

CHALLENGES OF LAND RIGHTS IN MORTGAGE FINANCE DEVELOPMENT IN TANZANIA

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ABSTRACT

The laws relating to land rights in Tanzania allow an individual or group of person to acquire land as explored in the Land Act, 1999 [Cap. 113]. The occupancy of land in Tanzania either under a granted right of occupancy or customary right of occupancy allows a landholder to use land as a security in different applications such as mortgages. An application of mortgage financing requires a borrower to use the property to secure a loan. Land is mostly applied as a property to protect the interests of both parties however, it faces challenges because of its insecurity due to the absence of absolute ownership and limitation of time length of the right of occupancy. The radical title over the land is vested to the President who is a trustee for the citizens of Tanzania and no private ownership of land as provided in the Land Act of 1999. The nature of land rights interferes with the enjoyment of the land rights whereas the President is allowed by the law if necessary for the public purpose to acquire land at any time this is expressed under the Land Acquisition Act of 1967 [Cap. 118]. Other challenges based on land rights includes the poor valuation of land before compensation is given and the variety of land tenure.

INTRODUCTION

The Black's Law Dictionary defines land as an immovable and indestructible three dimensional areas consisting of a portion of the earth's surface, the space above and below the surface and everything growing on or permanently affixed to the land.ⁱ People enjoy land rights in Tanzania which are acquired by occupancy of land obtained through an application for a granted right of occupancyⁱⁱ or customary right of occupancy.ⁱⁱⁱ Tanzania land rights are characterized by leasehold tenure because it is issued for a specific period of time not exceeding ninety nine years and individuals has no private ownership of land where all land is vested to the President as a trustee for the citizens^{iv} therefore he or she has full mandate over any land in Tanzania that where is required to acquire the land can do so but for the public purposes.

The laws governing mortgage financing in Tanzania allow the use of both developed and undeveloped or underdeveloped land to seek for a loan.^v Mortgage bases on the interest in land although a landholder remains as an occupier of land since no interest in land shall be transferred rather it acts a security.^{vi} The certificate occupancy of the land is put forward to secure loan a borrower seeks. Land as a property in Tanzania is itself determined as a property with value.^{vii}

THE NATURE OF LAND RIGHTS IN TANZANIA

The Tanzania legal system provides the procedures for the grant of land rights which an individual enjoys and the limitations over the land. Since the pre-colonial and colonial eras land were owned in different modes for example in the pre-colonial era before 1884 land was owned communally by indigenous where customs and traditions of tribe were laws controlling the grant of land but the colonial era changes the situation for instance soon after the introduction of the Germany system from 1884-1916 in this period the ownership of land communally ceased and Germany government held a radical title and few such as chiefs and other people who claimed ownership were granted with a legal ownership of land but they had to prove active cultivation on such land. Germany government granted land in several categories such as leasehold, customary tenure, and through purchase. The British caused all land to be under their control through the enactment of the Land Ordinance^{viii} which declared

all land in Tanganyika public land and any disposition or a grant of land needed the governor's consent. The proclamation that all land is public land continued even after the enactment of the land Act.^{ix} Tanzania guarantees the right to occupy and use land simply known as a *usufructuary right* this was provided in the case of Mtoro Bin Mwamba v. The Attorney General^x that there is no individual ownership of land the only thing an individual has is merely a usufructuary right. Despite of the occupancy of land in Tanzania land rights obtained share the following same nature;

a) *No Absolute Land Rights*

The government of Tanzania owns all land through the Head of the Government,^{xi} he acts as a trustee on behalf of the citizens and controls all land in Tanzania.^{xii} Any person who holds land in Tanzania is subject to the grand landholder according to the law where an occupier of land can be evicted or reallocated with other land or paid compensation^{xiii} accordingly there is no way out an individual can defy from the notice of intention to acquire which must be sent to him or her by the Minister before the land is acquired.^{xiv} This proves that in Tanzania there is no absolute ownership of land as the land tenure system allows interference by the government where land owned by a legal and rightful occupier can be deprived just because that land has been found valuable for the public purpose then it will be acquired.^{xv} People enjoy the occupancy of land but they are not fully free to use it because the law provides procedures in case of the transfer of interest or disposition of land in Tanzania for instance a borrower under a legal mortgage it is necessary for him or her to adhere to the formalities related with mortgage of land such as notification^{xvi} in an authorized form normally Land Form No. 29 GN no. 71. The absence of absolute land rights cause no freedom in the use of land especially in relations where land is required as a security or in the transfer of land.

