

THE PROTECTION OF PURCHASERS OF THE MORTGAGED PROPERTY IN TANZANIA

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ABSTRACT

The term security here is applied to mean an obligation, pledge, mortgage, deposit, or lien, given by a debtor in order to assure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation. In a simple language, one may define security as a transaction of offering some property for a loan or advance given.ⁱ Indeed, it is worth noting that every lender has a right to demand and accept some security against an advance he grants. This is because the possibility of a borrower to default in due repayment is always there. The mortgage is a security created by contract by conferring an interest in the property, redeemed upon the performance of a duty or condition of payment of loan with or without interest. In case the borrower defaults in repayment of the loan, the security is deposited; the mortgaged property can be sold to a third party; the purchaser by the lender to recover the same.

INTRODUCTION

A bona fide purchaser is a buyer who buys a property innocently in the absence of knowledge of any opposing titles. The one with good faith paid valued consideration for a property without previous knowledge of adverse claims.ⁱⁱIn the transaction of borrowing and lending, the borrower who is normally a property owner will give his property to the creditor for loan security; the lender becomes the holder of the security. In a position wherever the debtor fails to repay the loan; the creditor subject to the property laws is entitled to sell the security to recover the loan.ⁱⁱⁱ Usually, the sale is conducted by auctioneers in a public place. The person; the purchaser who gets the highest bid will be allowed to buy the property.

The need for the protection of the purchaser arises when the security holder sells the security to the buyer. The essence has been that the security holder may not be the owner of the security. On top of that, the property law seems to require that the purchaser of homes must be careful before purchasing the premises. The availability of good laws for the creation of mortgages, good monetary policy, availability of loans, and good property rights are important for securing business but protection of purchaser is equally essential.

In Tanzania, the main law which regulates mortgages is the Land Act 1999. The Act provides various forms of mortgages that can be created which include formal mortgage where the owner mortgages his or her interest in land by either part of it or the whole land to obtain a loan. The holder or the tenant of the property can remortgage the property to obtain a loan.^{iv} Informal mortgage^vtakes the form of a charge that provides the creditor a right on the assets secured through a mortgage.^{vi}

The mortgage created with a lien by deposit of document,^{vii} third party mortgages are created to secure the debt of another and the three parties are involved; the mortgagor, the mortgagee, and the borrower. The mortgagor does not have the direct obligation to repay the mortgage debt.^{viii}

The customary mortgage is the local way of giving property as security.^{ix} And the mortgage of matrimonial homes is created by mortgaging matrimonial homes. The signature of the

mortgagor and his partners residing in those marital homes is required for a mortgage to be valid.

THE PRINCIPLE OF ‘NEMO DAT QUOD NON-HABET’

The protection of the purchaser of the mortgaged property is governed by the principles. The principles stipulate the circumstance in which the purchaser can be entitled to a better title over the property he has purchased. One of the principles stipulates: the buyer who buys a property from the personal who have no ownership of the same does not acquire ownership on the property. There is no any remedy even if the buyer has no knowledge of incapacity of the seller to pass ownership. In whatever situation the position is the same that where goods are sold by a person with no ownership and without authority the buyer acquires no title over the property.

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The principle above is been incorporated in Latin Maxim: ‘*Nemo Dat Quod non-Habet*’ which means ‘No one can give what they do not have’. This is a legal principle which is to the effect that a person who lacks ownership on a property has nothing to pass to another person.^{xi} That, according to the general rule, the buyer cannot acquire better title from the seller with no title. On the other hand, someone who buys the property in good faith and for value without notice will acquire a good title and will be able to claim against the entitlements of the original owner. In the case *Bishopsgate Motor Finance Corporation Ltd V Transport Brakes Ltd*^{xii}, Lord Denning gives different interpretation of the maxim that the person who takes it in good faith and for value without notice should get a good title. And the inference from the court decision of Lord Denning a bona fide purchaser is entitled to the better title over the property he has purchased. When a person purchases a property that is not free from encumbrances and which prohibitory order has been issued, or there is a caveat, he cannot be said to be a bona fide purchaser.

