involves the tripartite transaction which involves the holder of land, lender and commissioner of lands.

Declaration that the Loan Shall be Invested in Tanzania

The mortgagor must make a declaration that the loan obtained from mortgage shall be invested in Tanzania. A person who intends to obtain the loan from a bank or a financial institution shall submit the declaration to the commissioner for lands.^{lxxxi} The declaration must assert that the loan obtained by the mortgagor shall be invested in Tanzania.^{lxxxii}

The declaration by the mortgagor must include the description of the mortgaged land. Moreover, the declaration must include the name and address of the borrower, name and address of the lender, statement of the use of the loan obtained and place where the loan will be utilized.^{lxxxiii} The *Land Act* state that the lender has to deliver to the commissioner a declaration that the loan acquired from the mortgage is invested in Tanzania to develop the mortgaged land".^{lxxxiv}

The commissioner for lands shall endorse the declaration made upon satisfaction that the declaration contains all the information required.^{lxxxv} The commissioner shall not endorse the declaration if all the required information where not included. Upon satisfaction of all the information the registrar can register the mortgage. A lender must submit to the registrar a copy

of endorsed declaration by the commissioner accompanied by other documents referred under regulation 6 of the *Land (Procedure for Mortgage of Land) Regulation* of 2019.

Registration

This is the mode of formalizing and legalizing the mortgage. The registration of mortgage in Tanzania is regulated by the *Land Registration Act*.^{lxxxvi} The Act stipulates procedures for registration of mortgage as well as the effect of not registering it. The mortgage must be registered by the registrar to be effectual.^{lxxxvii} Mortgage of a registered land is a registrable estate which is compulsory registrable.^{lxxxviii} The disposition of land shall be effectual to create, transfer, vary or extinguish any estate when so registered.^{lxxxix}

Furthermore, it is provided that for the disposition to be operative it must be registered.^{xc} The mortgage that was not registered is inoperative. The mortgage of land must be registered, if not registered the mortgagee will not be able to exercise his remedies under the mortgage unregistered mortgage.^{xcⁱ} In the case of Manyara Estates Ltd & Others v National Development Credit Agency,^{xcⁱⁱ} where the court adopt the provision of Section 57 of the Land Registration Act^{xcⁱⁱⁱ} that a registered mortgage basically operates as a security and not the transfer of land. The mortgagee shall have powers and remedies when the mortgagors' default the terms of the mortgage. The mortgage normally confers upon the parties the obligations which are implied or express which are subject to redemption.

When a mortgage is created over a registered lease a mortgagor shall not be liable for rent to a landlord. Moreover, the mortgagee is not legally responsible to the landlord for any covenants and conditions lease deed. The mortgagee liability is limited to any greater extent than he would have been had the mortgage been by way of sublease.^{xc^{iv}} The court award the mortgagee the same protection against the forfeiture of the lease as it grants to a sub-lessee.^{xc^v}

The registered mortgage has the effect to rank prior according to the order in which they were registered.^{xc^{vi}} *The Land Registration Act* provides that if there are two or more mortgages over same land a mortgage shall rank according to the order in which they are registered.^{xc^{vii}} In case where the prior lender agrees in writing the mortgage shall rank according to order of creation.

The registered mortgages shall rank according to the order in which they were registered. A mortgage which was registered first shall align prior over other mortgages unless otherwise provided. The priority to mortgage has the effect on enforcement of mortgages due to the reason that the payment of loan is normally made according to the order of creation.

The case of Omary Yusuf vs. Rahma Abdulkadir,^{xcviii} provides for the sanctity of the register that the information found in the register are final and conclusive. There register contain all subsisting memorials created over the land. Moreover, the register contains the description of land as well as the description of any burden of any filed documents in the register.^{xcix}

The requirement to register the mortgage of land hinders the development of mortgage finance in Tanzania. This is due to the fact that the law does not provide the mechanism in which the mortgages created over unregistered land could be registered. The laws states that the mortgage of land must be registered, if not registered the mortgagee shall not be able to exercise his remedies. This is barrier when it comes to the development of mortgage finance. There is the need to establish the register for mortgages created in unregistered land under *Land Registration Act*. The registration of mortgages created using customary tenure shall flourish the development of mortgage finance.

Report on Utilization of Mortgage Money

It is the requirement of the law that a mortgagor to make a report on the utilization of the loan to the commissioner.^c The Mortgagors' report must assert the manner in which the loan obtained is used to develop the mortgaged land.^{ci} In the circumstances where the loan is given by instalments, a mortgagor is required to submit other report within six months after receiving each instalment.^{cii}

CONCLUSION

Generally, for a formal mortgage to have a force of law it has to observe the formalities enshrined under the law. Formal mortgage shall be enforceable if were executed and signed by the parties. The formally mortgage will not be enforceable if where no in writing. Other

formalities which required to be observed are the requirement to notify the commissioner for lands, and the requirement to register a mortgage. Thus, the disposition which observes all the formalities shall be enforceable, effectual, valid and operative.