b) *Limited Time Length of Occupancy*

An application for the right of occupancy is one among the methods of acquiring land in Tanzania. The application made may render an applicant be granted and become a landholder after complying with the procedures set forth in the law^{xvii} however, such grant of right of occupancy does not last but limited to the duration not exceeding ninety-nine years.^{xviii} The occupancy of land in Tanzania is categorized into three scales namely short-term scale where the granted land right subsists only for a period of 33 years of land occupancy, medium scale

in this category land is granted for a period of 66 years of occupancy whereas the long-term scale involves a period not more than 99 years of occupancy. These divisions of terms of occupancy are chiefly considered in a granted right of occupancy than customary right of occupancy which is nurtured by the point of indefinite period of occupancy.^{xix} The law does not define the term indefinite term but explores the grant of customary right of occupancy to be of an indefinite term or less than.

CHALLENGES OF LAND RIGHTS IN MORTGAGE FINANCE DEVELOPMENT IN TANZANIA

a) Variety of Land Tenure

The right of occupancy is mainly categorized into two types that is granted right of occupancy and customary right of occupancy. Both types of land holding such as Customary Right of Occupancy and Granted Right of Occupancy are applied in the creation of mortgage in Tanzania as emphasized in the Village Land Act, 1999.^{xx}

The granted right of occupancy is categorized into two main types such as a granted right of occupancy issued basing on the duration classification which is not less than five years and the period not exceeding ninety-nine years of occupancy, another type is granted in accordance to the functional classification this is only granted for purpose for example agriculture and pastoralism activities. Under customary right of occupancy includes an indefinite term not exceeding ninety-nine years. Both types share the same status however, the Land Act proscribes the application of mortgage finance by using land held under certificate of customary right of occupancy.^{xxi} This challenges hinders mortgage finance development in Tanzania because many people hold land under customary right of occupancy and which consists village land of about 70% of the whole land in Tanzania therefore, the possibility of using land to access a loan for mortgage financing obvious left to the people holding land under a granted right of occupancy.

b) *Absence absolute of Land Rights*

There are no absolute land rights in Tanzania as reflected under the Land Act, 1999.^{xxii} There is no private ownership of land but people apply for the right occupancy to use land which its full control is vested to the President. The absence of absolute land ownership affects the use of land in mortgage financing since the transaction involves tripartite relation where the interest of the landlord or landlady has to be protected. It is unsecured property with three parties because the borrower acts as a tenant in the land while the President at any time can take or acquire such land for the public purposes, the property also becomes unsecured for instance land when it is acquired or revoked by the government but an obligation to repay the loan remains to the borrower.^{xxiii} Although compensation is paid pursuant to the Land Acquisition Act of 1967^{xxiv} but this contrives with people's right to enjoy the use of land thus proves limited land rights.

The nature of land ownership in Tanzania is an obstacle in the development of mortgage financing because of insecurity of the property employed due to a tripartite relationship stated by the Court of Appeal in the case of Abualy Alibhai Azizi v. Bhatia Brothers Ltd^{xxv} for a disposition of a right of occupancy which involves a landlord or landlady. In Tanzania there is no absolute land rights but leasehold since for a person with fee simple has good security of tenure than a person with leasehold because the property under leasehold can be acquired at any time by the real occupier. Therefore, the security may perish before the time for the recovery of a loan is up and that interference destroys borrower's development expectations by using land.

c) *Limitation of Time of Occupancy*

The length of right of occupancy in land is not less than 5 years and not exceeding 99 years provided under the Land Act, 1999.^{xxvi} Limitation of time in the right of land occupancy impedes mortgage finance development in Tanzania, it is because the landholder cannot use his land in large scale investments expecting to last over a long period of time by fearing expiry of time. However, the length of time for a right of occupancy of land is renewable^{xxvii} there is no guarantee that an occupier of the previous land will be granted the same land or any land since his or her application can be rejected too.