On the other way round, when a person purchases a property in a public auction in satisfaction of a decree, he becomes a bona fide purchaser and therefore acquired a good title. This was the position in the case of *Hassan Said Kipussi versus KCB Bank Tanzania Limited (Unreported)*^{xiii}

the court has provided the circumstances on identifying and defining who the bona fide purchaser is, the court held that: - A person who has bought an asset in public sale upon fulfilment of a decree is the innocent purchaser and acquires a good title.

THE PRINCIPLE OF CAVEAT EMPTOR

Caveat emptor is a Latin phrase that means 'let the buyer beware.' It is primarily applied to real estate transactions. It is a caution principle which warns the buyer to be extra careful before purchase. The principle has its limitations; it is not applicable in circumstances where the seller offers incorrect information to the buyer, or when there is a misrepresentation of the product. It places the liability to the consumer to be attentiveness before acquiring goods or service. Caveat emptor is an important standard in business and contractual dealings between a consumer and a vender.^{xiv}

The caveat emptor standard rises mainly from the irregularity of information between a buyer and a seller. This is due to fact that the supplier tends to have more information concerning the product than the consumer. So the consumer accepts the peril of probable faults in the bought manufactured goods. The consumer must be content with the property before the buying the same that it fits the need. The failure of the consumer to make the required actions does not guarantee him or her any remedy for compensations in case the product bought shows substantial deficiencies.^{xv}

THE ACTUAL NOTICE TO A PURCHASER

The person is assumed to have direct information of land when he or she has actual notice. There are two types of actual notice: express real notice and inferred notice. The direct real notice happens once an individual has personally been given notice about a property. Implied actual notice occurs when an ordinary people has observed something that providing them with data about the physical assets.^{xvi}

The rule of actual notice has been incorporated in the laws of the land. For instance under the Land Act 1999^{xvii} per section 67(b) (ii) provides that it is in the knowledge of the person or

ought to have awareness of any inquires and inspection has been done or ought to have been done by that person. The inference drawn from the provision requires the purchaser to have actual knowledge before the purchase of the property. The person who intends to obtain an interest in land must find out all necessary information concerning the land to be purchased in the registry.^{xviii}

THE PRINCIPLE OF THE CONSTRUCTIVE NOTICE

The principle presumed that one knows all the information regarding the property. When facts are so obvious the law assumes that the person should have knowledge about it. The property owner has to recognise the state of his assets. The owner is required to make intervallic assessments of the property fix hazardous environments providing a sign warning of the danger in a public office. A person must inspect every document.^{xix}

It is the primary duty of a person to read through every clause and every public documents of the subject matter. The principle is supported by Latin maxim '*Ignorantia Juris non-excusat*' meaning that ignorance of the law is not an excuse and it is presumed that you know the law. For example in the premises liability the property owner becomes liable for dangerous conditions on his property which caused injury regardless of the knowledge of existence dangerous condition.^{xx}

THE IMPUTED NOTICE

The imputed notice refers to the knowledge of the facts obtained by an agent on behalf of the principal. The law presumed that the person employing the agent have got information in question.^{xxi} That the notice of the adverse interest can be imputed to the purchaser from the knowledge acquired by the purchaser or the purchaser's agent, for example the purchaser of land is expected to have imputed notice of all matters relating to the purchase of his agent has knowledge. The base of the principle of imputed knowledge is that the agent has a legal duty to disclose information obtained in the course of the agency, and the agent will be presumed to have fulfilled this duty.^{xxixxxiii} The inference is that the principle does not regard on whether the

agent has actual information is question, what is considered is the duty arising from the agency agreement.

THE RECEIVED LAWS

In Tanzania, both legal and equitable mortgages existed before the Land Act, 1999 came into force in May 2001, and there was no single piece of legislation to govern matters of mortgage in general. However, we relied on the English law, to wit, the law and practice in respect of mortgage which were in force in England on the first day of January, 1922 were to apply *mutatis mutandis* / in the similar manner in our territory as they applied in England.^{xxiv} The Chapter 114 is the law which was supposed to provide for dealing in property but did not proceed to provide for the manners of creating instruments; the documents of disposition. After the enactment of Land Act, 1999, the specific provisions for creation of mortgages were indeed incorporated.