ENDNOTES

ⁱ Cap 113 R. E 2019.

ⁱⁱ Section 120A (1) of Cap 113 R. E 2019.

ⁱⁱⁱ Section 120A (2) (a) of Cap 113 R. E 2019.

^{iv} Section 120A (2) (b) of Cap 113 R. E 2019.

^v Section 120B (1) of Cap 113 R. E 2019.

^{vi} Section 120B (2) of Cap 113 R. E 2019.

^{vii} Section 120C of Cap 113 R. E 2019.

^{viii} Section 62 (2) of Cap 113 R. E 2019, which Provides that “the provisions of sections 61 to 166 of Land Act of 1999 shall not...apply to a disposition of or dealing with land carried out and executed in accordance with customary law”. Section 62 (3) of Cap 113 R. E 2019 further provides that “For avoidance of doubt, dispositions of customary rights of occupancy shall be governed by customary law”. Section 115 (1) of Cap 113 R. E 2019 states that “The creation and operation of customary mortgages of land shall, subject to the provisions of this section, continue to be in accordance with the customary law applicable to the land in respect of which the customary mortgage is created”. Section 20(1) of Cap 114 R. E 2019 where it was stipulated that “Subject to the provisions of this Act, on any matter concerning the rights and obligations of a person... of a person occupying land under a customary right of occupancy or on another matter affecting land held under a customary right of occupancy and ...where that matter is not otherwise provided for under the Village Land Act or any other enactment, determined in accordance with customary law”.

^{ix}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 at page 91.

^x Cap 113 R. E 2019.

^{xi} Section 180 (1) (b) of Cap. 113 R. E 2019.

^{xii} Section 181 of Cap. 113 R. E 2019.

^{xiii}MWAISONDOLA G. N., (2007), *Op. cit.* at page 92.

^{xiv}TENGA R. W. & MRAMBA S. J., (2014), *Theoretical Foundations of Land law in Tanzania*, Law Africa publishes (T) Limited, Dar es salaam at page 200.

^{xv} TYLER E. L. G (1987), *Fisher and Lightwood, Law of Mortgages* 10th Edition; See also cases of Santley vs. Wilde [1899] 2 Ch 474 CA, Handvel pty Ltd vs. Comptroller of Stamp (Vic) [1984] VR 894, London County and West Minister Bank Ltd vs. Tompkins [1918] 1 KB 515.

^{xvi}Loc. cit.

^{xvii}Law of Property Act of 1925, section 85 and 86.

^{xviii} Fisher and Lightwood, Loc. cit. at page 6.

^{xix}[1918] 1 KB 528.

^{xx} Section 64 and Section 37 of Cap 113 R. E 2019 and Section 41 of Cap 334 R. E 2019.

^{xxi} [2000] TLR at page 290.

^{xxii} Loc. cit.

^{xxiii} Fishers and Lightwood's, *Op. cit.* at page 5.

^{xxiv} Section 115 of the Law of property Act 1925.

^{xxv} TENGA W. R. and MRAMBA S. J., (2014), *Op. cit.* at pg. 200

^{xxvi} (1918) 1 KB 515, Page 528.

^{xxvii} London County and Westminster Bank Ltd vs. Tompkins, [1918] 1 KB 528.

^{xxviii} Swiss Bank Corporation v Lloyds Bank Ltd [1982] AC 584 at 594.

^{xxix} Goodwin vs. Waghon (1835) 4 LJ Ch 172.