d) *Poor Protection of Land Property*

Land laws allow occupancy of land in Tanzania, these laws such as Land Act and Village Land Act of 1999 broadly express land issues for example land tenure, transfer and disposition but the supreme law of the country that is the Constitution of the United Republic of Tanzania, 1977^{xxviii} does not specifically recognize land rights^{xxix} something which causes no effective protection when laws are in contradiction. As the mother law the Constitution of the United Republic of Tanzania needs to include land rights for effective implementation and protection of the right to land like other countries for example the Republic of Kenya where the constitution of 2010 became a model for African countries from its formation to what is found in the constitution.^{xxx} The Constitution of the Republic of Kenya is very clear on the matter of land rights as stipulated under article 60 of the constitution. The protection of land is necessary due to the risk likely to occur when land is applied as a security for a loan.

e) *Land Properties*

The meaning of land and in Tanzania excludes minerals, petroleum, waters, fauna and flora. In land matters the degree of permanence should be considered to differentiate real property and personal property.^{xxxi} This lies on two categories that is action in personam and action in rem. Personal property should be excluded as part to land because they are attached to land temporary otherwise there is a title for that property included in mortgage financing.

This concept of land affects mortgage financing because if minerals or petroleum is found in that land then such land will be acquired for the public purpose hence the security will destroy.

The extent of land properties should be well formalized to protect land rights against personal property which are at risk during the practice of remedies by mortgagee which in practice the data found exposes that for a sale of property by mortgagee whatever found in the land characterized by either being a fixture or chattel is sold because of the latin phrase "*quicquid plantatur solo solo cedit*" as the general rule that whatever is attached to the land becomes part of it.^{xxxii}

RECOMMENDATIONS

Basing on the challenges hindering mortgage finance development, the recommendations provided here below aim to ensure land become a secured property useful in mortgage financing in Tanzania.

Recommendations to the Parliament of Tanzania

Legislative powers vested to the parliament under the Constitution of the United Republic of Tanzania, 1977^{xxxiii} should be applied for constitutional review and amendment of different laws governing land in Tanzania. The constitution has to be amended to add land property in a bill of rights and all matters related to land should be specified and expressed in the constitution as evidenced in other countries like Kenya under Chapter Five of the Constitution of the Republic of Kenya, 2010. For the development of mortgage financing in Tanzania this will provide protection of land rights.

The amendment of land Acts is important to grant an individual or people with absolute land rights this will contribute to the presence of secured property for mortgage financing. Compensation for an acquisition of land or revocation of land title for good cause should be given to the mortgagee when that land is under mortgage to ensure a mortgaged property guarantee loan recovery because the practice shows after default of a borrower mortgagee is the person who sells the property mostly after a notification is rendered to the mortgagor pursuant to the *Land Act, 1999*.^{xxxiv}

There should be unlimited land tenure, it is because time limit has been blocking large scale investments as the expiration of time of occupancy can be renewed but no guarantee of being granted such land hence amendment of land Act is necessary for the sake of economic development in the country. The ownership of land and length time of occupancy in the Land Act, 1999^{xxxv} must be reviewed and amended.

Recommendations to the Government

Government should use qualified persons in valuating land before compensation or alternatively it is best for the government valuer to be present during issuance of loan for mortgage financing to avoid difficulties during compensation in case of acquisition of the land by the government. Land value changes due to the use of different people where banks consider what an architect state for the value of all processes before issuing loan but what is provided

by the government valuer become very different value this is corresponded with the qualification of a valuer. To mitigate or prevent risk to the lender or mortgagee it is better to use skill people for the matter at hand.

Land acquisition made by the government should be for public purposes and not otherwise because acquisition has been providing side effects in the development of mortgages.