The received laws form part of the legal system governing mortgages in Tanzania. The doctrine of equity and other substance of common law applied in the commonwealth countries and appears to be relevant to Tanzania can be applied by the courts in Tanzania.^{xxv} The courts in Tanzania in adjudicating task can use Common Law to determining the land disputes arising under the Land Act.^{xxvi} Therefore, the doctrine of common law applies to all matters relating to mortgages stipulated under the Land Act including the protection of the purchaser of mortgaged properties in Tanzania.

The doctrine of equity constitutes what is right and fair. It does not allow the loan without remedy. ; Equity regards substance and not the form. The same position was explained in *Walsh v Lonsdale*^{xxvii} where the court held that Equity considers that done what the parties ought to be done. So the doctrine ought to be applied by the Tanzanians' court in the circumstance where the law is harsh, silent, or lacuna in the law for instance in the protection of purchaser of mortgaged property to equalize rights and liabilities of the parties.

STATUTORY LAWS

Apart from received laws, Tanzania has laws that regulate land ownership and dispute relating to land matters as following:

THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA¹⁹⁷⁷^{xxviii}

The supreme law of the land is the Constitution and it provides right of property ownership to Tanzanians.^{xxix} The right to own property facilitates the creation of a mortgage, for one must prove the existence of interest vested on the subject property. The provision of the right to own property by the Constitution is of paramount importance is Article 24 (1) & (2) entitles every individual to own property and shall be protected by the law. This is because any law of the land which contradicts the constitution shall be void.^{xxx}

THE LAND ACT 1999 [CAP 113 R.E 2019]

The supreme law in land matters in the mainland Tanzania is the Land Act 1999. The other laws that shall conflict with the Act shall cease to apply in mainland Tanzania.^{xxxi} The Act cap 113 establishes a substantive and procedural requirement for mortgage business. It provides general regulation on the transfer of the right of occupancy for instance the requirement of the transfer to be writing, the need of notification to the commissioners for lands, and the requirement of registration for the disposition to be valid.^{xxxii}

THE PROTECTION OF PURCHASER BY THE LAND ACT 1999 [CAP 113 R.E 2019]

In Tanzania, some degree of protection of purchaser of the mortgaged property has been stipulated who is entitled to the protections.^{xxxiii} There are two categories of persons for such protection; the purchaser of the mortgaged land who purchases from the mortgagee, and the purchaser who claims the mortgaged land from the person who bought the same the mortgagee, or receiver, this is the purchaser.

The protection begins when a person qualifies as the purchaser. The person qualifies as a purchaser after signing the contract of sale and the bid has been accepted. In a normal disposition of land, the buyer qualifies to be the purchaser of the land only after the name of the buyer appears in the registry.

The position has been established in the case of *Moshi Electrical Light Co. Ltd and Others v. Equity Bank (T) Ltd and Others (Unreported)*^{xxxiv} the court held that the purchase is complete where the name of the purchaser appears in the registry. Therefore, the case applies when the sale is the disposition of land in a normal transaction not in a mortgaged property where the sale is done by way of the auctioneer.

The land Act 1999 under section 135 (2) provides the extent of protection to the purchaser as follows:

- a) The purchaser is not accountable for the damage, misuse, or non-application of money.
- b) The purchaser is not indebted to see the use of the buying value.
- c) The purchaser is not indebted to request if the mortgagor has defaulted or notice has been properly set or the deal is essential, correct, or systematic.

That is the extent of protection, what is required is the person qualifying as a purchaser. This is done by showing that he or she got information through advertisement and did have knowledge about the problem associated with the mortgaged property.

However, the protection afforded to the purchaser varies depending on who has bought that land. The person who is afforded such protection is the purchaser who is not the mortgagee. The protection is waived against the purchaser who is the mortgagee, it is presumed that the mortgagee must have knowledge of any irregularities in a sale and hence is not immune from the claims of the mortgagor.