- xxx Simmons vs. Montague [1909] 1 IR 87.
- xxxii Re Borrow ex p Broadbent (1834) 1 Mont & A 635.
- xxxiii Cap. 113 R. E 2019.
- xxxiv Section 113 (1) of Cap. 113 R. E 2019.
- xxxv Section 18 (1) of Cap. 114 R. E 2019.
- xxxvi Section 41 (3) of Cap. 334 R. E 2019.
- xxxvii Section 113 (4) of Cap. 113 R. E 2019.
- xxxviii Loc. cit.
- xxxix Section 113 (5) (a) of Cap. 113 R. E 2019.
- xl Op. cit.
- xli Section 112 (2) (b) of Cap 113 R. E 2019.
- xlii MWAISONDOLA G. N., (2007), Op. cit. at page 138.
- xliii Cap 113 R. E 2019.
- xliv Section 112 (3) of Cap 113 R. E 2019.
- xlv Section 113 (2) of Cap 113 R. E 2019.
- lxvi KIBUUKA P. (2018), *Critical Issues in Third Party Security for Bank Loans*, Isidora and Co. advocates. Also see www.isidorolaw.co.tz – accessed on 7th August 2020.
- lxvii Commercial case No. 138 of 2017, HCT at Dar es salaam before Mruma J.
- lxviii [1891] 2 Ch. 48 Ch. D.
- lxix No 2 of 2004.
- ¹ Section 113(5) (b) (i-v) of Cap. 113 R. E 2019.
- ^{li} Section 115 (1) of Cap. 113 R. E 2019.
- ^{lii} Section 115 (1) of Cap. 113 R. E 2019.
- ^{liii} Section 115 (4) (a) and (b) of Cap. 113 R. E 2019.
- ^{liv} Section 3 of the Interpretation of laws Act Cap. 1 R. E 2019.
- ^{lv} Section 115 (3) (a) and (b) of Cap. 113 R. E 2019.
- ^{lvi} Section 115 (3) (c) of Cap. 113 R. E 2019.
- ^{lvii} The Order of 1963 Government Notice No. 279 which come into force on January 1st 1964.
- ^{lviii} (1949), 16 EACA 79.
- ^{lix} Section 112 (2) of Cap. 113 R. E 2019.
- ^{lx} Section 112 (2) (a) of Cap. 113 R. E 2019.
- ^{lxi} Section 112 (2) (b) of Cap. 113 R. E 2019.
- ^{lxii} Cap. 113 R. E 2019.
- ^{lxiii} G. N. No. 355 of 2009.
- ^{lxiv} Section 114 of Cap. 113 R. E 2019 and Regulation 4, 5 and 6 of the GN. No. 355 of 2009.
- ^{lxv} CAT at Mbeya, Civil Appeal No. 59 of 2000.
- ^{lxvi} Section 61 to section 67 of Cap. 113 R. E 2019.
- ^{lxvii} Section 36 to section 43 of Cap. 113 R. E 2019.
- ^{lxviii} Section 111 to section 142 of Cap. 113 R. E 2019.
- ^{lxix} Section 113(4) of Cap. 113 R. E 2019.
- ^{lxx} Section 62 (1) of Cap. 113 R. E 2019.
- ^{lxxi} Section 62 (2) of Cap. 113 R. E 2019.
- ^{lxxii} Section 64 (1) (a) and (b) of Cap. 113 R. E 2019.
- ^{lxxiii} Section 64 (2) of Cap. 113 R. E 2019.
- ^{lxxiv} Section 36 (2) of Cap. 113 R. E 2019.
- ^{lxxv} Section 36 (4) of Cap. 113 R. E 2019.
- ^{lxxvi} Section 36 (4) of Cap. 113 R. E 2019.
- ^{lxxvii} GN. No. 74 of 2001.
- ^{lxxviii} Regulation 3 (b) of the GN. No. 74 of 2001.
- ^{lxxix} Section 36 (1) (b) of Cap 113 R. E 2019.
- ^{lxxx} [2000], TLR 288.
- ^{lxxxi} Regulation 5 (1) of G. N. No. 345 of 2019.
- ^{lxxxii} Regulation 5(1) of G. N. No. 345 of 2019.
- ^{lxxxiii} Regulation 5 (2) of G. N. No. 345 of 2019.

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- lxxxiv Section 120B (2) of Cap 113 R. E 2019.
lxxxv Regulation 5 (3) of G. N. No. 345 of 2019.
lxxxvi Cap 334 R. E 2019.
lxxxvii Section 41(1) of Cap. 334 R. E 2019.
lxxxviii Section 8 of the of Cap. 334 R. E 2019.
lxxxix Section 41(3) of Cap. 334 R. E 2019.
xc Section 62 (2) of Cap. 113 R. E 2019.
xci Section 113 (4) of Cap. 113 R. E 2019.
xcii [1970] EA 177.
xciii Section 57 of Cap. 334 R. E 2019.
xciv Section 57 of Cap. 334 R. E 2019.
xcv Loc. cit.
xcvi Section 117 of Cap. 113 R. E 2019.
xcvii Section 60 of Cap. 334 R. E 2019.
xcviii [1997] TLR 167.
xcix Section 34 of Cap. 334 R. E 2019.
c Section 120A (3) of Cap. 113 R. E 2019.
ci Regulation 7 (1) of G. N. No. 345 of 2019.
cii Regulation 7 (2) of G. N. No. 345 of 2019.