Recommendations to the Banks and Financial Institutions

Lenders should make sure loans guidelines and procedures issued by the law for acquiring loan are observed before the grant of such loan. This will enable conducting a thorough inspection of the title of the property. Failure to conduct inspection of title over land is caused by negligence of bank officers who do not comply with the requirement of Deed of Security Arrangement (DSA) for the borrower to the local authorities and the security itself to prove his ownership and the use of Land Form No. 42 for spouses. The spouse consent affects mortgage financing because according to the *Mortgage Financing (Provisions) Act, 2008^{xxxvi}* allows the borrower to use whatever means for a spouse to sign the document.

Recommendations to the Borrowers

Borrowers have to comply with the law and procedures set by financial institutions or banks and be honest with a loan he or she is given. This will help to enhance the development of mortgage financing since there are borrowers seeking loan to do investment or constructions but the part of money obtained as a loan is used in different purpose this brings risk to the lender when the value of the property is found less than the amount he or she obtained thus become hard for the lender to recovery entire loan.

CONCLUSION

The development of mortgage financing in Tanzania is clearly assessed considering land rights where findings show the problem rendering land unsecured property is the nature of ownership due to absence of absolute land rights and the existing limitation of time in the length of occupancy that affect mortgage finance development in Tanzania. Unsecured titles used to seek for a loan bring down mortgage finance development due to leasehold and unsound consent

issued for instance by the partner for the property owned in common. The enjoyment of land rights depends on both law and practice in Tanzania.

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ENDNOTES

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- ⁱ Bryan G., 1999, Black's Law Dictionary, 7th edition.
- ⁱⁱ Section 19 (1) (a) of the Land Act, 1999, Cap. 113, R.E 2019.
- ⁱⁱⁱ Section 22 (1) of the Village Land Act, 1999, Cap. 114, R.E 2019.
- ^{iv} Section 3 of the Land Acquisition of 1967, Cap. 118, R.E 2019.
- ^v Section 120A (1) and (2) (a) and (b) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{vi} Section 116 (1) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{vii} Section 3 (1) (f) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{viii} 1923.
- ^{ix} Section 4 (1) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^x (1953)2 Tang. LR 327 (C.A).
- ^{xi} Article 33 (2) of the Constitution of the United Republic of Tanzania.
- ^{xii} Section 4 (1) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xiii} Section 11 (1) of the Land Acquisition Act, 1967, Cap. 118, R.E 2019.
- ^{xiv} Section 6 of the Land Acquisition Act, 1967, Cap. 118, R.E 2019.
- ^{xv} Section 3 of the Land Acquisition Act, 1967, Cap. 118, R.E 2019.
- ^{xvi} Section 36 (3) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xvii} Section 25 (1) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xviii} Section 32 (1) (a) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xix} Section 27 (1) (a) of the Village Land Act, 1999, Cap. 114, R.E 2019.
- ^{xx} Section 18 (1) of the Village Land Act, 1999, Cap. 114, R.E 2019.
- ^{xxi} Section 120C of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xxii} Section 4 (1) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xxiii} Mwaiondola G. N., (2007), *The Modern Law of Mortgages in Tanzania, The Role of the Land Act of 1999*, A Thesis Submitted to the School of Law of the University of Birmingham for the Degree of Philosophy.
- ^{xxiv} Section 11 (1) of the Land Act, 1967, Cap. 113, R.E 2019.
- ^{xxv} [2000] TLR 288.
- ^{xxvi} Section 32 (1) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xxvii} Section 32 (3) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xxviii} Cap. 2.
- ^{xxix} Abdon R., 2012, *Land as a Human Right, A History of Land Law and Practice in Tanzania*, Mkuki na Nyota Publishers Ltd, p. 30.
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- ^{xxxi} Tenga R and Mramba S, 2020, *Land Law in Tanzania, Theory and Procedure*, Juris Publishers Limited, p. 27.
- ^{xxxii} Kate G & Joe C, 2004, *Land Law (Palgrave Law Masters)*, Fifth Edition, Palgrave Macmillan, p.8.
- ^{xxxiii} Article 64 (1) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2.
- ^{xxxiv} Section 127 (1) of the Land Act, 1999, Cap. 113, R.E 2019.
- ^{xxxv} Section 4 (1) and section 32 (1) (a) of the Land Act, Cap. 113, R.E 2019.
- ^{xxxvi} Section 8 of the Mortgage Financing (Provisions) Act, 2008.