Despite the protection extended to the purchaser by laws in Tanzania, the purchaser is required to investigate to establish the title of the seller. The purchaser is bound by the principle *caveat emptor* where the purchaser is required to conduct and rely on his investigation, inspections, and inquiries before the purchase. This is the position by the court in *National Bank of Commerce v. Walter T. Czurn V Walter T Czurn*^{xxxv} case it was held that a bona fide purchaser

of a mortgaged property cannot purchase real property without establishing the title of the seller on the property.

The land Act 1999 under section 135 (3) provides the extent of protection to the purchaser to the effect that: the purchaser will still be safe if, before the conclusion of the auction, he obtains real notification of failure to the side of the mortgagor or the notice has not been properly served, or the transaction is avoidable, inappropriate or irregular. The purchaser of the mortgaged property will not be protected in circumstances of fraud, misrepresentation, or dishonesty by the mortgagee who has genuine or positive notice.

According to section 135 (5) of the Land Act 1999, the purchaser is entitled to ownership of the property immediately after accepting a bid at a public auction of that guaranteed assets. The purchaser should start enjoying his property immediately after its purchase but the practice show contrary to the provision. The position of the courts in Tanzania is that if the bona fide purchaser has not transferred the property into his or her name cannot be protected by the provision of section 135 of the Land Act 1999.

That is the position in the following cases; the case of Registered Trustees of Africa Inland Church Tanzania versus CRDB Bank PCL and 2 Others (Unreported)^{xxxvi} the court held that the protection of bona fide purchaser under section 135 of the Land Act 1999 starts after the transfer and registration of the said property to the bona fide purchaser.

Again in the case of Albinus Kalaba Mtesigwa versus NIC Bank of Tanzania, (Unreported)^{xxxvii} the court basing on prevailing practice observed that on buying of an auctioned house unless there is an express term that the seller covenant to provide to the buyer vacant possession, the buyer assumes the risks in so far 'as and where it is then the court dismissed the suit with costs. These cases are evident in how the purchaser is not supported and fully protected by neither the law nor the court.

THE LAND REGISTRATION ACT [CHAPTER 334 R E 2019]

The Act requires all dispositions inland including mortgages to be registered for it to be effectual. The mortgage will be considered imperfect due to a lack of registration.^{xxxviii} The failure to register a mortgage makes it mortgage to be inoperative.^{xxxix} When a mortgage is registered is deemed to be effectual to transfer or extinguish an interest on a registered mortgage.^{xl} The particulars of the ownership or interest in mortgage shall be entered in the registered. Information in the register shall be final and conclusive. This is Sanctity of the Register as has been discussed in the case of National Provincial & UBE v Charnley^{xli} it was held that: The insurance of the certificate by registrar certifying a loan, it is considered that the loan formed is correctly recorded, although some facts are inadequate and the entrance in the record by the registrar is imperfect. Thus, the requirement of registration must be fulfilled for the mortgage to be perfect.

THE PROTECTION OF PURCHASER UNDER THE LAND REGISTRATION ACT CHAPTER 334

The buyer who buys an interest in land registered from the seller with power to sale is not required to make findings on the regularities and propriety of the sale, even the registrar when registering the transfer will not be bound any irregularities of the sale. The registrar is only required to notify the owner of the land and on the expiration of the notice; the registrar will affect the transfer to the new owner of the land. Such transfer shall not be nullified based on impropriety and irregularities.^{xlii}

The court in the case of Moshi Electrical Light Co. Limited and 2 Others versus Equity Bank Limited (T) and 2 Others (Unreported) lines with the Act that; the protection of the purchaser begins when a person qualifies to be a purchaser. By a Private contract, a person qualifies to be a purchaser after signing the contract while under public auction qualification to be a purchaser is after being issued a certificate of sale. In addition; the court holds that the purchase is regarded to be complete when the name of the purchaser appears on the registry of titles.

The provision protects the purchaser for value upon registered land from a seller who has the power to sell. But in the presence of a court order, the registrar will be barred from registering the transfer of the property. The lack of registration leaves the purchaser without ownership of the property. In *Abualy Alibhai Azizi v Bhatia Brothers Ltd*^{xliii} case, the court held that a sale that does not fulfill the mandatory condition is void in its totality.

The Act chapter 334 under section 51(2) provides that a registered transfer do vest the mortgaged land in the buyer free and quit from all responsibility on account of such mortgage or of any incumbrancer recorded after the registration, excluding a lease to which the creditor has asserted in the inscription, or to which the permission of the creditor is not mandatory.

The purchaser under the Act Chapter 334 is only protected if there is no lease of which the mortgagee did not consent in writing and his consent is not required. Therefore, The Act does not fully protect the purchaser by allowing the mortgage in some circumstances to make a lease of the subject property.

THE DEFAULT NOTICE

The law requires the mortgagor to be given two months of default notice to pay off loans before the mortgagee can sell the property.^{xliv} There must be effective default notice communication; the notification must be communicated and dispatched to the intended party for it to be effective. When the intended party receives it, it is communicated. When the intended party does not read the notice, it is constructive notice. Where the notice is given to the agent of the borrower, it is considered as the imputed notice.

The failure of the mortgagee to serve default notice to the mortgagor leaves the purchaser with no title. This is the position of the court concerning the communication of default notice in the case of *National Bank of Commerce V Walter T. Czurn*^{xlv}, the court was with the view that failure to prove service of demand notice to the party made the mortgage not payable and power was not exercisable for lack of lawful communication. So the mortgaged property was not legally sold. There was no title to pass to the purchaser. So the sale was invalidated.

The same applies in third-party mortgages, the default notice must be given to the mortgagor. For instance in *Moshi Electrical Light Co. LTD and 2 Others versus Equity Bank (T) LTD and 2 others (Unreported)*^{xlvi}, in this case, one of the mortgagors was not served with notice so did not attend the auction. The court held the sale to be illegal and effectual. Therefore the mortgagee is required to give a default notification to the mortgagor before the sale, the consequence of failure to serve default notice leaves the purchaser without title on the property.^{xlvii}

THE PRINCIPLE OF ‘NEMO DAT QUOD NON-HABET’

The principles entail that no one can give what they do not have. Thus, the buyer who buys a property from the person who has no ownership of the same does not acquire ownership of the property. There is no remedy even if the buyer has no knowledge of the incapacity of the seller to pass ownership. In whatever situation the position is the same that where goods are sold by a person with no ownership and without authority the buyer acquires no title over the property.^{xlvi} On the other hand, according to the reasoning of Lord Denning, someone who buys the property in good faith and for value without notice will acquire a good title and will be able to claim against the entitlements of the original owner.

In the case *Bishopsgate Motor Finance Corporation Ltd V Transport Brakes Ltd*,^{xlvi} Lord Denning gives a different interpretation of the maxim that the person who takes it in good faith and for value without notice should get a good title. And the inference from the court decision of Lord Denning a bona fide purchaser is entitled to the better title over the property he has purchased.

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The rule of actual notice has been incorporated in the laws of the land. For instance, under the Land Act 1999 per section 67(b) (ii) provides that it is in the knowledge of the person or ought

to have awareness of any inquires and inspection has been done or ought to have been done by that person.

The inference drawn from the provision requires the purchaser to have actual knowledge before the purchase of the property. The person who intends to obtain an interest in land must find out all necessary information concerning the land to be purchased in the registry.^{liv}

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The principle presumed that one knows all the information regarding the property. When facts are so obvious the law assumes that the person should know about it. The property owner has to recognize the state of his assets. The owner is required to make intervallic assessments of the property fix hazardous environments providing a sign warning of the danger in a public office.^{lv}

A person must inspect every document. It is the primary duty of a person to read through every clause and every public documents of the subject matter. The principle is supported by the Latin maxim '*Ignorantia Juris non-excusat*' meaning that ignorance of the law is not an excuse and it is presumed that you know the law. For example, in the premises liability, the property owner becomes liable for dangerous conditions on his property which caused injury regardless of the knowledge of the existing dangerous condition.^{lvi}

RECOMMENDATIONS

The land act of 1999 indeed brought significant changes in the management of mortgage transactions followed by its amendment of 2004 and enactment of other laws such as the Mortgage Financing (Special provision) Act of 2008 and its regulations. All of these laws were enacted to curb the challenges which impede the development of mortgage transactions; however, the same has not been effective as expected. Thus been the case, the study confined to examine the third objective which concerns the measures to be taken to curb these challenges been identified by the study.

TO THE JUDICIARY

The procedure for filling in Court mortgage disputes/suit should be changed and the same should be by way of Summary suit and not as a current form of filling suit by way of Plaint or application which takes a long procedure and involve legal technicalities, which results to delay in resolving mortgage disputes. Using the procedure of summary suit will help fasten the hearing of mortgage disputes without following other procedures which are demanding and time-consuming.

TO THE PURCHASER OF THE PROPERTY

The study calls upon the purchasers to bind with the provisions of the laws in place. The observation of laws will assist them to avoid some losses which would be contributed by the lack of adherence to laws. The study discourages violations of rules and conditions by purchasers who do not respect the rules in place; the violations lead them to suffer loss for the court finds the situation non-attainable, so the courts end up nullifying the sale.

TO THE LEGISLATURE

The research recommends the amendments to be made to the laws governing properties especially mortgaged property; The Land Act Chapter 113. The Land Act Chapter 113 is silent when the court nullifies the sale when the house has latent defects. The provision does not impose an obligation to the purchaser to inquire whether the mortgagor has defaulted or whether the notice of exercise power of sale has been served to the mortgagor.

The practice reveals that the problem do already exist as in the case of Moshi Electrical Light Co. LTD and 2 Others versus Equity Bank (T) LTD and 2 others (Unreported)^{lvii}; the sale was nullified on the ground that the mortgagor was not served with notice of sale. The decision affected the purchaser although had no obligation to inquiry on the same under the law.

The study recommends amendment of laws for full protection of purchaser of the mortgaged property. Currently, a conflict does exist between the Land Act Chapter 113 under section 135 which provides for the protection of a bona fide purchaser, and the Land Registration Act

Chapter 334 under section 51 which provides for the requirement of registration of the transfer in which confuses the position at what time a people becomes a purchaser and entitled for protection.

The study recommends simplification of the sale process of the mortgaged property. Currently, the sale process of the mortgaged property under the laws is cumbersome, complicated, and full of technicalities. The failure to comply with the same process makes the whole transaction void. The process for sale should be made simple and clear to avoid unnecessary mistakes which in the end will nullify the whole transaction.

The research recommends an application and restoration of foreclosure; the right of foreclosure to the mortgagee will enable the mortgagee to have ownership of the property before, thus, the bona fide purchaser will buy a vacant property; take direct possession, and will be protected against issues of misrepresentation or dishonesty which are likely to happen during the sale.

The study recommends an introduction of an electronic system of effecting service of notices between the mortgagor and mortgagee under the laws to avoid unnecessary technicalities which will finally nullify the whole transaction hence infringing the right of bona fide purchaser.

The practice shows some instances where the court has nullified the sale of mortgaged property for failure to issue statutory notice and other legal requirements. The electronic system will minimize unnecessary legal technicalities that would affect the absolute title of a bona fide purchaser after the purchase of a mortgaged property.

The study recommends that the system of registration of land should be more advanced to accommodate other information such as the name of the spouse and other relevant information. This will help the Lender to have enough information regarding the status of the property used as security before giving a loan. The current system of registration helps the Mortgagor only in identifying the name of the property owner and whether the same has been mortgaged to another lender or not.

The study recommends enactment of a specific statute dealing with equitable mortgages. Current laws do not express into detail the issue of equitable mortgage and how the same is governed. Looking to other jurisdictions like Kenya, they have a specific statute relating to equitable mortgages known as Equitable Mortgage Act Cap 291 R: E 2012.

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